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Collier Bankruptcy Case Update

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

0407-001 **Stay continued in debtor's fourth case conditioned upon payment of postpetition rent and timely payment of future rents.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Respondent debtor sought bankruptcy relief under chapter 13. Movant creditor sought relief from the automatic stay order to prosecute an unlawful detainer action for possession of real property that was rented by the debtor.

OVERVIEW: The debtor's current chapter 13 bankruptcy petition was the debtor's fourth bankruptcy case filed with the court in seven years. The creditor was debtor's landlord. As part of the chapter 13 plan, which had been approved without objection, the debtor acknowledged and provided for the prepetition rent obligation owed to the creditor. The original lease term had expired, and the debtor was renting month-to-month. Before the debtor filed his petition, the creditor had initiated a claim in state court for unlawful detainer. In the state court action, the creditor sought possession of the property and a money judgment for unpaid rent. It was also undisputed that the debtor had not made any rent payments after filing for bankruptcy relief. The debtor represented that he would be able to promptly cure the postpetition defaults. The court denied relief from the stay, conditioned upon the debtor's payment of the postpetition rent in the amount of $6,600 and upon the timely payment of rent when it became due in the future.

Chi Chiu v. Barnard (In re Barnard), *2007 Bankr. LEXIS 509 (Bankr. E.D. Va. February 8, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 363(c)(2)(B) Use, Sale, or Lease of Property; Where Operation of Debtor's Business is Authorized; Cash Collateral; Notice and Hearing.

0407-002 **Chapter 11 debtor with reasonable chance of successful reorganization could use cash collateral to finance operations.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: A chapter 11 bankruptcy debtor moved pursuant to 11 U.S.C. § 363(c)(2)(B) for authority to use the cash collateral of a creditor to finance its continued operations and reorganization, and the creditor opposed the motion.

OVERVIEW: The debtor submitted a projected budget of monthly operating costs and proposed to make monthly payments to the creditor. The bankruptcy court held that the debtor's use of the creditor's cash collateral in the ordinary course of its business was appropriate. The debtor appeared to have a reasonable possibility of reorganization, and the debtor's budget was relatively lean and provided for the expenses of the operations which were necessary to generate income to repay creditors. Further, the monthly payments proposed by the debtor were sufficient to adequately protect the creditor.

In re La Ruche Imps., Inc., *2007 Bankr. LEXIS 468 (Bankr. S.D. Tex. February 8, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.03[4]**

§ 506 Determination of Secured Status.

0407-003 **Strip down allowed where secured claim included obligations separate from and in addition to purcahse price of vehicle.** (*Bankr. E.D.N.C.)*

PROCEDURAL POSTURE: Chapter 13 debtors submitted for confirmation a proposed plan that would bifurcate creditor's claim which was secured by debtors' motor vehicle pursuant to 11 U.S.C. § 506, and strip down the secured part of the claim to the current value of the vehicle. Creditor filed an objection, asserting the plan violated the prohibition on bifurcation in 11 U.S.C. § 1325(a), because the debt in issue created a purchase money security interest.

OVERVIEW: The creditor cited the "hanging paragraph" of section 1325(a), noting that the vehicle had been purchased within 910 days prior to the filing. The full amount of its claim was $18,332.37. Debtors disagreed, contending that the debt was not a purchase money security interest, because the amount of the claim included obligations separate from, and in addition to, the purchase price of the vehicle,

primarily the negative equity of debtors' trade-in of $2,837.96, which was rolled into the loan. Alternatively, debtors argued that if creditor did have a purchase money security interest, that secured interest was for less than the full amount of creditor's claim. The court noted that the hanging paragraph was subject to different reasonable interpretations. The court ruled that the amount advanced to fund the negative equity on the trade-in was not within the definition of "purchase money obligation," and thus could not give rise to a purchase money security interest. Strip down of the secured claim to the current value of the encumbered vehicle was proper.

***In re Price**, 2007 Bankr. LEXIS 639 (Bankr. E.D.N.C. March 6, 2007) (Small, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.01**

§ 522(c)(1) Exemptions; Debts Collectible from Exempt Property; Domestic Support Obligations.

0407-004 **Fully exempt homestead could not be sold by trustee to satisfy domestic support obligation.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: The chapter 7 trustee filed an objection to debtor's claimed homestead exemption, a request for authority to sell homestead to pay outstanding domestic support obligations, and a motion to compel turnover of documents.

OVERVIEW: In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA"), Congress added several provisions benefitting creditors holding claims for debts in the nature of alimony, maintenance and support. The two questions presented in the pending contested matters in the case arose from these changes. First, did amended 11 U.S.C. § 522(c)(1) create a valid basis for an objection to exemptions by the trustee or a domestic support obligation ("DSO") creditor? Second, did the changes in 11 U.S.C. §§ 522(c)(1) and 507 authorize a trustee to administer exempt property for the benefit of a DSO creditor? The court answered no to both questions. Without question, BAPCPA enhanced the protections to and rights of DSO creditors. Nevertheless, despite numerous other changes, Congress did not amend the provisions in chapter 7 which set forth the scope of a trustee's duties and authority. As specifically set forth in 11 U.S.C. §§ 704(a) and 726, a trustee's authority was limited to the administration and distribution of property of the estate. Thus, debtor's fully exempt home, having been withdrawn from the estate, could not be sold by the trustee.

***In re Quezada**, 2007 Bankr. LEXIS 454 (Bankr. S.D. Fla. February 7, 2007) (Mark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.02**

§ 545 Statutory Liens.

0407-005 **Properly recorded prepetition judgment lien was not avoidable unless underlying criminal conviction was reversed on appeal.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: A chapter 7 trustee filed a motion under 11 U.S.C. § 545 to void the government's judgment lien.

OVERVIEW: The debtor husband was convicted of a crime in the district court and ordered to pay restitution. The government recorded its judgment lien. The debtor husband and his wife filed for bankruptcy. The husband appealed his conviction, including the amount of restitution. The trustee filed a motion to void the lien. The court held that the husband's pending appeal of the order giving rise to the lien did not deprive it of jurisdiction over matters that related to the lien and involved the bankruptcy case. The court concurred with the government that the lien was a judicial lien, rather than a statutory lien, and that it would have been proper for the trustee to bring an action to avoid the lien under 11 U.S.C. § 544; however, the court considered the action properly filed when brought by motion. The court denied the motion without prejudice because the properly recorded lien was a valid lien existing at the time the case was filed and was not avoidable, absent a ruling by the appellate court vacating the sentencing order on which the lien was based.

