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Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

March 5, 2007 Issue 1

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§ 109(e) Who May Be a Debtor; Chapter 13.

0307-001 **Case dismissed with prejudice as improperly filed to frustrate secured creditors with no possibility of funding a realistic plan.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: A debtor filed a motion to dismiss her chapter 13 bankruptcy case, pursuant to 11 U.S.C. § 1307(b). The trustee filed a motion to dismiss the case, pursuant to 11 U.S.C. § 109(e).

OVERVIEW: The debtor and trustee filed motions to dismiss the chapter 13 case. The court dismissed the case, pursuant to 11 U.S.C. § 109(e), as a bad faith filing in order to preserve the integrity of the bankruptcy process because the debtor had the ability to pay her creditors through an auction sale of her ranch but improperly filed to frustrate her secured creditors' foreclosure rights and the closing of the sale when she had no intention of paying unsecured creditors or ability to fund a realistic plan of reorganization. The court held that the unconfirmable plan was not filed in good faith under 11 U.S.C. § 1325(a)(3) and was not feasible because the debtor lacked disposable income, as required by section 1325(b); her sporadic income was not regular income under section 1325(a)(6); the plan violated section 1325(a)(4) in that the unsecured creditors would be paid more in a chapter 7 liquidation; and the plan violated 11 U.S.C. § 1325(a)(5) in that the plan payments were insufficient to pay the mortgage payments and arrears. The court found that cause existed under 11 U.S.C. § 349(a) to bar the discharge of the debts existing on the petition date in any subsequent case.

In re Kollar*, 2006 Bankr. LEXIS 3613 (Bankr. M.D. Fla. October 5, 2006) (Briskman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.06**

§ 109(h)(4) Who May Be a Debtor; Mandatory Credit Counseling; Incapacity, disability or Active Military Duty.

0307-002 **Deceased debtor was exempted from financial management course requirement.** (*Bankr. D.N.J.)*

PROCEDURAL POSTURE: A debtor's counsel filed a certification in opposition, stating that the debtor had passed away and requesting that the chapter 7 bankruptcy case not be closed without the issuance of a discharge.

OVERVIEW: The debtor filed a chapter 7 petition. The court clerk issued a notice of deficiency for financial management course certificate, indicating that the case would be closed without a discharge unless the certificate were filed by January 29, 2007. The debtor's counsel filed a certification in opposition, stating that the debtor had passed away on November 16, 2006, and requesting that the case not be closed without a discharge. The court held that the deceased debtor was exempted under 11 U.S.C. § 109(h)(4) from the financial management course requirement under 11 U.S.C. § 727(a)(11) because he could not participate in an instructional course on personal financial management and such a course would not have aided him in avoiding future financial distress. The court directed the clerk to issue a discharge prior to closure of the case.

In re Trembulak*, 2007 Bankr. LEXIS 310 (Bankr. D.N.J. February 6, 2007) (Kaplan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[4]**

§ 303(h)(1) Involuntary Cases; Relief Against Debtor; Debtor not Paying Debts.

0307-003 **Involuntary petition dismissed where petitioning creditors owed money to debtor.** (*Bankr. W.D. Pa.)*

PROCEDURAL POSTURE: Movant, alleged debtor, challenged an involuntary petition filed against it by respondents, petitioning creditors.

OVERVIEW: The alleged debtor presented sufficient evidence to show that there were genuine issues of material fact that the claim by the first petitioning creditor was the subject of a bona fide dispute as to liability or amount. It was possible that this petitioning creditor owed the debtor money. This creditor thus failed to qualify as a petitioning creditor. The second creditor also failed to qualify as a petitioning creditor. The seconding petitioning creditor and the creditor had begun negotiations for the creditor to

acquire the debtor. The relationship quickly deteriorated. The debtor posited that the second creditor failed to pay certain necessary suppliers and vendors as it was to do under an agreement; that the creditor failed to maintain the level of personnel needed for operations; and that the creditor failed to utilize its line of credit to facilitate the ongoing operation. The situation continued to worsen. The second creditor appeared to have been delinquent in paying the debtor for payroll and expenses that the creditor had agreed to fund. Thus, the debtor demonstrated that there were numerous genuine issues of material fact as to its liability to the second creditor.

Regional Anesthesia Assocs. PC v. PHN Physician Servs. (In re Regional Anesthesia Assocs. PC)*, 2007 Bankr. LEXIS 397 (Bankr. W.D. Pa. February 15, 2007) (Bentz, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.14[1]**

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

0307-004 **Police and regulatory powers exception to stay applied to suit alleging discrimination under the Fair Housing Act.** (*W.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff, the United States, filed a suit alleging that defendants, a property owner and another individual, engaged in national origin discrimination, in violation of the federal Fair Housing Act, 42 U.S.C. §§ 3601–3619 and 3631. The owner filed a voluntary chapter 7 bankruptcy proceeding. The U.S. moved for an emergency order declaring that the automatic stay provision of 11 U.S.C. § 362 did not apply to this case.

OVERVIEW: The exception in 11 U.S.C. § 362(b)(4) applied to actions by a governmental unit to enforce a police or regulatory power. The court held that the exception applied in the instant case, reasoning that the owner was charged with discrimination after it was found that there was reasonable cause to believe that the owner had engaged in national origin discrimination. In prior case law, it had been held that the section 362(b)(4) exception applied as to a suit alleging that the debtor was charged with discrimination in the employment context. The court found that the allegations in the instant case were similar to the allegations of employment discrimination in the prior case law, as both causes alleged that the defendants engaged in discriminatory practices in violation of federal acts prohibiting discrimination. The court concluded that the cause in the instant case was an action by a governmental unit to enforce its regulatory power, which sought relief for alleged discriminatory practices in violation of a federal act. The court thus held that the automatic-stay provision of section 362 did not apply.

United States v. Silva*, 2007 U.S. Dist. LEXIS 9510 (W.D. Tex. February 5, 2007) (Yeakel, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05[5]**

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

0307-005 **Automatic stay continued where debtors' second chapter 13 case was filed in good faith, met payment requirements and circumstances had changed in debtors' favor.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: The chapter 13 debtors filed a motion for continuation of the automatic stay, pursuant to 11 U.S.C. § 362(c)(3).

