April 2007

Collier Bankruptcy Case Update

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April 9, 2007 Issue 2

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§ 109(h) Who May Be a Debtor; Mandatory Credit Counseling.

0407-036 **Failure to obtain credit counseling did not require immediate dismissal.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: A chapter 7 bankruptcy debtor failed to obtain credit counseling as required under 11 U.S.C. § 109(h) to be eligible as a debtor in bankruptcy and failed to file documents required by 11 U.S.C. § 521(a)(1)(B). The bankruptcy court denied the trustee's motion for an order to show cause why the debtor should not be held in contempt for disobeying a court order, pending consideration of whether dismissal of the case was warranted or required.

OVERVIEW: The trustee discovered that the debtor owned real properties and asserted that the debtor threatened the trustee to prevent the trustee's efforts to sell one of the properties which was facing imminent foreclosure. The trustee contended that the debtor's failure to obtain credit counseling did not require dismissal of the case, and that the case was not automatically dismissed for failure to file the documents. The bankruptcy court agreed, holding that dismissal was neither required nor automatic. The eligibility requirement of credit counseling was not jurisdictional, and the debtor's voluntary bankruptcy petition judicially estopped the debtor from requiring dismissal based on lack of eligibility. Further, the debtor filed a list of creditors which was the only filing the court could not excuse, and the court excused filing of the remaining documents, thus precluding automatic dismissal.

***In re Withers**, 2007 Bankr. LEXIS 663 (Bankr. N.D. Cal. February 26, 2007) (Tchaikovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09**

§ 524(c)(6)(A) Effect of Discharge; Reaffirmation Agreements; Where Debtor Was Not Represented by an Attorney; Lack of Undue Hardship and Best Interest of Debtor.

0407-037 **Bankruptcy court declined to authorize reaffirmation agreement regarding loan secured by debtor's vehicle as not in debtor's best interests.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: Creditor filed a motion to authorize a reaffirmation agreement with *pro se* chapter 7 debtor pursuant to 11 U.S.C. § 524(c)(6)(A).

OVERVIEW: Debtor owed creditor a debt secured by debtor's vehicle. Debtor claimed that she needed the car to transport her children to and from daycare and that the car was her only means of transportation. Debtor testified that all payments due to creditor had been made and that she was not in default under the terms of the parties' contract. The court denied approval of the reaffirmation agreement because it was not in debtor's best interest for her to be personally liable on any deficiency in the event that the car was repossessed. The court, however, held that debtor could "ride through" the bankruptcy and retain possession of the car, notwithstanding the court's refusal to approve a reaffirmation agreement with creditor pursuant to section 524(c)(6)(A), because debtor fully complied with the requirements under 11 U.S.C. §§ 362(h) and 521. The court held that, because debtor fully complied with the requirements under 11 U.S.C. §§ 521(a)(2), (a)(6) and (d), and 362(h), debtor was not compelled to surrender possession of the car, the stay was not terminated as to the car, and the Bankruptcy Code continued to prevent and limit the operation of the contract's *ipso facto* clauses.

***In re Blakeley**, 2007 Bankr. LEXIS 538 (Bankr. D. Utah February 21, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.04**

§ 549 Postpetition Transactions.

0407-038 **Disbursement to debtor's civil attorney as settlement of dispute over contingency fee agreement was avoidable.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Debtor hired defendant attorney to sue a certain entity. Their agreement provided for a contingency fee. Debtor settled with the entity. A dispute arose over attorney fees. The attorney sued in state court. A disbursement was made to the attorney and his counsel in the fee dispute. In the bankruptcy case, the bankruptcy trustee sought to recover the transferred funds under 11 U.S.C. § 549. The parties moved for summary judgment.