***In re Tampas**, 2007 Bankr. LEXIS 486 (Bankr. M.D. Ga. February 8, 2007) (Laney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:545.01**

§ 550 Liability of Transferee of Avoided Transfer.

0407-006 **Bankruptcy court could avoid fraudulent transfer of land involved in concurrent federal drug forfeiture proceeding.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee filed suit alleging that debtor fraudulently conveyed land to defendant individual, and transferred the same land to a company. The amounts paid by the company were seized as proceeds of drug trafficking. The trustee asserted that the civil forfeiture proceeding against the funds violated the automatic stay. The trustee moved for default judgment against the individual. Defendant marshals service moved to dismiss.

OVERVIEW: The court determined that the commencement of a civil forfeiture proceeding did not violate the automatic stay because drug forfeiture proceedings fell within the police and regulatory exception to the automatic stay in 11 U.S.C. § 362(b)(4). Also, the marshals service was wrong when it alleged that the court had no subject matter jurisdiction over the adversary proceeding. There was little doubt that the chapter 7 trustee's claims for avoidance under 11 U.S.C. § 550 were within the jurisdiction set forth in 28 U.S.C. § 1334 and the reference to the court under 28 U.S.C. § 157. Accordingly, the mere fact that forfeiture jurisdiction independently existed in the district court did not mean that bankruptcy jurisdiction did not also arise. The trustee was wrong when he alleged that he was entitled to turnover under 11 U.S.C. § 542, as turnover was not a remedy available to recover claimed debts which remained in dispute. Finally, default judgment against the individual was proper because the individual had been properly served and had not answered.

Schmidt v. United States Marshall Serv. (In re Villarreal)*, 2007 Bankr. LEXIS 463 (Bankr. S.D. Tex. February 8, 2007) (Isgur, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:550.01**

§ 1129(a) Confirmation of Plan; Requirements.

0407-007 **Confirmation of plan proposed by debtor check cashing business denied on grounds of bad faith.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: A bankruptcy debtor who operated check cashing retail stores proposed a reorganization plan which provided for the debtor to merge with its subsidiary which previously acquired the debtor's payday loan portfolio, and the subsidiary would be the surviving entity. The debtor requested confirmation of its plan, and a putative class of consumers who obtained payday loans from the debtor were the sole objectors to confirmation.

OVERVIEW: The consumers sought redress for allegedly usurious loans to the consumers and asserted that the debtor's plan improperly classified unsecured creditors, was not proposed in good faith, and was not feasible. The bankruptcy court held that, while noteholders which had personal guarantees from insiders of the debtor and the insiders themselves were properly classified as unsecured creditors, the plan could not be confirmed since it did not appear to be proposed in good faith and it did not appear likely to succeed. The debtor failed timely to make relevant disclosures, such as the subsidiary's encumbrance of all of its assets, which was only disclosed on the first day of the confirmation hearing and after voting on the plan, and such conduct suggested manipulation of financial information to accomplish plan confirmation. Further, the debtor failed to show that creditors would receive at least as much as they would in a liquidation, since the debtor's growth and income projections failed to consider the asset value of the subsidiary and the inherent risks of the short-term lending business, and the debtor ignored potential claims for fraudulent and preferential transfers.

In re Frascella Enters., Inc.*, 2007 Bankr. LEXIS 455 (Bankr. E.D. Pa. February 8, 2007) (Sigmund, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1129.03**

§ 1146(a) Special Tax Provisions; Securities and Instruments of Transfer Not Taxed.

0407-008 **Exemption from state taxes could not be included in debtor's order for sale of assets where no plan had been confirmed.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: The State of Florida Department of Revenue filed a limited objection to the debtor's motion to approve a sale of substantially all of its assets, pursuant to 11 U.S.C. § 363(b) and (f).

OVERVIEW: The debtor's chief executive officer testified that, without an immediate 11 U.S.C. § 363 sale of assets, the debtor would proceed into liquidation and the proceeds would not satisfy the senior secured lenders. Florida's limited objection to the motion to approve the sale claimed that the proposed sale provided for an exemption of the state taxes under 11 U.S.C. § 1146(a). The debtor argued that the section 1146(a) exemption from Florida's taxes was necessary. The court sustained the objection. The court held that the plain language of section 1146(a) limited the applicability of a tax exemption to sales and other transactions that were "under a plan confirmed." The court found no authority under for a section 1146(a) exemption in a case where the debtor had not filed a plan as of the time of the sale transaction; therefore, the sale was not under a plan confirmed when no plan had been filed.

In re Complete Retreats, LLC*, 2006 Bankr. LEXIS 3954 (Bankr. D. Conn. December 29, 2006) (Shif, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1146.02**

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

0407-009 **Debtors could surrender vehicles in full satisfaction of secured debt.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Creditor filed an objection to the confirmation of debtors' chapter 13 bankruptcy plan and plan terms. The sole issue the court was called upon to resolve was whether the provision at paragraph 14 of the debtors' plan that the collateral securing the creditor's claims (two vehicles), which debtors proposed to surrender in full satisfaction of the debt, met the confirmation requirements of 11 U.S.C. § 1325(a)(5).

OVERVIEW: 11 U.S.C. § 1325(a), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, eliminated the ability of secured creditors to bifurcate their claims into secured and unsecured components under 11 U.S.C. § 506(a) when the provisions of the alphanumeric paragraph located at the end of 11 U.S.C. § 1325(a) were met. Both motor vehicles securing the creditor's claims were purchased by debtors for their personal use within the 910-day period set forth in 11 U.S.C. § 1325(a), and the retail installment contracts executed by debtors granted the creditor purchase money security interests in the two vehicles. Accordingly, 11 U.S.C. § 506(a) did not apply to the creditor's claims, the "anti-cramdown provision" solidified its position as a fully-secured creditor of debtors without regard to whether the proposed treatment was retention or surrender of the vehicles, and there was no avenue by which the creditor could bifurcate its fully-secured claim and file an unsecured deficiency claim.