OVERVIEW: The debtors filed an uncontested motion to continue the stay. The court found that the presumption of a lack of good faith arose because the debtors' prior bankruptcy case was dismissed for failure to perform under the confirmed plan. However, the court held, under the Warren factors, that the debtors met their burden of showing that their second case was filed in good faith because they contributed all of their disposable income to the 60-month plan and complied with the payment requirements in 11 U.S.C. § 1325(b); the debtor husband had stable employment at a bank and expected to receive pay increases as his tenure increased; the prior default was caused by the debtor wife's unanticipated medical expenses from an extended hospital stay, during which time the husband took unpaid time off to care for their children; and they expressed a sincere intention to complete the plan, which provided no preferential treatment between creditor classes and did not modify secured claims. The court held that the case, which was commenced within two and a half months of the dismissal and included substantially the same debts, did not impose any undue administrative burden on the trustee.

***In re Resto-Perez**, 2006 Bankr. LEXIS 3697 (Bankr. N.D. Cal. November 20, 2006) (Morgan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

0307-006 **Motion to extend stay denied as to creditor that foreclosed on debtor's property after prior bankruptcy was dismissed for failure to comply with credit counselling requirement.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: After a foreclosure deed conveyed the interest of movant debtor in her residence to a creditor, a special warranty deed was filed that conveyed the creditor's interest in the residence to respondent guarantor, who had guaranteed the debtor's obligation to the creditor. In her second bankruptcy proceeding, the debtor filed a motion to extend the stay under 11 U.S.C. § 362(c)(3), and the guarantor opposed this extension.

OVERVIEW: The foreclosure sale was concluded prior to the debtor's first bankruptcy filing. That case was dismissed because she failed to obtain the required pre-bankruptcy credit counseling, and the foreclosure and special warranty deeds were filed for record after the first dismissal of the prior bankruptcy case but before it was reopened and finally dismissed. Thus, the debtor had no bankruptcy case pending when the deeds were filed. The guarantor commenced a dispossessory proceeding in state court, followed by the filing of the debtor's second chapter 13 case. The court denied the debtor's motion to extend the automatic stay to the extent it applied to the guarantor, holding that the debtor's equity of redemption had terminated under Georgia law. The residence was not property of the debtor's bankruptcy estate, and the guarantor was permitted to proceed with its dispossessory action in state court. The court granted the stay extension to other creditors because they did not object to the motion.

***In re Dillard**, 2007 Bankr. LEXIS 394 (Bankr. M.D. Ga. February 7, 2007) (Hershner, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 362(c)(4)(D) Automatic Stay; Duration; Cases Filed Within One Year of Dismissal of Two or More Prior Cases; Presumption of Bad Faith.

0307-007 **Automatic stay that did not arise upon filing of debtors' third chapter 13 case reinstated upon showing of good faith.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The chapter 13 debtors filed a motion to invoke the automatic stay, pursuant to 11 U.S.C. § 362(c)(4)(B).

OVERVIEW: The debtors voluntarily dismissed their first case on January 31, 2006, when they were unable to make the plan payments. The debtor husband's income was inconsistent due to the depressed economy following the hurricane season. The debtor's third case, filed on August 18, 2006, was filed within one year of the dismissal of the second case on August 8, 2006. The court held that the automatic stay of 11 U.S.C. § 362(a) did not arise upon the filing of the third case, pursuant to section 362(c)(4)(A)(i). The court found that the debtors' September 20, 2006, motion to invoke the automatic stay, pursuant to section 362(c)(4)(B), was not filed within 30 days after the filing of the later case. The court found that a secured creditor holding a mortgage on the debtors' home filed a response in opposition to the motion and that the debtors established that the filing of the third case was in good faith as to all creditors and that reinstatement of the automatic stay was appropriate conditioned on the debtors remaining current on their chapter 13 plan.

***In re Schroeder**, 2006 Bankr. LEXIS 3612 (Bankr. M.D. Fla. October 18, 2006) (Briskman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[4]**

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

0307-008 **Bankruptcy Code exemption scheme did not violate uniformity requirements of the U.S. Consitution.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Chapter 13 trustee filed a motion for a certification of unconstitutionality, claiming that 11 U.S.C. § 522(b)(3) violated the uniformity requirement found in U.S. Const. art. 1, § 8, Cl. 4.

OVERVIEW: Debtor resided in Montana, but did not reside in Montana for the full 730 day period prior to commencing his bankruptcy proceeding; and was "domiciled" in California within the meaning of 11 U.S.C. § 522(b)(3). In support of the claim of unconstitutionality, the trustee maintained that section 522(b)(3) did not satisfy the requirement of geographical uniformity, created a class consisting of one

debtor in the district, and defeated the policy underlying the uniformity requirement. The court held that section 522(b)(3) did not violate the uniformity requirement found in U.S. Const. art. 1, § 8, Cl. 4, because it applied uniformly throughout the United States to all debtors who sought protection under the Bankruptcy Code within 730 days of moving from one state to another.

In re Urban, *2007 Bankr. LEXIS 366 (Bankr. D. Mont. January 31, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.10**

§ 523(a)(2) Exceptions to Discharge; Types of Debt Excepted; Fraud.

0307-009 **Debtor's false representations regarding defects in mobile home sold to creditors resulted in nondischargeable debt.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff creditors filed an adversary proceeding complaint against defendant chapter 7 debtor seeking to have the debt owed to them declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). They claimed that the debt, in the amount of $9,042.66, was not dischargeable because it arose as the result of actual fraud committed by the debtor. The debtor did not answer the complaint or appear at the trial.

OVERVIEW: The creditors alleged that they bought a mobile home from the debtor, that they were forced to abandon the home after the debtor refused to repair concealed defects in the home, that they never received title to the home, and that they subsequently learned that the debtor never owned the home. The debtor listed the creditors on her bankruptcy schedule, stating that they held an unsecured undisputed claim in the amount of $0. The creditors claimed that $9,042.66, which represented their down payment, their closing costs, and their payments under a purchase price promissory note, was a nondischargeable debt owed by the debtor. The court found that the creditors met their burden of showing, by a preponderance of the evidence, that at least part of the claimed debt was nondischargeable under section 523(a)(2)(A). The debt arose because of the false representations knowingly made by the debtor, with the intent to deceive the creditors and on which they had reasonably relied. Only the creditors' down payment, closing costs, and closing-related attorney's fees were nondischargeable. They had received a benefit for their promissory note payments, which the court treated as rent payments.

Gillespie v. Pleskovich (In re Pleskovich), *2006 Bankr. LEXIS 3724 (Bankr. M.D. Fla. October 30, 2006) (Briskman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08**

§ 523(a)(15) Exceptions to Discharge; Types of Debt Excepted; Debts in Connection with Divorce or Separation.

0307-010 **Debt resulting from post-divorce landlord tenant arrangement between former spouses was dischargeable.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: After plaintiffs, a debtor's former husband and his new spouse, won a state court judgment against defendant debtor, plaintiff husband's ex-wife, on account of debtor's conduct in having taken items from their former marital home, where she was a tenant, plaintiffs sought a ruling excepting that debt from discharge per 11 U.S.C. § 523(a)(15).