OVERVIEW: The funds that were transferred to the attorney and his counsel originated from the settlement with the entity, which was a settlement of a claim owned by debtor. The court rejected the attorney's claim that he "owned" the proceeds of the settlement immediately upon payment by the entity. The court noted a contingent-fee lawyer was not a joint owner of his client's claim in the legal sense any more than the commission salesman was a joint owner of his employer's accounts receivable. Under the rules of professional responsibility applicable to Texas attorneys, the attorney's interest in the funds could be no more than a security interest. The contingent fee agreement between the attorney and debtor could grant no more than a lien to secure fees and expenses. If it were to grant more, the fee agreement would be illegal. The court did not rule on the status of the attorney's lien, but determined even if the funds might be subject to the attorney's security lien, the funds were property of the estate under 11 U.S.C. § 541 and the transfers were avoidable under 11 U.S.C. § 549. The attorney and his counsel were ordered to pay the funds that they received to the trustee.

Havis v. Norman (In re Equator Corp.)*, 2007 Bankr. LEXIS 554 (Bankr. S.D. Tex. February 20, 2007) (Steen, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:549.01**

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

0407-039 **Bankruptcy court exercised discretion to deny motion for voluntary dismissal of chapter 7 case.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: In this chapter 7 bankruptcy case, the matters before the court were the trustee's motion for turnover and the debtors' motion to voluntarily dismiss the case.

OVERVIEW: The debtors filed a chapter 7 petition in bankruptcy. The trustee filed a motion seeking an order requiring the debtors to turn over information related to real property in which one of the debtors shared an interest with her siblings. This real property interest had not been scheduled by the debtors. The debtors responded by filing a motion to voluntarily dismiss their case, saying they would reach an accord outside bankruptcy with their creditors. The trustee argued that it was unknown whether all creditors had been paid in full and thus creditors would be prejudiced if the case were dismissed. The court found that the debtors had not justified voluntary dismissal of the case under either 11 U.S.C. § 707(b) or 305(a)(1). Though the debtors may have made their best efforts to satisfy creditors, that effort did not constitute cause for dismissal. Debtors had no authority to compromise the several claims against the estate and any such compromises were not binding because the statutory duty to insure an appropriate distribution was with the trustee under 11 U.S.C. § 704.

In re Cink*, 2007 Bankr. LEXIS 649 (Bankr. D.S.D. February 21, 2007) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04**

0407-040 **Below-median debtor who did not include bonuses in Form B22A calculation ordered to convert to chapter 13 or face dismissal for substantial abuse.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7. The chapter 7 trustee filed a motion to dismiss the case for abuse, pursuant to 11 U.S.C. § 707(b)(3).

OVERVIEW: Based on the debtor's petition and schedules, the debtor's annualized income fell below the median family income for a family of the debtor's size in the State of Nebraska. As a "below-median" debtor for purposes of 11 U.S.C. § 707(b)(7), the presumption of abuse under 11 U.S.C. § 707(b)(2) was not applicable. The trustee argued that under the totality of the circumstances, the debtor's financial situation demonstrated abuse under 11 U.S.C. § 707(b)(3), and that if the bonuses that the debtor had received had been made part of the Form B22A calculation, the debtor would be an "above-median" debtor. The trustee further argued that some of the monthly expenses claimed by the debtor were not reasonable. The court held that under the totality of the circumstances presented in the case, the debtor had the ability to repay the creditors under a chapter 13 plan. Even though the debtor's annual bonus was not guaranteed, he had received it in each of the last few years. When the bonus was included in the debtor's income, the debtor had the ability to pay a substantial amount to unsecured creditors. Granting relief under chapter 7 would be an abuse of the provisions of the chapter.

In re Gannon*, 2007 Bankr. LEXIS 604 (Bankr. D. Neb. February 20, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04**

§ 707(b)(1) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Test.

0407-041 **Chapter 7 case ordered dismissed or converted due to improper deductions taken on Form B22A.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: Debtors' chapter 7 matter was before the court on the U.S. Trustee's ("UST") Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(1). The UST's Motion asserted that certain line item deductions made by the above median income debtors on Form B22A (Means Test) were either inaccurate or were ones to which debtors were not entitled, and that adjustment was needed to accurately reflect debtors' monthly disposable income.