In re Keck*, 2007 Bankr. LEXIS 464 (Bankr. E.D. Tenn. February 9, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0407-010 **Secured creditor could not claim deficiency where debtor proposed to surrender vehicle in full satisfaction of claim.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: Under a chapter 13 plan, a debtor proposed to surrender collateral in full satisfaction of a claim of a secured creditor. The creditor objected to confirmation, arguing that this treatment conflicted with the intent of 11 U.S.C. § 1325(a). The debtor argued that this treatment was allowed under the plain reading of the statute as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

OVERVIEW: The issue before the court was the effect of the BAPCPA's recent amendment to section 1325(a) regarding "910 claims," for vehicles purchased as a secured debt within 910 days of filing for bankruptcy protection, providing that bifurcation of the secured claim under 11 U.S.C. § 506 did not apply to 910 claims. As a matter of first impression, the court sustained the debtor's objection to the creditor's claim and overruled the creditor's objection to confirmation of the plan. The court found that the amended language was clear that the provisions of section 11 U.S.C. § 506 did not apply to 910 claims, so that the creditor was not entitled to a deficiency claim upon the debtor's surrender of the collateral. The court further found that the disallowance of a deficiency claim did not violate U.S. Const. amend. V

by taking property without just compensation. Because the loan was created post-BAPCPA, the creditor whose claim was secured by 910 property did not have a property right to a deficiency claim in bankruptcy. Thus, as applied, the restriction did not violate the Fifth Amendment where the debtor properly proposed to surrender the collateral in full satisfaction of the creditor's claim.

***In re Durham**, 2006 Bankr. LEXIS 3953 (Bankr. D. Utah December 14, 2006) (Thruman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(b)(2) Confirmation of Plan; Objections; `Disposable Income" Defined.

0407-011 **From 22C did not provide sufficient or accurate basis for determining debtor's "projected disposable income."** (*Bankr. D. Alaska)*

PROCEDURAL POSTURE: The debtors moved to confirm their proposed chapter 13 plan. The chapter 13 trustee recommended against confirmation. The issue was the proper calculation of the debtors' "projected disposable income" for purposes of 11 U.S.C. § 1325(b)(2).

OVERVIEW: The problem was that the debtors' current monthly income, as calculated under 11 U.S.C. § 1325(b)(2) and reflected on Official Bankr. Form 22C, was not representative of the debtors' actual income on an annual basis. The debtors' income was higher in the summer months than in the winter. Thus, the current monthly income and disposable income figures shown on Form 22C distorted and overstated the debtors' ability to pay creditors. The court held that "projected disposable income" for purposes of 11 U.S.C. § 1325(b)(2) was to be based upon the debtors' anticipated income during the term of a chapter 13 plan, not merely an average of the prepetition income. The court could not make a determination because the debtors needed to present specific evidence to show that the numbers reflected on Form 22C were inaccurate projections of their future finances.

***In re Bossie**, 2006 Bankr. LEXIS 3956 (Bankr. D. Alaska December 12, 2006) (MacDonald, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[2]**

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

§ 105 Power of Court.

0407-012 **Attorney sanctioned for false filings, failure to attend creditors' meeting and advice to debtor not to attend creditors' meeting or produce documents.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Chapter 7 trustee filed a motion for sanctions against debtor, debtor's attorney, and debtor's son.

OVERVIEW: Debtor and her first attorney attended the meeting of creditors. The attorney promised to produce documents requested by trustee. Because the attorney felt that he was in over his head, he contacted an attorney who was board certified in consumer bankruptcy law. That attorney took over representation of debtor. He filed a motion to dismiss the case that included blatantly false factual and legal contentions. He also told debtor not to attend a continued meeting of creditors and did not attend the meeting himself. He told debtor not to produce documents requested by trustee. The court held that a monetary sanction against the attorney was warranted pursuant to 11 U.S.C. § 105 because the attorney's conduct was willful, it was not an isolated event, and there were at least two examples where the attorney engaged in similar conduct in other bankruptcy cases. The court also sanctioned debtor and her son, who lived with debtor, because they were responsible for the extremely dilapidated condition in which they left properties owned by debtor. The court held that, had debtor and her son properly maintained the properties, their sale would have yielded $75-80,000 more for creditors.

***In re Cochener**, 2007 Bankr. LEXIS 460 (Bankr. S.D. Tex. February 9, 2007) (Bohm, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.01**

§ 348(f)(1)(B) Effect of Conversion; Property of the Estate in Cases Converted from Chapter 13; Composition and Valuation; Valuation.

0407-013 **Bankruptcy court erred in requiring trustee to rely on debtor's original chapter 13 valuation and abandon property when valuation should have been determined upon conversion to chapter 7.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant, a chapter 7 trustee, sought review of an order of the Bankruptcy Court for the Northern District of California, which compelled the trustee to abandon the residence owned by appellee debtors. The debtors had originally filed a chapter 13 plan, which had been converted to a chapter 7 proceeding post-confirmation.

OVERVIEW: When the debtors filed for relief under chapter 13, they valued their residence at $560,000, subject to a deed of trust held by the bank in the amount of $422,000 and to the debtors' $150,000 homestead exemption. When the matter was converted to chapter 7, the trustee obtained an order allowing the trustee to sell the residence. The trustee asserted that the value of the home was $669,000. The debtors obtained an order compelling the trustee to abandon the residence, arguing that pursuant to 11 U.S.C. § 554(b) the residence was of inconsequential value to the estate. The lower court determined that the residence had been implicitly valued at the amount originally scheduled by the debtors pursuant to 11 U.S.C. § 348(f)(1). The court held that it was error for the bankruptcy court to require the trustee to rely upon the implicit valuation that the debtors placed on their property when they filed for chapter 13 protection. The bankruptcy court could make a valuation determination upon conversion. The time for the valuation was the date that the chapter 13 petition was filed, pursuant to 11 U.S.C. § 348(f)(1)(B), when there was no showing that the debtors acted in bad faith.

Kendall v. Lynch (In re Lynch)*, 2007 Bankr. LEXIS 445 (B.A.P. 9th Cir. January 11, 2007) (Dunn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:348.07[3]**

§ 363 Use, Sale, or Lease of Property.

0407-014 **Settlement could provide for sale of estate interest in D&O policies but could not include channeling injunction and third party releases not critical to debtor's reorganization.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: In a chapter 11 bankruptcy case, the debtors moved, pursuant to 11 U.S.C. § 363, for approval of a settlement with insurers that issued their Directors and Officers ("D&O") policies under which the debtors would sell their interest in the policies to the insurers for $32.5 million. The settlement included a proposed channeling injunction prohibiting others from proceeding against the insurers to pursue claims under the policies.

OVERVIEW: This case was one of many spawned by the alleged fraud on the part of certain former directors of the debtor companies. While the debtors had moved forward with reorganization, much litigation remained involving the debtors and the former directors. In a case before another court, the insurers that issued D&O policies contended that they were not required to pay any claims related to the litigation because of the fraud of the directors. With respect to the bankruptcy matter, the court found that a settlement between the debtors and the insurers that secured $32.5 million was plainly in the interests of the debtors' estate. The court also found that a sale of the estate's interests in the policies under 11 U.S.C. § 363, even if such could adversely affect others, including the former directors, was not prohibited under the law. However, the court concluded that the channeling injunction requested in the settlement could not be issued because the applicable law authorizing the approval of channeling injunctions and third party releases was very restrictive, and such relief was only appropriate when critical to the reorganization of the debtor, which was not the case here.