OVERVIEW: After plaintiff husband and defendant were divorced, the husband allowed defendant to remain in the marital home as a tenant. When she moved out, not only taking some of the husband's property with her but also taking funds from an account belonging to the husband, plaintiffs sued and won a state court judgment against her. Defendant then filed a chapter 7. Plaintiffs brought an adversary proceeding seeking an order that the underlying debt represented by the judgment was nondischargeable under section 523(a)(15). Defendant argued that the debt at issue was not within section 523(a)(15) and that, in any event, plaintiff wife had no standing to pursue a claim because she was not defendant's "former spouse." The court agreed and denied relief. Specifically, after finding that plaintiff wife was not within the class of persons who were entitled to seek relief under section 523(a)(15), the court reviewed the transactions between plaintiff husband and defendant and concluded that they did not arise out of their divorce but were based on their subsequent landlord-tenant relationship. Thus, because none of the claims arose from the parties' prior status as spouses, the debt was not within section 523(a)(15).

Tracy v. Tracy (In re Tracy), *2007 Bankr. LEXIS 360 (Bankr. D. Idaho February 2, 2007) (Pappas, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

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

0307-011 **Debtor's prepetition counsel ordered to turn over funds deducted from debtor's escrow account.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Chapter 7 trustee filed a motion for summary judgment, seeking a turnover to the estate of funds retained by debtor's prepetition counsel pursuant to 11 U.S.C. § 542(a) and a declaration that counsel had no interest in the funds.

OVERVIEW: Counsel represented debtor in certain prepetition litigation to collect an account receivable. The litigation resulted in a stipulated final judgment in which the defendant made installment payments to counsel. Postpetition, and without authority of the court, counsel deducted legal fees and expenses from the amount that it held in escrow. Counsel asserted that the funds it deducted were not property of the estate under 11 U.S.C. § 541. The court held that the funds were property in which debtor's bankruptcy estate had an interest. The court also held that trustee met its burden under 11 U.S.C. § 542 for turnover of the funds because the funds were in the possession of counsel, the funds could be used by debtor in accordance with 11 U.S.C. § 363, and the funds were not of such inconsequential value or benefit to the estate that trustee should abandon them.

Kaufman & Canoles, PC v. RAI Funding, LLC (In re Brandseed Media Commerce Group, LLC)*, 2006 Bankr. LEXIS 3636 (Bankr. E.D. Va. December 14, 2006) (Tice, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.02**

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

0307-012 **Mortgage payments on property to be surrendered were "scheduled as contractually due" and could be deducted from debtors' current monthly income.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: The U.S. Trustee filed a motion to dismiss chapter 7 debtors' case based on a presumption of abuse under 11 U.S.C. § 707(b)(2) or as an abuse under section 707(b)(3).

OVERVIEW: Debtors were above-median debtors. Their Form B22A showed that their total monthly deductions exceeded their monthly income. The trustee argued that debtors could not claim a deduction for mortgage payments on their homestead because they intended to surrender it, and that, therefore, the court should presume that debtors' case was an abuse of chapter 7 because their monthly income exceeded allowable deductions by the statutory amount. The court held that the words "scheduled as contractually due," found in section 707(b)(2)(A)(iii), were those payments that debtors would be required to make on certain dates in the future under the contract. The court held that debtor's mortgage payments were appropriately deducted from debtors' current monthly income because the payments on their mortgages were still "scheduled as contractually due" on the date of the petition. The court held that, because the parties focused almost exclusively on section 707(b)(2), and very little evidence was introduced at the hearing relating to the totality of the circumstances test under section 707(b)(3), the parties had to improve the record and support their section 707(b)(3) arguments.

In re Nockerts*, 2006 Bankr. LEXIS 3435 (Bankr. E.D. Wis. December 14, 2006) (Kelley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04**

§ 1104(a)(1) Appointment of Trustee or Examiner; Request by Party in Interest or United States Trustee; For Cause.

0307-013 **As court appointed federal equity receiver could continue to manage debtor postpetition appointment of chapter 11 trustee was not necessary.** (*S.D.N.Y.)*

PROCEDURAL POSTURE: Appellant, Acting U.S. Trustee, sought review of an order of the bankruptcy court denying the U.S. Trustee's motion for the appointment of a chapter 11 trustee for debtors, an affiliated group of limited liability companies that created and managed hedge funds.

OVERVIEW: Before the debtors filed for bankruptcy, the court appointed appellee receiver as non-bankruptcy federal equity receiver and exclusive managing member for the debtors. After the debtors filed for bankruptcy, the U.S. Trustee sought the appointment of a chapter 11 trustee to administer the bankruptcy estate, arguing that the receiver's corporate governor role derived from his receivership and that the termination of the receivership upon the bankruptcy filing also ended the receiver's role as

corporate governor. The bankruptcy court determined that there was no need to appoint a chapter 11 trustee because the order appointing the receiver as exclusive managing member had set up corporate management for the debtors. On appeal, the court held that the receiver's corporate governance powers were not derived from his receivership because the corporate appointment was made pursuant to federal securities laws, the court's inherent authority, as well as federal receivership statutes; accordingly, the receiver's corporate management role did not end when the debtors filed for bankruptcy. The Bankruptcy Code did not prohibit the receiver from continuing as manger after the bankruptcy filing.

Adams v. Marwil (In re Bayou Group, LLC), *2007 U.S. Dist. LEXIS 9395 (S.D.N.Y. February 5, 2007) (McMahon, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1104.02[3][b]**

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

0307-014 **Debtor could not cure mortgage arrearage once equitable interest in property was extinguished by foreclosure.** (*Bankr. N.D.W. Va.)*

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion requesting that creditor be held in contempt of court for rejecting debtor's postpetition mortgage payments. Creditor filed a motion for relief from stay. Debtor filed a motion to filed a late proof of claim.

OVERVIEW: Creditor was the holder of a deed of trust on debtor's principal residence. Creditor sold the property at a foreclosure sale and the trustee executed a memorandum of sale. The deed conveying the property, however, was not prepared until after debtor filed his chapter 13 bankruptcy petition. Debtor sought to undue the foreclosure sale and cure his mortgage arrearage in his proposed chapter 13 plan. The court held that debtor could not cure his mortgage arrearage under 11 U.S.C. § 1322(c)(1) because he had no equitable interest in the property under state law after the execution of the memorandum of sale. The court also held that debtor lacked standing to assert a cause of action under 11 U.S.C. § 544(a)(3) because only the bankruptcy trustee had standing. The court further held that debtor has no basis for avoiding a foreclosure sale to the extent that he could have claimed an exemption because debtor had not suffered any impairment of his exemption as a result of the sale. The court also held that creditor was entitled to a modification of the automatic stay to permit the recording of the foreclosure sale trustee's deed because the property never became property of the estate.