OVERVIEW: The issues were: (1) whether debtors in a chapter 7 case were allowed to take expense deductions for payments on secured debt when they stated an intent to surrender the collateral; (2) whether the debtors were allowed to include mortgage payments in the calculation to determine the amount of the administrative expense deduction on line 45; and (3) whether the debtors' filing was an abuse under chapter 7. Regarding the first issue, the court observed that the debtors had stated their intention to surrender certain personal property, had not undertaken amendment to their statement, nor explained why they might. The debtors thus were not entitled to deduct these "average monthly payments" from their current monthly income. On the second issue, the court stated that, since the percentage fee took into account the disbursements of trustees, including the fact that regular monthly mortgage payments were paid outside the plan, the debtors should not include these payments in the calculation of administrative expenses on line 45. The court found that there was a presumption of abuse under 11 U.S.C. § 707(b), and the debtors demonstrated no special circumstances to rebut it.

***In re Ray**, 2007 Bankr. LEXIS 623 (Bankr. D.S.C. February 28, 2007) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04**

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

0407-042 **Fluctuating income from commissions did not create "special circumstances" sufficient to rebust presumption of abuse.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: The United States Trustee ("UST") moved to dismiss the debtor's chapter 7 case pursuant to 11 U.S.C. § 707(b)(2) on the grounds that the filing constituted a substantial abuse of the provisions of chapter 7.

OVERVIEW: The debtor's income as shown on Official Bankr. Form B22A was sufficient to raise the presumption of abuse under 11 U.S.C. § 707(b)(2). The court noted that while the two special circumstances under 11 U.S.C. § 707(b)(2)(B)(I) did not constitute an exhaustive list, they showed that Congress intended special circumstances to be truly special. The only special circumstance raised by the debtor was that she earned what she considered unusually high commissions during the period used for calculating her current monthly income. This was not a situation where the debtor claimed that there was a one-time large and unique commission earned during the six-month period used for calculating current monthly income. Nor had some circumstance arisen which would have caused her income to remain lower during the term of a chapter 13 plan. The debtor failed to identify any special circumstance which would have clearly caused her income to be dramatically different postpetition than what she experienced in the six months prepetition. Fluctuations in income were simply a fact of life for those who were paid on a commission basis and not a special circumstance.

***In re Ferando**, 2007 Bankr. LEXIS 607 (Bankr. D. Neb. March 1, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04[5]**

0407-043 **Debtors' deductions for payments of secured debt on three motor vehicles allowed over trustee's objection.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Trustee objected to confirmation of chapter 13 debtors' plan pursuant to 11 U.S.C. § 1325(b)(1)(B).

OVERVIEW: Debtors were above-median-income debtors who owned three vehicles. Debtors' plan proposed to pay all of the debt secured by the vehicles through plan payments. Trustee argued that debtors could deduct only two car payments at line 47 of their Official Form 22C where deductions were

allowed for the payment of secured debt. The court held that nothing in 11 U.S.C. § 707(b)(2)(A)(iii) suggested that debt for only two vehicles could be included in the calculation under 11 U.S.C. § 1325(b)(3). Trustee also argued that one of the vehicles, a Cadillac Escalade, was a luxury vehicle which was not reasonably necessary for debtors. The court held that, if an expense was allowed under 11 U.S.C. § 707(b)(2), it met the definition of "reasonably necessary" under 11 U.S.C. § 1325(b)(3) and no subjective review of the expense by the court was permitted. Trustee also objected to debtors' deduction line 37 for telecommunication services on the basis that the deduction could not exceed debtor's actual expenses. The court held that debtors' actual expenses as shown on their Schedule J were irrelevant to the determination of reasonably necessary expenses for above-median-income debtors.

In re Carlton, *2007 Bankr. LEXIS 545 (Bankr. C.D. Ill. February 28, 2007) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04[5]**

0407-044 **Inclusion of mortgage payments on property to be surrendered in means test was appropriate and not grounds for substantial abuse dismissal.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss chapter 7 debtors' case pursuant to 11 U.S.C. § 707(b)(2).