In re Adelphia Communs. Corp.*, 2007 Bankr. LEXIS 644 (Bankr. S.D.N.Y. March 6, 2007) (Gerber, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.01**

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

0407-015 **Creditors not entitled to attorneys' fees for dischargeability proceeding filed without court approval and which did not result in benefit to the estate.** (*Bankr. E.D. Tenn.*)

PROCEDURAL POSTURE: Creditors filed a motion, pursuant to 11 U.S.C. §§ 105(a) and 503(b), for the payment of attorneys' fees incurred in their prosecution of an adversary proceeding against chapter 7 debtor, resulting in the denial of his chapter 7 discharge.

OVERVIEW: Creditors filed a complaint objecting to debtor's discharge on the grounds that debtor improperly transferred money from his business account for personal use, did not keep adequate books and records concerning his financial affairs, did not disclose all of his assets and liabilities and made fraudulent statements in his bankruptcy statements and schedules, failed to comply with requests for documentation by the chapter 7 trustee, and failed to satisfactorily explain how he spent the money fraudulently received from his business accounts. The court denied debtor's discharge. In denying creditors' motion for the payment of their attorney's fees, the court held that creditors did not obtain prior approval from the court before commencing their action against debtor, and the action did not result in any recovery of property for the benefit of the estate. The court also held that creditors were not entitled to the payment of the attorney's fees pursuant to 11 U.S.C. § 105 because the requirements for the payment of the fees under 11 U.S.C. § 503(b) had not been met, and the court could not utilize 11 U.S.C. § 105 to rewrite 11 U.S.C. § 503(b).

In re Courtney, *2007 Bankr. LEXIS 471 (Bankr. E.D. Tenn. February 8, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.05**

0407-016 **Homeowners' association was entitled to administrative expense claim for postpetition assessments.** (*Bankr. M.D.N.C.*)

PROCEDURAL POSTURE: Movant, a homeowner's association, sought leave to file a tardy claim on the ground that it was a secured creditor of debtor holding a lien created under N.C. Gen. Stat. § 47F-3-116 (2005), a part of the North Carolina Planned Community Act. Alternatively, movant asserted that it was entitled to have postpetition assessments treated as an administrative expense claim per 11 U.S.C. § 503(b). Debtor objected and asked that the motion be denied.

OVERVIEW: Though debtor listed her residence in her petition, movant was not listed as a creditor. After the property was sold, movant sought an order permitting a late filing of certain allegedly secured claims or, alternatively, treating arrearages as an allowable administrative expense. The court granted relief. First, the court noted that Fed. R. Bankr. P. 9006(b)(1) allowed filing of untimely claims such as those at issue here because the failure to file resulted from excusable neglect. Next, based on the rule adopted by the U.S. Court of Appeals for the Fourth Circuit, the court held to the extent that the sum consisted of unpaid homeowners' association assessments, it was a postpetition debt that was properly allowed as an administrative expense per 11 U.S.C. § 503(b) because it was an actual and necessary cost of preserving the estate. However, as for certain prepetition arrearages, the court rejected movant's claim that it had a secured lien under N.C. Gen. Stat. § 47F-3-116, finding that movant's failure to perfect the lien by filing a notice thereof prevented it from asserting rights as a secured creditor. However, it was allowed an unsecured claim for the prepetition arrearage.

In re Guillebeaux, *2007 Bankr. LEXIS 430 (Bankr. M.D.N.C. February 7, 2007) (Carruthers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.05**

§ 507(a)(1) Priorities; Order of Priorities; Administrative Expenses; Fees and Charges Against Estate.

0407-017 **Claim for lump sum payment of retirement benefits to employee terminated by debtor was not entitled to administrative priority.** (*2d Cir.*)

PROCEDURAL POSTURE: Contending that a portion of the early retirement benefits that became due when he was terminated without cause by appellee debtor was entitled to administrative priority under 11 U.S.C. § 507(a)(1), appellant former employee sought review of a judgment of the District Court for the Southern District of New York affirming the bankruptcy court's determination that the payment at issue was not an administrative expense.

OVERVIEW: Under change-in-control provisions of the supplemental retirement plans at issue, the employee was entitled to receive the entirety of his accrued retirement benefits in a lump sum because he was terminated without cause within five years after the debtor acquired the employee's former employer. The employee argued that he became subject to an early retirement penalty when he was terminated before reaching retirement age, that the change-in-control provisions waived the penalty to compensate him for termination, and that the portion of his retirement benefits representing the penalty that was not applied constituted a severance payment that was entitled to priority payment. On appeal, the court determined that an early retirement penalty was not applied and waived because the penalty only applied to employees who retired. The court held that the lump-sum retirement benefits for which the employee became eligible at termination did not constitute a new benefit earned at termination because the lump-sum payment represented the accelerated payment of benefits that the employee accrued over the course of his employment; thus, the payment did not constitute an administrative expense.

Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 2007 U.S. App. LEXIS 4801 (2d Cir. March 2, 2007) (Sotomayor, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:507.02A**

§ 522(d) Exemptions; Types of Exempt Property.

0407-018 **Workers' compensation settlement proceeds were exempt only to the extent necessary for the support of debtor and dependents.** (*Bankr. W.D. Mich.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7 and claimed that two bank accounts were exempt. The trustee objected to the claimed exemptions and filed a motion for summary judgment on the objections.

OVERVIEW: The debtor had an account known as the Medicare set aside account with a balance of $8,336, and an account known as the Disability Pay account with a balance of $73,000. The debtor claimed that the entire balances from these accounts were exempt pursuant to 11 U.S.C. § 522(d)(11)(E). The money in the accounts was attributable to a workers' compensation settlement that the debtor reached with her employer and the employer's insurance carrier before their liability for weekly payments was actually adjudicated. The settlement was intended to address the debtor's lost wage-earning capacity over the balance of her lifetime and related future medical benefits. The court found that the lump sum settlement fell within the exemption set forth in 11 U.S.C. § 522(d)(11), although a weekly benefit would have been exempt under 11 U.S.C. § 522(d)(10)(C). Thus the amounts were exempt only to the extent necessary for the support of the debtor and any dependents. The court found that the applicability of 11 U.S.C. § 522(d)(11) was not limited to tort settlements, and could also apply to workers' compensation settlements.