In re Bardell, *2007 Bankr. LEXIS 352 (Bankr. N.D.W. Va. February 8, 2007) (Flatley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.15**

§ 1325(a)(5)(A) Confirmation of Plan; Conditions for Confirmation; Allowed Secured Claimholders; Acceptance of Plan.

0307-015 **Modification of plan to abate delinquent plan payments allowed in absence of objection by secured creditor.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: The court confirmed debtors' chapter 13 case. The chapter 13 trustee moved to dismiss the case, stating that debtors were three months delinquent in plan payments. Debtors objected to the trustee's motion to dismiss and moved to modify their plan to abate delinquent plan payments. The secured creditor of debtors' vehicle received notice of debtors' abatement request and did not file an objection.

OVERVIEW: The trustee raised a concern that if the abatement were permitted, monthly payments to the secured creditor would be interrupted, and would not be in equal monthly installments under 11 U.S.C. § 1325(a)(5)(B)(iii). The court took the matter under advisement to determine whether chapter 13 debtors may modify a chapter 13 plan where the modification would result in unequal periodic payments to a secured creditor. The court concluded that this type of modification was permissible so long as the secured creditor did not object. As with any proposed modification, the court could grant the relief requested only if the modifications would comport with 11 U.S.C. § 1325(a). Here, the secured creditor's silence concerning the proposed modification was significant, as it constituted acceptance of the modification under section 1325(a)(5)(A). The court concluded that debtor's proposed abatement was appropriate because it conformed with the requirements of section 1325(a), and specifically with section 1325(a)(5). The court found that debtors need not propose a modified plan providing equal monthly payments to the secured creditor because the secured creditor had accepted the modified plan.

In re Tonioli, *2007 Bankr. LEXIS 325 (Bankr. D. Utah February 5, 2007) (Thurman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06[2]**

§ 1325(b) Confirmation of Plan; Objections.

0307-016 **Objection to confirmation sustained since above median debtors could not deduct trustee's and attorneys' fees from projected disposable income.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Debtors filed a chapter 13 case. The trustee filed an objection to confirmation of debtors' plan, asserting among other grounds that their plan failed to meet the disposable income requirements appearing at 11 U.S.C. § 1325(b)(1)(B).

OVERVIEW: The issues were: (i) did debtors' proposed plan meet the disposable income requirement of 11 U.S.C. § 1325(b)(1)(B) if debtors did not pay to the unsecured creditors all of debtors' projected disposable income to the Trustee during the applicable commitment period? (ii) could administrative expenses for attorneys fees and trustee fees be deducted from all of the projected disposable income received by the Trustee during the applicable commitment period prior to distributions to unsecured creditors? As above median income earners, debtors, pursuant to 11 U.S.C. § 1325(b)(3), determined amounts to be reasonably necessary to be expended under 11 U.S.C. § 1325(b)(2) by applying 11 U.S.C. § 707(b)(2)(A) and (B). The Trustee contended that debtors had to commit $12,000 to fund the "general" unsecured creditors in order to meet the disposable income requirement and not $9,400, calculated by deducting $1,200 for trustee's fees and $1,400 for attorney's fees. The court concluded that debtors had to add the amount identified on line 50 for the trustee's fee to the monthly disposable income under line 58 when calculating the plan payment. Debtors conceded the attorneys fees issue.

In re McDonald, *2007 Bankr. LEXIS 363 (Bankr. D. Mont. February 7, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

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

§ 1930 Bankruptcy Fees.

0307-017 **Court had no authority to waive fees in case converted to chapter 7 from chapter 11.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: The debtors filed motions to reinstate their dismissed chapter 7 cases, to alter the statutory filing fee requirements, and to waive their filing fees.

OVERVIEW: The debtors' chapter 11 cases were converted to chapter 7 and dismissed. The court held that the debtors' procedural requests suffered from numerous defects which the court was unable to cure. The court denied the debtors' motions to alter the statutory filing fee requirements under 28 U.S.C. § 1930 and waive the fees. The court had no statutory authority to waive their fees because a waiver was only authorized in a case initially filed as a chapter 7 and they chose to file under chapter 11 and the court had no information regarding the debtors' income and expenses given their failure to comply with its order to file schedules or statement of affairs. Simply because there were "discussions" with the clerk's office staff and that the debtors were unable to succeed in chapter 11 and were granted leave to convert their cases to chapter 7 did not dispense with the requirement that they pay the fee for the cases under chapter 11. The court would not consider reinstating the cases unless the balance of the fees were paid. The court held that the debtors had the option of filing a new chapter 7 petition or an appeal.

In re Bach, *2007 Bankr. LEXIS 405 (Bankr. D. Ariz. February 2, 2007) (Marlar, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:9.01**

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

§ 105 Power of Court.

0307-018 **Debtor awarded punitive damages for creditor's knowing violation of discharge injunction and damages for emotional disturbance of being served at financial insitution where she worked as loan officer.** (*Bankr. D.P.R.)*

PROCEDURAL POSTURE: After a court entered a default judgment in favor of defendant creditor in its action for collection of money and foreclosure of a mortgage against plaintiff debtor, the court entered a default judgment in the debtor's adversary proceeding alleging that the underlying debt had been discharged before the mortgage lien securing its payment was registered. The debtor filed a motion for entry of judgment and for damages.

OVERVIEW: The debtor listed the creditor as a secured creditor due to the mortgage on her residence. After the debtor was discharged in bankruptcy, the registrar returned the defective mortgage deed to the creditor without registering it. Once the deed was corrected, the creditor presented the deed to the registry, and it was recorded. The court concluded that because the mortgage deed was not registered until after the entry of the discharge order, the second attempt to perfect the lien was null and void. The underlying debt had been discharged and its payment could no longer be guaranteed by the mortgage. Under 11 U.S.C. § 524, the order of discharge prevented the creditor from taking any action to collect the discharged debt. Pursuant to 11 U.S.C. § 105, the court awarded damages to the debtor based her claims of anxiety and emotional disturbance resulting from having been served at work in front of her coworkers and boss, which were heightened because she was a loan officer at a lending institution. The court also found that the creditor knowingly violated the discharge injunction; thus, it awarded punitive damages, costs, and attorney's fees to the debtor.