OVERVIEW: Debtors' residence was encumbered by two mortgages. Despite the fact that debtors filed with their petition a statement of intention in which they disclosed their intent to surrender their residence, debtors included their mortgage payments in their expenses for the purpose of calculating the "means test" under 11 U.S.C. § 707(b)(2). Including the mortgage payments in the test left debtors with a negative available monthly income. The Trustee argued that debtors could not deduct the mortgage payments because they intended to surrender the property. The Trustee pointed out that, if the mortgage payments were not deducted, debtors available monthly income would be well in excess of the presumption of abuse threshold set forth in section 707(b)(2)(A)(i)(II). In denying the Trustee's motion, the court held that debtors' surrender of their residence had no effect on whether, under section 707(b)(2)(A)(iii)(I), payments were "contractually due" to the secured creditors following the petition date because debtors' rights and duties under an otherwise enforceable prepetition contract remained, notwithstanding the collateral's surrender.

In re Haar, *2007 Bankr. LEXIS 544 (Bankr. N.D. Ohio February 20, 2007) (Speer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04[5]**

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

0407-045 **Above-median debtors were entitled to flat vehicle ownership deduction regardless of whether or not subject to lien or lease agreement.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: Chapter 13 trustee objected to debtors' chapter 13 plan on the grounds that it did not devote all of debtors' projected disposable income to the plan as required by 11 U.S.C. § 1325(a)(3) and (b)(1)(B).

OVERVIEW: Debtors, above-median debtors, owned two vehicles and did not have to make a note or lease payment on either vehicle. Nonetheless, debtors deducted for the two vehicles the Internal Revenue Service Local Standard amount for vehicle ownership from their disposable income for the purposes of determining how much they had available to devote to paying creditors. Trustee objected that debtors were not allowed to claim vehicle ownership deductions because debtors' vehicles were not subject to a lien or lease agreement. The court held that 11 U.S.C. § 707(b)(2)(A)(ii)(I) gave above-median-income debtors a flat ownership deduction, regardless of whether they had an actual car payment expense or not, because a debtor's monthly expenses for categories of expenses listed in the National and Local Standards, including vehicle ownership costs, were the "applicable" monthly expense amounts specified under the National and Local Standards, not the actual expenses.

In re Sawdy, *2007 Bankr. LEXIS 619 (Bankr. E.D. Wis. February 20, 2007) (Pepper, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.04[5][a]**

§ 1325 Confirmation of Plan.

0407-046 **Bifurcation allowed where claim secured by motor vehicle was not a purchase money security interest and was incurred within one year of filing.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: A creditor objected to confirmation of the debtors' chapter 13 plan under 11 U.S.C. § 1325.

OVERVIEW: The creditor objected to the plan, which proposed to "cram-down" the secured portion of its claim to the present value of the debtors' automobile and treat the remainder of its claim as unsecured. The creditor argued that its entire claim should have been treated as secured. The court held that the "hanging paragraph" of 11 U.S.C. § 1325, under the plain meaning rule, was inapplicable to prevent the debtors from bifurcating the creditor's claim as provided in the plan because the creditor, by its stipulation, did not have a purchase money security interest in the automobile and the debt to the creditor was incurred within one year of filing. The court held that it was undisputed that the creditor's security interest in the automobile was not incurred to secure purchase money but to refinance the debtors' existing debt to another creditor.

In re Ellegood*, 2007 Bankr. LEXIS 578 (Bankr. E.D. Va. February 22, 2007) (St. John, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0407-047 **Vehicle purchased primarily for use of non-debtor spouse was not subject to anti-bifurcation provisions of "hanging paragraph."** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: The debtor moved for confirmation of his proposed chapter 13 plan. The creditor, which held a security interest in the debtor's vehicle which the debtor purchased within 910 days of the date that he filed for bankruptcy relief, filed an objection. The creditor objected to the plan's bifurcation of its claim. The issue concerned the interpretation of the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9).