In re Sanchez*, 2007 Bankr. LEXIS 438 (Bankr. W.D. Mich. January 31, 2007) (Hughes, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.09**

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

0407-019 **Personal loan from creditor was dischargeable absent proof of any false statements regarding alleged romantic relationship between the parties or debtor's financial condition.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendant debtor seeking a determination that her debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2).

OVERVIEW: The creditor, a former employee of the debtor, claimed that she had a romantic relationship with the debtor and that she loaned him money because she had inferred, from the nature of their relationship, that they would one day be married. However, the creditor admitted that she and the debtor did not date. The extent of their relationship was at the office and telephone calls which she described as "flirtatious." The debtor denied any romantic relationship. The creditor failed to prove that any false representation was made. As for the debtor's intentions, the creditor failed to identify even one false statement of fact. Rather, her argument was that she was led to believe that the parties had a romantic relationship. The creditor also alleged that she was misled as to the debtor's financial condition. However, she was generally aware of the business difficulties that the debtor was suffering at the time of her employment, and she could not identify a false statement. To be sure, the creditor formed the mental

impression that the indebtedness could be repaid given the level of the debtor's accounts receivable. However, the evidence did not show that the creditor was misled.

Page v. Moore (In re Moore), *2007 Bankr. LEXIS 436 (Bankr. M.D. Ala. February 7, 2007) (Sawyer, 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.

0407-020 **Award of interest in property specifically labeled as property distribution in divorce decree was dischargeable due to debtor's inability to pay.** (*Bankr. N.D. W. Va.)*

PROCEDURAL POSTURE: Plaintiff former spouse of defendant bankruptcy debtor brought an adversary proceeding against the debtor, seeking a determination that a debt to the spouse arising from the parties' divorce was not dischargeable under 11 U.S.C. § 523(a)(5) and (15), and on the basis of an equitable lien. The bankruptcy court conducted a trial.

OVERVIEW: In the parties' divorce decree, the spouse was awarded an amount representing the spouse's share in the increase in value of the marital residence. The spouse contended that the award was not dischargeable because it was in the nature of alimony or support and, in any event, the debtor was able to pay the debt arising from the divorce. The spouse also asserted that an equitable lien against the debtor's property was warranted to avoid unjust enrichment of the debtor. The bankruptcy court held, however, that the debt to the spouse was dischargeable. The divorce agreement expressly labeled the award to the spouse as a property distribution and expressly disclaimed any alimony, and thus the debt could not be deemed to be alimony or support. Further, even though certain expenses claimed by the debtor were unreasonable, the debtor's remaining expenses exceeded his income, and thus the debtor was unable to pay the debt. Also, there was no basis for imposing an equitable lien since the agreement created no nexus between the debt and the debtor's property, and there was no showing of wrongdoing on the part of the debtor to establish unjust enrichment.

Robinson v. Robinson (In re Robinson), *2007 Bankr. LEXIS 473 (Bankr. N.D. W. Va. February 5, 2007) (Flatley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

§ 525(a) Protection Against Discriminatory Treatment; Discrimination by Governmental Unit.

0407-021 **Bankruptcy court erred in lifting stay to allow city housing authority to start eviction proceedings against debtor as debtor was protected from discrimination on account of bankruptcy.** (*W.D. Pa.)*

PROCEDURAL POSTURE: Appellant debtor appealed the order of the bankruptcy court granting appellee city housing authority's motion for relief from the automatic stay for bankruptcy under 11 U.S.C. § 362, thus permitting the authority to commence eviction proceedings in state court against debtor based upon her previous failure to keep up with her rent payments and to pay accumulated arrearage.

OVERVIEW: Debtor resided in subsidized housing owned and operated by the authority. After the authority and issued an order for eviction, debtor filed for bankruptcy which had the effect of staying all state court proceedings. Pursuant to 11 U.S.C. § 525(a), debtor qualified for statutory protection against discriminatory treatment if several statutory components existed and converged, namely: a governmental unit attempted to deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to a person that is or has been a debtor under Title 11 or a debtor under the Bankruptcy Act solely because such debtor was or had been a debtor under Title 11 or a debtor under the Bankruptcy Act or had not paid a debt that was dischargeable in the case under Title 11. The instant court found all of the necessary individual components were present and converged. Therefore, debtor was entitled to the protection of section 525(a) which prohibited the bankruptcy court from lifting the automatic stay, and prevented the authority from seeking to evict debtor based upon her non-payment of rent and the debt she accrued that was dischargeable in her bankruptcy proceeding.

Biggs v. Housing Auth. of Pittsburgh, *2007 U.S. Dist. LEXIS 14232 (W.D. Pa. February 28, 2007) (Schwab, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:525.02**

§ 541(a)(8) Property of the Estate; Creation and Composition of the Estate.

0407-022 **Debtor's federal tax refund to be allocated to debtor and former spouse in proportion to tax withholdings for each party.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: The chapter 7 trustee filed a motion for turnover of property of the estate requesting that the debtor turnover a federal income tax refund that she received. The question presented was how to determine the extent of the estate's interest in a refund of an overpayment of income tax withholding when the debtor and her non-debtor spouse filed a joint income tax return.

OVERVIEW: The court noted that it was state property law, not domestic relations law, that was applicable for purposes of 11 U.S.C. § 541(a)(8). The court then concluded that the majority approach of allocating the tax refund in proportion to the income tax withholdings of each spouse appropriately reflected Connecticut property law. The court rejected the approach that allocated the refund in proportion to the total income earned by each spouse, as such may have had little relationship to the contribution of each spouse toward the overpayment which resulted in a refund. The court also rejected the approach of allowing each spouse one-half of the refund. Rather, the estate was entitled to 75.6 percent of the refunds, which equaled $7,640.13. The figure of $7,640.13 was then allocated in proportion to each spouse's withholding, with the estate being entitled to the debtor's share of $7,640.13 multiplied by $183 / $12,798, which equaled $109.25. Thus, the trustee was required to remit to the non-debtor spouse the sum of $1,121.76, which was the excess of the $1,231.01 the trustee received from the IRS over the $109.25 which was property of the estate.

In re Edwards*, 2007 Bankr. LEXIS 429 (Bankr. D. Conn. February 2, 2007) (Krechevsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

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

0407-023 **Trustee could recover property free and clear as bono fide purchaser for value where deed of trust securing bank loan had not been recorded.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant chapter 7 trustee sought review of a decision of the Bankruptcy Court for the Southern District of California, which denied the trustee's motion for summary judgment and granted the cross-motion of appellee bank. The bank had filed a motion to quiet title to a deed of trust in the debtor's real property. The trustee sought to recover the property for the estate pursuant to 11 U.S.C. § 544(a)(3).