Baerga v. Solomon Bros. Realty Corp. (In re Raven)*, 2006 Bankr. LEXIS 3838 (Bankr. D.P.R. September 28, 2006) (de Jesus, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.01**

§ 107(b)(2) Public Access to Papers; Protective Orders; Persons.

0307-019 **Motion to seal trustee's adversary complaint as defamatory or scandalous denied absent establishment that allegations were untrue.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: A putative defendant, a law firm, sought an order pursuant to 11 U.S.C. § 107(b)(2) requiring that the chapter 11 trustee be required to file a proposed adversary complaint under seal.

OVERVIEW: The firm was retained to represent debtors in a chapter 11 case. Debtors operated Dunkin Donuts franchises and were owned by a family. The franchisor was unwilling to permit debtors to continue as franchisees so long as the family remained involved in any way in the business. The court authorized an auction of debtors property, on the condition that the buyer would have no involvement with the family. One of the bidders was related to the family, a fact that was not disclosed at the time of the bid. The trustee alleged that the firm and several other parties had notice or knowledge of the relationship and breached its fiduciary duty and committed fraud on the court by failing to disclose the facts. The firm argued that the adversary complaint should be sealed because it contained scandalous or defamatory matter. In denying the motion to seal, the court held that, although the adversary complaint contained matters that could alter the firm's reputation, it was neither defamatory or scandalous. The court held that the firm had not established that the allegations were untrue, and the allegations were relevant and not included for an improper purpose.

In re Food Mgmt. Group, LLC*, 2007 Bankr. LEXIS 381 (Bankr. S.D.N.Y. February 13, 2007) (Glenn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:107.03**

§ 326(a) Limitation on Compensation of Trustee; Compensation for Services Under Chapter 7 or 11.

0307-020 **Credit bid could not be included in calculation of trustee's compensation.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: A chapter 7 trustee requested approval of $64,878 as compensation. The U.S. Trustee objected to the application, arguing that the trustee was only entitled to $12,631 because a credit bid could not be included in the calculation of the trustee's compensation under 11 U.S.C. § 326(a).

OVERVIEW: The issue in this case was whether a credit bid could be included in the calculation of the chapter 7 trustee's compensation under 11 U.S.C. § 326(a) as moneys disbursed or turned over in the case by the trustee. The chapter 7 trustee urged the court to adopt a constructive disbursement theory. The U.S. Trustee argued that the language of section 326(a) did not allow for inclusion of a credit bid. Here, the trustee sold the debtor's property for $1.3 million, of which $1,178,701 represented a credit bid. The purchaser received the property in satisfaction of its secured claim against the estate. The trustee's act of conveying the property to the purchaser – at least to the extent of the credit bid – secured no benefit to the estate. The only benefit realized by the estate from the sale arose from the $121,298 cash paid by the purchaser. Therefore, the court determined that the chapter 7 trustee's compensation was properly calculated without the inclusion of the credit bid. After analyzing the legislative history for section 326(a), the court concluded that Congress did not intend to include a credit bid in the calculation of a trustee's compensation.

In re American Canadian Investments, Inc.*, 2006 Bankr. LEXIS 3842 (Bankr. E.D. Va. November 1, 2006) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:326.02**

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

0307-021 **Suspension of driver's license for debtor's ongoing failure to pay fines was excepted from stay as a continuation of prior criminal proceeding.** (*N.D. Ala.)*

PROCEDURAL POSTURE: Appellant, a chapter 13 debtor, sought review of a decision of the bankruptcy court, which dismissed the debtor's adversary proceeding brought against appellees, the Alabama Department of Public Safety and a state official, alleging that the suspension of the driver's license of the debtor violated the automatic stay imposed by 11 U.S.C. § 362.

OVERVIEW: Before the debtor's proposed plan was confirmed, a state court ordered the suspension of the debtor's license in response to the debtor's continuing failure to pay his criminal fines. The bankruptcy court concluded that the suspension met the exemption under section 362(b)(1) because it was merely a continuation of a prior criminal proceeding. On review, the court upheld the dismissal of the proceeding. Both the plain reading of the statute and a review of the relevant case law indicated that the license suspension was precisely the type of conduct that section 362(b)(1) excluded from bankruptcy protection. There was no indication that the conduct of appellees was solely, or even partially, designed to strong-arm the debtor to pay his fines ahead of schedule. To the contrary, the court found that the bankruptcy filing was more likely a ploy to frustrate criminal sanctions. There was no question that the fines were criminal in nature, and the action taken by appellees was a part of a prior criminal proceeding. The suspension was not an independent action but rather the inevitable consequence of the debtor's not paying the fines, constituting a continuation of a criminal action.

Talley v. Alabama Dep't of Public Safety*, 2007 U.S. Dist. LEXIS 9299 (N.D. Ala. January 30, 2007) (Acker, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05[1]**

§ 507(a)(8)(C) Priorities; Order of Priorities; Unsecured Governmental Claims; Collected or Withheld Tax.

0307-022 **IRS was entitled to a priority unsecured claim for debtor's failure to remit withholding taxes.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: When debtor filed a chapter 7 bankruptcy proceeding, the IRS filed a proof of claim in which it asserted that, by reason of unpaid employee withholding taxes, it was a priority unsecured creditor under 11 U.S.C. § 507(a)(8) and was entitled to a stated sum in that capacity. The trustee objected to the IRS claim and also claimed that it was properly subordinated per 11 U.S.C. § 510(c).

OVERVIEW: The IRS filed a secured claim based on debtor's failure to remit withholding taxes. Once the IRS received certain payments, the IRS amended to assert a priority unsecured claim per 11 U.S.C. § 507(a)(8) for a smaller sum. The trustee objected thereto, arguing that while the taxes were owed, the IRS did not prove that debtor was a "responsible person" or that the failure was willful as per 26 U.S.C. § 6672. While the court sustained the objection as to a $24,000 item because a mathematic discrepancy was not clarified, it otherwise overruled the objection, holding that the IRS had a priority claim. Moreover, because debtor did not contest the assessment but in fact admitted in his schedule that the taxes were priority claims, the trustee was not permitted to contest those taxes. In making the additional finding that the claim was entitled to priority under 11 U.S.C. § 507(a)(8)(C), the court held that though the item was referred to as a "penalty," that reference did not alter the essential character as taxes for purposes of bankruptcy law, especially where, as here, liability was predicated on a failure to pay over rather than a failure initially to collect the taxes at issue.

In re Toberman*, 2006 Bankr. LEXIS 3844 (Bankr. D. Minn. November 22, 2006) (Dreher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:507.10[4]**

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

0307-023 **Debtor's use of credit privileges granted by employer for purchases beyond monthly income or ability to repay rendered debt nondischargeable.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff creditor, the former employer of defendant debtor, sought a determination that its claim against the debtor was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) as a debt obtained by false pretenses, a false representation, or actual fraud.