OVERVIEW: Specifically, the issue was whether the term "acquired for the personal use of the debtor" as used in the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9) included a vehicle acquired for the use of a debtor's non-filing spouse. When the debtor purchased the vehicle, he was a long-haul truck driver who was away from home for two or three weeks at a time. The debtor intended for his wife to be the primary user of the vehicle. The debtor's wife, in fact, was the primary user. She was initially listed as the sole driver on the vehicle's insurance policy, although the debtor was later added. The debtor drove the vehicle once or twice a month. The vehicle was the only vehicle that the debtor and his wife own. The court thus found that the debtor's wife was, in fact, the primary user. Thus, the court then held that the vehicle was not "acquired for the personal use of the debtor" as that term was used in the hanging paragraph. Accordingly, the creditor's claim was not protected from bifurcation by the hanging paragraph.

In re Adams*, 2007 Bankr. LEXIS 616 (Bankr. M.D. Ga. March 1, 2007) (Hershner, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0407-048 **Creditor allowed secured claim for purchase money security interest in truck and separate unsecured claim for negative equity on trade-in.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: After the debtor filed an amended chapter 13 plan, the trustee filed a valuation motion requesting a determination that a creditor had an allowed secured claim for the $17,000 scheduled amount or retail value of a truck and an unsecured claim for the balance of the creditor's claim. The creditor opposed the valuation. The bankruptcy court conducted a hearing.

OVERVIEW: As part of a new truck purchase, the debtor had traded in a truck that had an outstanding lien greater than its value. The negative equity in that trade-in was rolled in and refinanced in connection with the purchase of the new truck. The trustee argued that the hanging paragraph following 11 U.S.C. § 1325(a)(9) did not apply because the creditor had a purchase money security interest for only the portion of the debt for the new truck, not the rolled in and refinanced portion of the debt. The bankruptcy court found that the trustee had met his initial burden of proving that the two separate financial transactions evidenced by the applicable retail installment contract included the separate transaction where the car

dealer had loaned the debtor money to refinance the negative equity she had in the trade-in. Specifically, the retail installment contract indicated that there was over $10,000 in negative equity in the trade-in and that the refinance by the car dealer of some of the negative equity resulted in the debtor paying over $30,000 for the new truck that had an initial sale price of only approximately $27,000.

***In re Rodwell**, 2007 Bankr. LEXIS 654 (Bankr. W.D.N.Y. March 1, 2007) (Ninfo, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0407-049 **Claim could be bifurcated where only a portion was secured by purchase money security interest in new vehicle.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: Bankruptcy debtors proposed a chapter 13 plan which treated the claim of the financer of the debtors' vehicle as an allowed secured claim under the Hanging Paragraph of 11 U.S.C. § 1325(a). The trustee moved for a determination that, under 11 U.S.C. § 506(a), the financer had an allowed secured claim only for the value of the vehicle and an unsecured claim for the balance.

OVERVIEW: The debtors purchased the vehicle within 910 days of their bankruptcy, thus implicating the Hanging Paragraph under 11 U.S.C. § 1325(a), and the debtors also traded in a vehicle as part of the same transaction. The trustee contended that the debtors had negative equity in the trade-in, the purchase price of the new vehicle exceeded the vehicle's actual value, and the excess over such value represented a refinancing of the negative equity which was not secured by the vehicle. The bankruptcy court held that bifurcation of the financer's claim under 11 U.S.C. § 506(a) was the appropriate treatment of the claim, since only a portion of the debt to the financer was secured by the new vehicle, and the remainder was unsecured refinancing debt. Although the retail installment contract granted the financer a security interest in the new vehicle for the entire amount financed, the financer's claim included rolled-in and refinanced debt, and the financer did not have a purchase money security interest for the refinanced debt to implicate the Hanging Paragraph under section 1325(a).

***In re Phillips**, 2007 Bankr. LEXIS 656 (Bankr. W.D.N.Y. March 1, 2007) (Ninfo, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0407-050 **Creditor's claim for deficiency on motor vehicle loan allowed despite debtor's surrender of vehicle.** (*Bankr. N.D. Miss.)*

PROCEDURAL POSTURE: A secured creditor objected to confirmation of a debtor's plan proposing to surrender a vehicle that served as collateral for the creditor's loan to fully satisfy the loan pursuant to 11 U.S.C. § 1325(a), as amended by the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. The vehicle had been purchased for the debtor's personal use within 910 days preceding the filing of the debtor's chapter 13 petition.