OVERVIEW: Before filing for bankruptcy, the debtor had obtained a loan from the bank secured by a recorded deed of trust that was assigned to an affiliate of the bank. The debtor and appellee former husband, refinanced with a new loan from the bank secured by a new deed of trust. The new deed of trust was never recorded. When the debtor filed for bankruptcy, she listed the bank's claim and alleged lien in several places. The bank filed a complaint to quiet title, and the trustee sought to recover the property pursuant to 11 U.S.C. § 544(a)(3). The bankruptcy court found in favor of the bank, finding that the trustee had constructive notice of the lien and alternatively that the bank was entitled to equitable subrogation. The court rejected the bankruptcy court's conclusion that the trustee had constructive notice of the lien from the bankruptcy schedules because the trustee's power under 11 U.S.C. § 544(a)(3) arose at the commencement of the case, before the schedules were filed. Further, it was error for the bankruptcy court to apply the doctrine of equitable subrogation in favor of the bank because the trustee was a hypothetical bona fide purchaser.

Taxel v. Chase Manhattan Bank (In re Deuel)*, 2006 Bankr. LEXIS 3947 (B.A.P. 9th Cir. December 28, 2006) (Montali, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:544.08**

§ 546(a) Limitations on Avoiding Powers; Statute of Limitations.

0407-024 **Avoidance proceedings filed by trustee appointed more than two years after order for relief were untimely.** (*3d Cir.*)

PROCEDURAL POSTURE: Appellant chapter 7 trustee filed actions in debtors' bankruptcy proceedings to avoid preferences. The bankruptcy court dismissed the actions as untimely under 11 U.S.C. § 546(a), and the District Court for the District of Delaware affirmed. The trustee appealed.

OVERVIEW: The bankruptcy cases of the debtors, seven related companies, were converted from chapter 11 to chapter 7, and an interim trustee was appointed under 11 U.S.C. § 701 within two years of the entry of the order for relief. The meeting of creditors under 11 U.S.C. § 341 was held more than two years after the entry of the order for relief, and appellant trustee was elected at the meeting under 11 U.S.C. § 702. The court of appeals agreed with the lower courts that the avoidance actions filed by the trustee were untimely under 11 U.S.C. § 546(a) because they were filed more than two years after the order for relief. The interim trustee's appointment did not trigger an additional one-year period for filing the avoidance actions under section 546(a)(1)(B), as section 546(a)(1)(B) did not refer to appointment of an interim trustee under 11 U.S.C. § 701 as a trigger event. Although the trustee had no opportunity to prosecute any avoidance actions, other parties in interest could arguably have brought such actions within the limitations period. The fact that the trustee's claims were time-barred by the time he was elected did not make application of the statute of limitations absurd.

Singer v. Kimberly Clark Corp. (In re American Pad & Paper Co.), *2007 U.S. App. LEXIS 4792 (3d Cir. March 2, 2007) (Sloviter, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:546.02**

§ 727(a) Discharge; Grounds for Denial.

0407-025 **Discharge denied due to debtor's fraudulent transfer of corporate property as well as failure to keep, and possible destruction of, financial records.** (*Bankr. E.D. Va.*)

PROCEDURAL POSTURE: Plaintiff trustee sought denial of defendant debtor's discharge under 11 U.S.C. § 727 based on the transfer of property from a corporation of which the debtor was an insider to a related individual and on his failure to keep proper financial records for the corporation.

OVERVIEW: The debtor personally borrowed money that was secured by real property owned by the corporation. The debtor, as owner and officer of the corporation, caused the corporation to convey the property to the debtor's father, and any consideration paid for the transfer was used to repay the debtor's personal loan. The court denied the discharge under 11 U.S.C. § 727(a)(2) and (a)(7) after concluding that badges of fraud existed to indicate that the transfer was done with the requisite intent to hinder, delay, or defraud creditors. The net effect of the transaction was to transfer the corporation's property to a related individual for no consideration to the corporation within one year of the debtor's bankruptcy. The court also denied the discharge under 11 U.S.C. § 727(a)(3) and (a)(7) based on testimony that the corporate records turned over to the trustee by the debtor were not adequate to fully evaluate the corporation's financial condition. There was evidence supporting the trustee's assertion that valuable records were placed in a dumpster behind the corporation's business premises. This evidence was more than sufficient to prove the unavailability of corporate records.

Phillips v. Habboush (In re Habboush), *2007 Bankr. LEXIS 457 (Bankr. E.D. Va. February 6, 2007) (Tice, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

0407-026 **Discharge denied due to failure of sophisticated debtor to keep records of transactions despite production of all records in its possession.** (*Bankr. N.D. Tex.*)

PROCEDURAL POSTURE: Plaintiff creditor moved for summary judgment on its objection to discharge of defendant debtor. It sought summary adjudication that debtor was not entitled to a discharge of his debts pursuant to 11 U.S.C. § 727(a)(3), for the purported, unjustified failure by debtor to keep and maintain financial records, and section 727(a)(4), for the purported, knowing and fraudulent making of a false oath by debtor with regard to his bankruptcy case.

OVERVIEW: Debtor – a sophisticated businessman – kept no records of his financial transactions. When asked by counsel for the creditor at the "341 meeting" whether there was any record that he could go to in order to determine what funds had passed through debtor's hands, debtor replied quite candidly that there was no record. There was no genuine issue of material fact in dispute concerning debtor's netting approximately $5,000 a month and keeping no record of what happened to it. Debtor argued that because he had produced all the financial records that were in his possession, *i.e.*, copies of cashiers checks, paycheck stubs, and his joint tax returns with his wife, he met his burden under section 727(a)(3). However, the court concluded that the consequence of failure to have adequate records was denial of a discharge. Regarding the section 727(a)(4) issue, although the creditor raised several troubling omissions and discrepancies with regard to debtor's Schedules and Statement of Financial Affairs, there were genuine issues of material fact as to whether the discrepancies were knowing and fraudulent false oaths or accounts, or, rather, whether they were genuine mistakes with no scienter behind them.

Cadle Co. v. Hughes (In re Hughes), *2006 Bankr. LEXIS 3946 (Bankr. N.D. Tex. November 13, 2006) (Jernigan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

0407-027 **Discharge denied where debtor's actions in obtaining credit card advances without ability to repay, using advances to pay down debt on and improve homestead and failing to disclose gambling losses demonstrated deliberate course of conduct to hinder, delay** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: The United States Trustee filed an objection to chapter 7 debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(4)(A), and (a)(5), and chapter 7 trustee filed an objection to debtor's claimed homestead exemption pursuant to 11 U.S.C. § 522(o)(4).