OVERVIEW: The creditor operated a construction business and allowed its employees to buy materials for their personal use through the business so long as the employees reimbursed the creditor within 30 days. The debtor placed orders under the creditor's name for a large quantity of material and failed to indemnify the creditor within 30 days. After the debtor stopped working for the creditor, the creditor obtained a state default judgment against him. The court concluded that the debt was non-dischargeable. The use of his employer's credit carried an implied representation of the intent to reimburse for the cost of the purchase. The debtor knew that the representation was false because the amount purchased greatly exceeded his monthly income. The ultimate inability to repay represented the requisite intent. The success of the creditor's program depended on a commitment by each participant to make reimbursement within the time period; thus, the creditor justifiably relied upon the debtor's representation. The debtor's false representation caused the creditor to suffer a financial loss to the extent of the unpaid balances and any accrued interest.

Cortese Bros. v. Christofaro (In re Christofaro)*, 2007 Bankr. LEXIS 348 (Bankr. W.D.N.Y. February 2, 2007) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

§ 549 Postpetition Transactions.

0307-024 **Postpetition recording of warranty avoided as unauthorized transfer.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee brought an adversary proceeding seeking to avoid a postpetition transfer made to defendant transferees by virtue of a warranty deed from debtor to defendants that was not recorded until well after the date of the petition. The trustee proceeded under 11 U.S.C. § 549. The matter was pending judgment. Also pending was defendants' motion to sell the property.

OVERVIEW: The individual transferee loaned debtor a considerable amount of money on several occasions. One particular loan was the source of the controversy. On August 29, 2002, debtor made, executed and delivered to the transferee a promissory note in the amount of $80,000. The transferee testified that debtor was to pay or refinance the note when the balloon payment came due. In an attempt to secure her repayment of the note, the transferee, with the advice of counsel, accepted a warranty deed to two rental properties. To succeed under 11 U.S.C. § 549, the trustee had the burden to prove that (1) the transfer occurred after the commencement of the case, and (2) that the transfer was not authorized under the Bankruptcy Code or by the court. The trustee met his burden of proof to demonstrate that the transfer was avoidable under section 549(a). The warranty deed was an unauthorized postpetition transfer. Defendants did not record the warranty deed until well after the date of debtor's bankruptcy petition and the individual defendant knew that she had filed bankruptcy and could not prove that defendants were bona fide purchasers for value.

Speth v. Vaupel (In re Smith)*, 2006 Bankr. LEXIS 3615 (Bankr. D. Kan. December 8, 2006) (Nugent, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:549.01**

§ 550 Liability of Transferee of Avoided Transfer.

0307-025 **Federal common law allowed trustee to seek recovery of funds transferred by debtor to bank as part of a Ponzi scheme.** (*11th Cir.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee for the estate of debtor filed an adversary action against defendant bank to recover under 11 U.S.C. § 550 approximately $900,000 from 11 transfers. The parties both moved for summary judgment. The bankruptcy court granted final summary judgment for the bank. The District Court for the Southern District of Florida affirmed the final summary judgment. The trustee appealed.

OVERVIEW: The debtor was allegedly used to perpetrate a Ponzi scheme. The trustee had previously sued the estate of the debtor's incorporator, the incorporator's wife, and others to recover approximately $10 million by avoiding approximately 377 transfers. The bank was not a defendant in the first action, but 11 of the 377 transfers concerned the funds transferred from the debtor to bank on the incorporator's behalf. The parties settled the first lawsuit for $3.9 million. The settlement expressly contemplated that the trustee could pursue claims for fraudulent transfer against other parties. The court held that the courts below erred in granting summary judgment to the bank because rather than applying Florida law, they should have applied federal common law because: (1) the federal rule of single satisfaction concerned the judicial process necessary to approve settlements that terminate bankruptcy proceedings and the valuation of settled claims in collateral litigation; (2) applying state law had the potential to frustrate the purposes of the Bankruptcy Code; and (3) applying a uniform rule of federal law would not disturb any preexisting commercial expectations predicated on state law.

Dzikowski v. National Trust Bank of Fla. (In re Prudential of Fla. Leasing, Inc.)*, 2007 U.S. App. LEXIS 3263 (11th Cir. February 13, 2007) (Pryor, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:550.01**

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

0307-026 **"Mere conduit" defense to avoidance applied to entity that forwarded debtor's payments to the company it serviced.** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: Defendant filed a motion for judgment on the pleadings in chapter 11 debtor's adversary proceeding, which alleged that transfers made by debtor to defendant within 90 days prior to the bankruptcy petition date were avoidable as preferences pursuant to 11 U.S.C. §§ 547(b) and 550.

OVERVIEW: Debtor was a global supplier of integrated enclosures for the computer, networking, and communications industries. Defendant provided sales support, technical support, and acted as a service arm to co-defendant, a related Taiwanese company, which sold products to debtor. During the preference period, debtor paid several invoices issued by co-defendant by sending checks to defendant. Defendant requested that debtor stop sending the checks to it, and, instead, to send the payments to co-defendant. Debtor did not respond to the request, and continued to mail the checks to defendant. Each time defendant received a check, it would forward the check to co-defendant, which would deposit the check into its bank account. The court held that defendant did not receive a transfer under 11 U.S.C. § 547(b) because the transfer only occurred when the checks were honored. Debtor argued that defendant should be equitably estopped from raising a "mere conduit" defense under 11 U.S.C. § 550(a) because of its dilatory conduct during discovery. The court held that, even if such conduct could have barred the use of the defense, defendant's conduct did not rise to the level that would warrant a bar.

Broadway Advisors, LLC v. Hipro Elecs., Inc. (In re Gruppo Antico, Inc.)*, 2007 Bankr. LEXIS 315 (Bankr. D. Del. February 7, 2007) (Carey, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:550.02**

§ 727(a) Discharge; Grounds for Denial.

0307-027 **Discharge denied due to debtors' concealment of property and failure to keep or preserve records.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: In consolidated adversary proceedings, plaintiffs, a creditor bank and the chapter 7 trustee, asserted that defendant debtors should be denied their bankruptcy discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (3), (4) and/or (5). Debtors opposed such relief. The matter was before the court for judgment.