OVERVIEW: The creditor contended that the debtor should be liable for any deficiency that might arise. The court sustained the creditor's objection after construing the recently amended "hanging paragraph" after 11 U.S.C. § 1325(a)(9) to allow the creditor to amend its claim, following liquidation of the debtor's vehicle in a commercially reasonable manner, to reflect any unsecured deficiency balance. The debtor's plan then had to treat the deficiency claim as any other general unsecured claim. The court vacated an order previously entered in the case of In re Hollis, No. 06-11256 (Bankr. N.D. Ms. 2006), which permitted those debtors to fully satisfy the claim of their 910 creditor by mere surrender of the vehicle and which had concluded that the debtors were not liable for any deficiency. Instead, once the debtor surrendered her vehicle and it no longer was considered a part of the bankruptcy estate, 11 U.S.C. § 506 did not apply. Once the vehicle ceased to become a part of the estate, the entire dynamic of the "hanging paragraph" of 11 U.S.C. § 1325(a) changed because of the language found in 11 U.S.C. § 506(a)(1), allowing for such deficiency claims.

***In re Clark**, 2007 Bankr. LEXIS 590 (Bankr. N.D. Miss. February 21, 2007) (Houston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0407-051 **Confirmation denied as plan needed to rely on Schedules I and J for determination of disposable income rather than Form B22C.** (*Bankr. E.D. Ky.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13, and submitted a plan that proposed to pay $290 per month to unsecured creditors. The trustee did not recommend confirmation, contending that the debtors had disposable income in the amount of $880.

OVERVIEW: The debtors filed their plan, including a Schedule I, showing current income, and Schedule J, current expenditures. The debtors also filed a Form B22C showing current monthly income and calculation of the commitment period and disposable income. The debtors claimed that their projected disposable income could only be determined by reference to the calculations performed on the Form B22C. However, the court agreed with the trustee that the debtors' projected disposable income needed to be determined from the Schedules I and J, pursuant to 11 U.S.C. § 1325(b)(1)(B). The debtors' projected disposable income needed to be based upon the debtors' anticipated income during the term of the plan. The court further agreed with the trustee that the debtors had understated their projected disposable income in the schedules. The trustee's negative recommendation for confirmation of the debtors' plan was well taken.

In re Riggs*, 2007 Bankr. LEXIS 542 (Bankr. E.D. Ky. February 27, 2007) (Howard, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

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

0407-052 **Claim arising out of bar fight was not due to willful or malicious injury and was dischargeable.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Defendant debtor filed for bankruptcy relief under chapter 13, and scheduled plaintiff creditor as having a disputed, unliquidated claim arising out of a bar fight. The creditor filed suit to determine the dischargeability of the debt, seeking a determination that any indebtedness arising as a result of his state court civil case against the debtor, be determined non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). Debtor moved to dismiss.

OVERVIEW: A prepetition award of restitution or damages for willful or malicious injury was a prerequisite to a finding of non-dischargeability under 11 U.S.C. § 1328(a)(4). Given the plain meaning of section 1328(a)(4), the court found that the creditor's debt was simply a contingent, unliquidated debt that was allowable in the debtor's chapter 13 bankruptcy, and not subject to exception from discharge. Further, the court reviewed 11 U.S.C. § 1328(h), and found that the section was clearly not applicable in the case. As such, the court had no choice but to allow the debtor's motion to dismiss.

Parsons v. Byrd (In re Byrd)*, 2007 Bankr. LEXIS 586 (Bankr. C.D. Ill. March 1, 2007) (Fines, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.02[3][k]**

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

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

0407-053 **Class action suit for alleged deceptive marketing of body building products was related to bankruptcy of defendant supplier against which co-defendant had filed an indemnity claim.** (*E.D. Pa.)*

PROCEDURAL POSTURE: Plaintiffs filed a consumer class action complaint in the Court of Common Pleas of Philadelphia County (Pennsylvania) against defendant companies alleging that they engaged in deceptive and unfair marketing with regard to a muscle-building product. Plaintiffs filed a motion to remand after company two removed the suit to the court. Company two moved to transfer the suit to the District Court for the Southern District of New York.