OVERVIEW: Debtor obtained numerous and large cash advances from his credit cards at a time when he had no ability to repay them. Further, within one year of filing the bankruptcy, debtor transferred some of that property to pay off the secured line of credit on his homestead, and to improve his home. Debtor also failed to disclose gambling income, as well as losses that met or exceeded the income, and also failed to disclose the existence of financial accounts that were closed within one year of the commencement of his bankruptcy case. In denying debtor a discharge under 11 U.S.C. § 727(a)(2)(A), the court held that debtor's actions showed a deliberate course of conduct, at a time when he was insolvent, with an intent to hinder, delay, and defraud creditors. The court also held that denial of discharge was warranted under section 727(a)(4)(A) because he made materially false statements under oath with at the very least reckless indifference. The court further held that debtor's homestead exemption should be reduced pursuant to 11 U.S.C. § 522(o) because he purposely incurred substantial debt on his credit cards in order to obtain non-exempt property, which he then converted to his homestead.

Turner v. Keck (In re Keck), *2007 Bankr. LEXIS 636 (Bankr. D. Kan. March 2, 2007) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 727(d) Discharge; Grounds for Revocation.

0407-028 **Discharge denied due to debtor's failure to disclose partial ownership of corporation with attorney.** (*Bankr. N.D. Miss.)*

PROCEDURAL POSTURE: The United States Trustee filed a complaint against chapter 7 debtors to revoke their discharge, asserting a violation of 11 U.S.C. § 727(d).

OVERVIEW: Debtors filed for chapter 7 relief. At the time of the filing of their chapter 7 case, debtors and their attorney shared ownership of a corporation that owned approximately 65 acres of real property. Debtors omitted their ownership interest in the corporation in their bankruptcy schedules and statement of financial affairs, and failed to attest to their ownership interest at their section 341 meeting of creditors. After debtors received their discharge, debtors' attorney withdrew as counsel for debtors and disclosed to the court debtors' failure to list their ownership interest. In sustaining the trustee's complaint to revoke debtors' discharge, the court held that debtors knew full well that their interest in the corporation should have been disclosed. The court held that, even if the attorney had given them the advice not to disclose, and he might have, debtors' reliance on such advice was not reasonable or in good faith.

United States v. McDaniel (In re McDaniel), *2007 Bankr. LEXIS 479 (Bankr. N.D. Miss. January 23, 2007) (Houston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15**

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

0407-029 **Bankruptcy court erred in refusing to distribute surplus held in disputed claim reserve as contemplated by plan.** (*D. Del.)*

PROCEDURAL POSTURE: Appellant, the plan committee for appellee reorganized debtor, asked the bankruptcy court's permission to distribute to unsecured creditors surpluses held in a disputed claims reserve as required under the terms of the debtor's confirmed plan. The committee and appellant, an ad hoc group of creditors, appealed after the bankruptcy court denied the committee's request.

OVERVIEW: The reserve consisted of more than 2.3 million shares of the debtor's new common stock. The bankruptcy court concluded that pursuant to section 7.7 of the debtor's reorganization plan, no distributions could be made from the reserve until every disputed claim was resolved. Appellants argued that section 7.7 of the plan clearly required the committee to make surplus distributions every six months and that the bankruptcy court's interpretation had the effect of staying and/or permissibly modifying the plan in violation of 11 U.S.C. § 1127(b). Appellees, two creditors with unresolved claims, argued that a distribution from the reserve before their claims were resolved would result in unequal treatment among the creditors, in violation of 11 U.S.C. 1129(a). The debtor asserted that the bankruptcy court's interpretation was correct and consistent with other plan provisions. The court agreed with appellants that the bankruptcy court had misinterpreted section 7.7 of the plan. That section clearly and unambiguously required surpluses in the reserve to be distributed every six months. It did not state that all disputed claims had to be resolved before any distribution of surpluses could be made.

Plan Comm. of NorthWestern Corp. v. NorthWestern Corp. (In re NorthWestern Corp.)*, 2007 U.S. Dist. LEXIS 15369 (D. Del. March 2, 2007) (Farnan, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1127.04**

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

0407-030 **Reconversion to chapter 7 was proper when debtor failed to file timely plan or make payments.** (*N.D. Ga.)*

PROCEDURAL POSTURE: Appellee chapter 13 trustee filed a motion in the bankruptcy court seeking to reconvert appellant chapter 13 debtor's case back to a chapter 7 case pursuant to 11 U.S.C. § 1307(c). The debtor filed a *pro se* appeal after the bankruptcy court granted the trustee's motion and ordered that his case should proceed as a chapter 7 case.

OVERVIEW: The debtor originally filed a chapter 7 petition. He successfully moved to convert his case to a chapter 13 case after one creditor sought relief from the automatic stay. The trustee moved to reconvert the case back to a chapter 7 case after the debtor repeatedly requested postponement of the hearing to confirm his chapter 13 plan. The trustee renewed her motion after the debtor failed to comply with a bankruptcy court order, which required him to present a confirmable plan by a specified date, to make timely payments to the trustee, and to make regular monthly payments to a mortgage creditor. The bankruptcy court agreed that the case should revert back to a chapter 7 case and noted that the creditors' interests would be better served by proceeding under chapter 7 because doing so would result in the payment of a substantial portion of their claims. The court held that the bankruptcy court did not act prematurely in reconverting the case back to a chapter 7 case. Reconversion was proper under 11 U.S.C. § 1307(c) because the debtor failed to timely file a confirmable chapter 13 plan and failed to make timely payments to the trustee, as required by 11 U.S.C. §§ 1321, 1326.

Simmons v. Townson*, 2007 U.S. Dist. LEXIS 14247 (N.D. Ga. February 28, 2007) (Carnes, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

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

0407-031 **Plan rate of interest controlled over higher note rate where creditor's proof of claim contained the erroneous lower rate but there had been no objection to confirmation.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Before the court in a chapter 13 case was debtor's objection to a mortgage creditor's Proof of Claim.

OVERVIEW: The original Proof of Claim was filed by the creditor in error, and had the error not occurred, debtor's plan would not have been confirmed since it would have failed to provide for the

creditor's claim in full. Nonetheless, the plan as confirmed provided for an interest rate with respect to the claim at 5.13 percent throughout the life of the plan, contrary to the rate of 8.50 percent provided for in the Note. The question before the court was whether 11 U.S.C. § 1322(b)(2), which precluded the modification of a claim secured only by a debtor's principal homestead, or the confirmed plan under the doctrine of *res judicata*, determined the proper interest rate. The court concluded that the Bankruptcy Code's provision that protected a mortgage lender had to yield to the Code's policy of promoting the finality of the court's confirmation order and principles of *res judicata*. Because notice was adequate, the creditor bore the burden to review the plan and raise any objections. Once the confirmation order became final, it was estopped from collaterally attacking the confirmed plan. The creditor could not raise an issue it could and should have raised during the confirmation process.