OVERVIEW: In essence, plaintiffs contended that efforts taken by debtors prior to their bankruptcy filing to avoid the bank's execution on judgments against them and a corporation they controlled, where some of the results of those efforts were not disclosed on their schedules, were fraudulent and should deprive debtors of their discharge. Debtors countered that their conduct was legal and appropriate, and that any mis-disclosures or non-disclosures in their bankruptcy case were inadvertent. The court concluded that plaintiffs had demonstrated by a preponderance of the evidence that debtors transferred and concealed property with an intent to hinder and delay their creditor within one year of their bankruptcy filing, that debtors unjustifiably failed to keep or preserve records from which their financial condition might have been ascertained fully, and that they made false oaths in the submission of their bankruptcy schedules and statement of financial affairs. Therefore, debtors were denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(3) and (a)(4). Debtors provided a sufficient explanation as to the disposition of their assets so that relief under section 727(a)(5) was denied.

Wachovia Bank v. Spitko (In re Spitko)*, 2006 Bankr. LEXIS 3741 (Bankr. E.D. Pa. October 23, 2006) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 1107(a) Rights, Powers, and Duties of Debtor in Possession; Same Rights and Duties as Trustee.

0307-028 **Waiver of avoidance action by debtor in possession was binding on chapter 7 trustee after conversion.** (*10th Cir.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee filed an avoidance action against defendant secured creditor to recover transfers for the benefit of the bankruptcy estate. A bankruptcy court denied the creditor's motion for summary judgment, and the creditor appealed. The District Court for the District of Colorado reversed the bankruptcy court's judgment, and the trustee appealed.

OVERVIEW: The debtor filed an action under chapter 11, and some of its creditors formed a creditors' committee to represent their interests. The debtor sought emergency authority from the bankruptcy court to use its cash on hand as collateral, incur additional postpetition debt, and protect postpetition lenders from existing creditors, and the bankruptcy court issued a financing order granting the debtor's request. After the debtor's action was converted to an action under chapter 7, the bankruptcy trustee filed an action against a secured creditor. The court of appeals found that the debtor waived its right and the trustee's right to bring an avoidance action against the creditor when it acted as a debtor-in-possession under chapter 11, and the financing order approved by the bankruptcy court had the effect of barring litigation against the creditor once conversion to chapter 7 dissolved the creditors' committee. As the trustee had no rights greater than the debtor and the debtor had no right to bring an avoidance action, the trustee was not entitled to bring an avoidance action in its own right.

Hill v. Akamai Techs., Inc. (In re MS55, Inc.)*, 2007 U.S. App. LEXIS 3376 (10th Cir. February 13, 2007) (Tymkovich, C.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 7:1107.01**

§ 1113 Rejection of Collective Bargaining Agreements.

0307-029 **Debtor airline's rejection of collective bargaining agreement with pilot's union allowed court to issue strike injunction without violating the Norris-LaGuardia Act.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff airline, a bankruptcy debtor, obtained approval to reject a collective bargaining agreement between the airline and defendant airline pilots' union. After the union expressed an intent to strike if the airline implemented proposed new terms of employment, the airline brought an adversary proceeding against the union and moved for a preliminary injunction to prohibit the union and its members from striking.

OVERVIEW: The airline contended that the Railway Labor Act ("RLA"), which applied to the airline as a carrier, permitted injunctive relief to compel the union to submit to the mandatory and lengthy RLA procedures for mediation. The union argued that the Norris-LaGuardia Act ("NLGA") precluded an injunction against the strike after the airline unilaterally changed the terms of employment following rejection of the collective bargaining agreement. The bankruptcy court held that, since there was no enforceable collective bargaining agreement between the parties after rejection, the airline did not change the terms of any such agreement and thus the union was precluded from striking under the RLA. The anti-injunction provision of the NLGA did not apply since the RLA expressly imposed bargaining obligations on the union to avoid interruption of carrier operations, and the airline did not violate any provision of the RLA in rejecting the agreement and implementing new terms of employment.

Comair, Inc. v. Air Line Pilots Assoc. (In re Delta Air Lines, Inc.)*, 2007 Bankr. LEXIS 377 (Bankr. S.D.N.Y. February 7, 2007) (Hardin, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 7:1113.01**

§ 1141(d)(1)(A) Effect of Confirmation; Discharge; Types of Debt Discharged and Rights Terminated; Debt Arising Prepetition or Specified in Sections 502(g), (h) and (I).

0307-030 **Action against debtor for continuing trespass related to maintenance of fiber optic cable was not discharged in bankruptcy.** (*S.D.N.Y.)*

PROCEDURAL POSTURE: Petitioner property owner filed an action alleging trespass, slander of title, and unjust enrichment based on the installation of fiber optic cable within railroad rights of way. Respondent debtor filed for bankruptcy. The debtor sought a declaratory judgment that a discharge precluded the owner's action. The bankruptcy court granted the debtor's motion for summary judgment. The owner appealed.

OVERVIEW: The bankruptcy court held that the owner's claims were discharged in their entirety under 11 U.S.C. § 1141(d)(1)(A). The owner contended that the bankruptcy court erred in finding that his trespass claims were within the scope of the bankruptcy discharge. The bankruptcy court held that the prepetition relationship between the owner and the debtor began when installation of the cable concluded in 1986, twelve years prior to the commencement of the owner's action. The owner's claims concerning the presence of the cable arose at that time. Accordingly, the court found that the bankruptcy court properly concluded that the owner's claims concerning the presence of the cable were permanent trespasses and therefore were claims discharged in bankruptcy. The second issue was whether the debtor's postpetition maintenance of the cable constituted a continuing or a permanent trespass. If the debtor prospectively entered the owner's property to access the underground cable, these incursions could inflict new injuries actionable as continuing trespasses. The possibility of future entries to repair existing cable was one basis for the owner's trespass claims.

West v. WorldCom, Inc., *2007 U.S. Dist. LEXIS 9874 (S.D.N.Y. February 13, 2007) (Pauley, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1141.06**

§ 1225(a)(5)(B) Confirmation of Plan; Conditions; Allowed Secured Claimholders; Retention of Lien.

0307-031 **Confirmation denied due to farmer debtor's failure to provide creditor trust with interest at prime rate plus risk factor.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Two cases were filed, one by two individual debtors and one by an LLC. Pending in the jointly administered chapter 12 bankruptcy cases were confirmation of debtors' chapter 12 Plans and objections thereto filed by two creditors, namely a revocable trust and a second creditor. Also pending was debtors' motion for valuation of the second creditor's security. The trust also sought dismissal. A separate Order addressed its judicial notice request.