OVERVIEW: Company two removed the suit, asserting that it was "related to" the product's supplier's bankruptcy proceedings, which were pending in the Southern District of New York. It sought to transfer the case pursuant to 28 U.S.C. §§ 157(a), 1334(b), 1409 and 1412. It claimed that the transfer would satisfy

the interests of justice, that it would be judicially efficient, and that it would be a more convenient forum in which to litigate plaintiffs' claims. Plaintiffs alternatively argued that the court lacked jurisdiction or that it should abstain from asserting jurisdiction pursuant to 28 U.S.C. § 1334(c). The court found that the suit was properly removed under 28 U.S.C. § 1452(a) because "related to" jurisdiction existed under 28 U.S.C. § 1334. Company two intended to assert a contract-based indemnification claim against the supplier. The supplier's bankruptcy estate, therefore, might be held liable if plaintiffs prevailed in their suit. Mandatory abstention was not required because it was unlikely that timely adjudication would occur in state court. Discretionary abstention and equitable remand were inappropriate. A transfer was appropriate under 28 U.S.C. §§ 1412 and 1404(a).

Toth v. Bodyonics, Ltd., *2007 U.S. Dist. LEXIS 18278 (E.D. Pa. March 15, 2007) (Ludwig, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.05**

BANKRUPTCY RULES (Post-2005 Act)

Rule 9006(b) Time; Enlargement.

0407-054 **Claims bar date could not be extended but late claim of homeowners' association could be paid absent objection.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Debtor filed a voluntary petition for adjustment of her debts under chapter 13. After a modified repayment plan was confirmed, creditor homeowners association filed a motion to allow a late-filed secured claim.

OVERVIEW: The association was not listed as a creditor and did not receive notice of the commencement of the case. It claimed that it did not learn of debtor's bankruptcy filing until well after the claims bar date. The court concluded that the bar date for the association to file its proof of claim could not be extended in a chapter 13 even for an unlisted creditor that had no notice of the case, but that the trustee could nevertheless pay the claim, even though tardy, if no party in interest objected. Fed. R. Bankr. P. 9006(b) clearly stated that the claims bar date could not be extended even where the creditor was not at fault. Although a secured creditor like the association was not required to file a proof of claim in order to preserve its lien, Fed. R. Bankr. P. 3002(c) did not exclude secured creditors from the need to file a proof of claim by the bar date in order to receive a distribution under the plan. However, no purpose would be served by objecting to a late-filed claim if the plan were sufficiently funded to pay it without affecting the payout to other creditors, and the association's lien was not extinguished simply because a timely proof of claim was not filed.

In re Nwonwu, *2007 Bankr. LEXIS 582 (Bankr. E.D. Va. February 23, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9006.06**

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

§ 330(a) Compensation of Officers; Determination of Amount.

0407-055 **Bankruptcy court did not err in disallowing creditors' committee's counsel's travle time and expenses absent sufficient evidence of reasonableness or necessity.** (*E.D. La.)*

PROCEDURAL POSTURE: Appellant law firm sought review of two orders of the Bankruptcy Court for the Eastern District of Louisiana, which granted the limited objection of appellee, the United States Trustee, and disallowing travel time compensation at full rate and first class airfare expenses pursuant to the firm's interim application for professional fees and reimbursement of expenses under 11 U.S.C. §§ 330(a) and 331. A motion to reconsider was also denied.

OVERVIEW: The firm was appointed pursuant to 11 U.S.C. § 1103(a) to serve as national counsel for a claimants' committee. The bankruptcy court calculated fees for nonworking travel time at 50 percent of the hourly rate as the prevailing community rate and reimbursed airfare at the coach rate. On review, the court found no error. The bankruptcy court could properly conclude that the firm failed to carry its burden under 11 U.S.C. § 330(a) to show that its requested compensation was reasonable. The only undisputed evidence offered by the firm was that its custom was to bill clients in nonbankruptcy matters for travel time at its full hourly rates, which was insufficient to satisfy the comparability factor of section

330(a)(3)(F). Further, the bankruptcy court properly looked at fees sought by comparable professionals in the same bankruptcy proceeding. The court also found that it was not an abuse of discretion for the bankruptcy court to find that flying first class was a necessary expense for the firm. At most, the firm established that it was more convenient for its attorneys to fly first class and that its attorneys were theoretically more productive when flying first class.