In re Turner-Mayo*, 2007 Bankr. LEXIS 466 (Bankr. S.D. Tex. February 8, 2007) (Isgur, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

§ 1329(b)(1)(B) Modification of Plan After Confirmation; Requirements; Compliance with Provisions Governing Plan, Preconfirmation Modification, and Confirmation.

0407-032 **Trustee's motion to modify confirmed plan to increase dividend to unsecured creditors granted.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: A trustee filed a motion to modify the debtors' confirmed chapter 13 plan to comply with 11 U.S.C. § 1325(b)(1)(B). The debtors opposed the motion.

OVERVIEW: The trustee sought to modify the plan to increase the dividend to unsecured creditors from 2% to 100% because, based on the number of unsecured claims filed, the 36-month plan would conclude in only 13 months unless the dividend was increased. The trustee sought to require the debtors to pay the amount they agreed to pay for the length of time they agreed to at the time of confirmation. The court granted the motion. The court held that the modification to increase the dividend was contemplated by 11 U.S.C. § 1329. The court and trustee were able to rely on the debtors' petition and schedules as originally filed because the debtors failed to allege or file an amendment to the schedules reflecting a change in circumstances that would have made it unfeasible for them to continue making the same plan payment for the same length of time as originally contemplated in their confirmed plan.

In re Osborne*, 2007 Bankr. LEXIS 451 (Bankr. N.D. Ohio February 5, 2007) (Baxter, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1329.05**

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

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

0407-033 **Fraudulent transfer proceeding involving consideration of state as well as federal law did not give rise to mandatory withdrawal.** (*E.D. Cal.)*

PROCEDURAL POSTURE: Debtor filed a chapter 7 bankruptcy and plaintiff trustee was appointed. The trustee sued defendant purchasers who had purchased real property from the debtor, seeking to have the sale avoided as a fraudulent transfer under 11 U.S.C. § 548 and various state law provisions. The purchasers filed a motion to withdraw the adversary proceeding from the bankruptcy court to the district court. The trustee did not oppose the motion.

OVERVIEW: The court held that the mandatory withdrawal provision of 28 U.S.C. § 157(d) dealt only with consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. Consideration of state laws did not give rise to mandatory withdrawal. While the purchasers demanded a jury trial, they had not established that they actually had a right to such a trial under the Seventh Amendment. An action to recover for an alleged fraudulent transfer of real property was a creature of equity for which there was no right to a jury trial. The court had no familiarity with either the adversary proceeding or the debtor's underlying bankruptcy. Leaving the case in the bankruptcy court would have provided for efficient use of judicial resources. There were no allegations of forum shopping and no indication that resolving the matter in bankruptcy court would have resulted in delay relative to resolving the matter in district court.

Stratton v. Garcia*, 2007 U.S. Dist. LEXIS 14434 (E.D. Cal. February 12, 2007) (Ishii, D.J.).*

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

§ 1334(a) Bankruptcy Cases and Proceedings; Cases Under Title 11.

0407-034 **Breach of contract and fraud actions remanded to state court.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff owners filed a motion to remand to the state court their adversary proceeding for defendant debtor's breach of contract and fraud in the construction of their house.

OVERVIEW: The debtor filed for bankruptcy after the filing of the adversary proceeding. Pursuant to a settlement agreement, the debtor was ordered to complete construction. The owners filed a motion to enforce the settlement and for contempt, alleging that the debtor failed to comply with the order and agreement. The bankruptcy case was dismissed. The court, despite its jurisdiction under 28 U.S.C. §§ 1334(a) and 157, granted the owners' motion to remand, declining to retain jurisdiction over a proceeding based entirely on state law claims because they were bringing a new claim against the debtor based on a breach of contract, which had been settled; there was no reason for a state court to defer to the court's jurisdiction in determining damages claims when the bankruptcy case had been dismissed for nine months; there were no issues of judicial economy since there was no longer an estate; and remanding the case would not have resulted in judicial inefficiency. The factors of convenience and fairness weighed in favor of remand because the parties should not have been forced to litigate a new cause of action based on jurisdiction arising under a previously-dismissed bankruptcy case.

Delgado v. Elsa St. Bank & Trust Co. (In re Romano)*, 2007 Bankr. LEXIS 447 (Bankr. S.D. Tex. February 2, 2007) (Isgur, B.J.).*

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

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

0407-035 **Bankruptcy court properly exercised permissive abstention in declining to rule on whether to lift existing state court injunction against involuntary debtor.** (*B.A.P. 10th Cir.)*

PROCEDURAL POSTURE: The Bankruptcy Court for the District of Colorado held in Order 1, that an adversary proceeding was properly dismissed and abstained from ruling on a motion to lift a preliminary injunction. In Order 2, it remanded equitable contract breach claims to a state court where similar claims pended. Appellants (entity 1 and entity 2), who had purchased, both pre- and postpetition, various interests in debtor's property, challenged the orders.

OVERVIEW: Prior to the filing of a chapter 7 bankruptcy against debtor, its limited partners filed a state court suit against it and entity 1, which had bought one of debtor's assets. The trustee removed the suit to the bankruptcy court and later agreed to sell debtor's assets to entity 2. The bankruptcy court then dismissed the suit (which had become an adversary proceeding), abstained from ruling on whether an extant state court injunction should be lifted, and remanded all remaining claims to state court, appeals were filed. The court affirmed Order 1 and held that it lacked jurisdiction over Order 2. As to Order 1, which was ripe for *de novo* review per *Quackenbush*, it held that the order was one for permissive abstention based on comity as per 28 U.S.C. § 1334(c)(1) and that there was no error as a matter of law in the conclusion that the state court was in a better position to decide whether to lift the injunction. As for Order 2, the court held that the because the remand order had been premised on the bankruptcy court's finding that it no longer could exercise subject matter jurisdiction over the remaining disputes, the resulting order was nonreviewable per 28 U.S.C. § 1447(d).

Telluride Asset Resolution, LLC v. Telluride Global Dev., LLC (In re Telluride Income Growth LP)*, 2007 Bankr. LEXIS 625 (B.A.P. 10th Cir. March 5, 2007) (McFeeley, C.B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 1:3.05**