OVERVIEW: The trust objected to confirmation of debtors' Plans because they did not provide interest to its claim based upon the prime rate plus a risk factor, and because the plans were visionary and not feasible. Further, it argued that the individual debtors were not eligible for chapter 12 relief because only 40.97 percent of their income was from agricultural sources rather than the more than 50 percent required to qualify as a family farmer under 11 U.S.C. § 101(18). The court first concluded that debtors' plans failed to satisfy the requirements of 11 U.S.C. § 1225(a)(5)(B)(ii) for an appropriate cramdown rate for the trust's secured claim under the formula approach, and failed to satisfy the same requirement for the second creditor's' claim, which debtors conceded had to be provided for in their Plan. Next, the court concluded that debtors had not satisfied their burden of proving that their Plans had a reasonable chance of success under section 1225(a)(6), but only because the issue was premature. Finally, by the court's analysis, debtors received from their farming operation 51.47 percent of their gross income in the year 2004, and thus, dismissal was denied.

In re Wilson, *2007 Bankr. LEXIS 359 (Bankr. D. Mont. February 7, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1225.03**

§ 1307(c) Conversion or Dismissal; Conversion or Dismissal for Cause.

0307-032 **Debtors' sixth chapter 13 case was not filed in good faith where there was no legitimate prospect for reorganization.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion seeking leave to file a seventh chapter 13 bankruptcy case. A secured creditor opposed the request.

OVERVIEW: Debtor and his alleged wife filed a chapter 13 petition. It was their sixth joint chapter 13 petition. All of the previous cases had been dismissed. The trustee, debtor, and the wife signed a consent order, under which the trustee withdrew his request to dismiss and the debtors, in return, were be barred from further bankruptcy filings without obtaining prior leave of court. The wife's case was voluntarily dismissed after it was discovered that the couple were not legally married, and the case continued with debtor as the sole debtor. Debtor unsuccessfully filed numerous plans and the case was dismissed. In denying leave to file a seventh case, the court held that the case was not filed in good faith pursuant to 11 U.S.C. § 1307(c) because there was no legitimate prospect of reorganization. The court held that the only change of circumstances since the sixth filing was a claim of additional rental income. The court held that there was no evidence regarding the long-term prospects of the income.

In re Lee, *2006 Bankr. LEXIS 3730 (Bankr. E.D. Pa. November 8, 2006) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

0307-033 **Bankruptcy court properly exercised discretion in denying motion to dismiss case where plan would not be completed within 60 months.** (*N.D. Ill.)*

PROCEDURAL POSTURE: Appellant trustee appealed from a decision rendered by the bankruptcy court, which denied the trustee's motion to dismiss appellee debtor's chapter 13 bankruptcy case. The trustee sought a review of whether cause to dismiss a case under 11 U.S.C. § 1307(c) existed when the plan would extend beyond the 60-month term limit imposed in 11 U.S.C. §§ 1322(d) and 1329(c), *inter alia.*

OVERVIEW: The court first determined whether cause existed for the dismissal of debtor's case under 11 U.S.C. § 1307(c)(6) for failure to complete her plan within the 60-month limit set forth in 11 U.S.C. §§ 1322(d) and 1329(c). Because dismissal under 11 U.S.C. § 1307 was a discretionary matter for the bankruptcy court, the bankruptcy judge was not required to dismiss debtor's case simply because debtor's plan would not complete until after 60 months had elapsed. Looking at the statutes, case law, and legislative history, the court agreed with the bankruptcy judge's rationale in denying the motion to dismiss. Nothing in section 1307 required such dismissal. The sections for confirmation and modification were separate and distinct from section 1307, which governed conversion and dismissal. The bankruptcy judge determined that, in light of debtor's history of diligent payments, the trustee's failure to bring a motion to dismiss until debtor had made such payments for four-and-a-half years, and the court's conclusion that debtor reasonably did not know the status of the IRS tax lien that was the cause of the delay, the extra 30 months it would take debtor to complete her plan was reasonable.

In re Henry, *2007 U.S. Dist. LEXIS 11132 (N.D. Ill. February 13, 2007) (Moran, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

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

0307-034 **Plan confirmation denied due to discrimination between student loan creditor and other unsecured creditors.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: A bankruptcy debtor proposed a plan which provided a minimal dividend to unsecured creditors but treated student loan debt as long-term debt under 11 U.S.C. § 1322(b)(5), which received a substantially greater dividend. The trustee objected to confirmation of the plan on the ground that it discriminated between unsecured creditors in violation of section 1322(b)(1).

OVERVIEW: The debtor contended that the anti-discrimination provision of section 1322(b)(1) did not apply to long-term debt and that, in any event, the disparate treatment of unsecured debt and unsecured student loan debt was not unfair and thus did not violate section 1322(b)(5). The bankruptcy court first held that, since long-term debt was not expressly excluded from the operation of section 1322(b)(1), the student loan debt classified under section 1322(b)(5) must also satisfy the prohibition against unfair

discrimination. Further, the record was inadequate for a determination of whether the discrimination was unfair, and thus the debtor's burden of showing that the disparate treatment was fair was not met.

In re Pora, *2006 Bankr. LEXIS 3723 (Bankr. N.D. Cal. October 17, 2006) (Weissbrodt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.05**

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

0307-035 **Bankruptcy court properly allowed debtor to use proceeds of trustee's sale of debtor's residence to complete plan early with lump sum payment.** (*N.D. Ill.)*

PROCEDURAL POSTURE: Appellant trustee appealed from the Bankruptcy Court, which ruled in debtor's favor, ordering the trustee to use the proceeds of the sale of debtor's personal residence to pay off the remaining payments under her chapter 13 plan and then release the excess proceeds to debtor. The bankruptcy court subsequently discharged debtor and denied a stay.

OVERVIEW: The instant bankruptcy appeal concerned the question of whether a debtor in a chapter 13 proceeding may sell her personal residence and then discharge her case by using some of the proceeds to make a lump sum payment covering the remaining monthly payments due under the debtor's confirmed plan. The trustee contends that this was inconsistent with 11 U.S.C. § 1325(b)(1) and the terms of the plan to permit debtor to be discharged in less than 36 months without paying unsecured claims in full. The language of the plan was standard language. The plan did not state that there was only one basis for concluding the plan at an earlier date Furthermore, by paying the total amount in less time than required, the creditors received a benefit compared to the whole amount being paid out over the full three years. Also, permitting the required payments to be paid out in less than 36 months was not inconsistent with 11 U.S.C. § 1325(b)(1)(B). Finally, even assuming that the disposable income standard applied to modification requests as claimed by the trustee, this would not be a basis for modification because proceeds from the sale of debtor's home were not disposable income.

Marshall v. Mangum (In re Mangum), *2007 U.S. Dist. LEXIS 10112 (N.D. Ill. February 12, 2007) (Hart, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[2]**