In re Babcock & Wilcox Co., *2007 U.S. Dist. LEXIS 18602 (E.D. La. March 15, 2007) (Vance, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

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

0407-056 **Bankrtuptcy court declined to assume contingency fee agreement with debtor's personal injury attorney but allowed attorney a claim in the amount due under the agreement.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Chapter 7 trustee filed a motion to allow assumption of a contingency fee agreement between debtor and a lawyer pursuant to 11 U.S.C. § 365(a). As part of that assumption, trustee asked that the court approve full payment of the lawyer's attorney's fees.

OVERVIEW: Debtor was hurt in a car accident. His agreement with his lawyer was a contingency fee agreement, granting the lawyer one-third of any gross recovery if the claim against the insurer for the other party to the accident was settled prior to filing suit, and if suit was filed, granting the lawyer 40 percent of any gross recovery. The agreement provided that debtor could not settle the claim without the consent of the lawyer. Debtor later filed for bankruptcy and was granted a discharge. The bankruptcy case was reopened, and trustee filed an application to compromise the automobile claim, as well as a request to pay the lawyer the contingency fee. The court held that the provision requiring consent of the lawyer to settle the claim was unconscionable, and that severance of the provision and assumption of the remainder of the agreement was not allowed because a contract had to be assumed or rejected in its entirety. The court did hold that the doctrine of quantum meruit allowed for the payment of attorney's fees and expenses from the settlement. The court held that the attorney had to provide information on what portion of his services were rendered prepetition versus postpetition.

In re Plaza, *2007 Bankr. LEXIS 624 (Bankr. S.D. Tex. February 23, 2007) (Isgur, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.03**

§ 502(b) Allowance of Claims or Interests; Disallowance.

0407-057 **Surety's contractual claim for attorney's fees incurred litigating bankruptcy law issues should have been allowed absent statutory exception.** (*U.S.)*

PROCEDURAL POSTURE: Petitioner, a workers' compensation surety, filed a claim in the bankruptcy of respondent debtor, the surety's insured, and litigated certain language in the debtor's reorganization plan. Upon the grant of a writ of certiorari, the surety appealed the judgment of the Ninth Circuit, which affirmed the disallowance of the surety's amended claim for contractual attorney fees incurred in the bankruptcy litigation.

OVERVIEW: The surety litigated language in the debtor's plan to provide for indemnification of the surety in the event the debtor defaulted on its workers' compensation obligations, and the parties' indemnity agreements provided that the debtor was responsible for the surety's attorney fees in litigating surety's rights in connection with the bonds issued to the debtor. The surety filed an amended claim to recover its fees, but the claim was disallowed on the ground that recovery of fees was precluded because the litigated issues involved federal bankruptcy law rather than contractual issues related to the bonds. The U.S. Supreme Court unanimously held that federal bankruptcy law did not disallow the surety's contract-based claims for attorney's fees based solely on the fact that the fees were incurred litigating bankruptcy law issues. 11 U.S.C. § 502(b) provided that the surety's claim was allowed in the absence of a statutory exception to allowance, no such express exception was identified to warrant disallowance of the surety's claim, and the fact that the surety's entitlement to fees was contractual presented no obstacle to enforcing such entitlement in the debtor's bankruptcy.

Travelers Cas. & Sur. Co. of Am. v. PG&E, *2007 U.S. LEXIS 3566 (U.S. March 20, 2007) (Alito, J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03**

§ 507(a)(5) Priorities; Order of Priorities; Claims of Grain Farmers and Fishermen.

0407-058 **Retirees' claims for medical expenses not reimbursed from employee benefit plans terminated by debtor employer were entitled to priority status.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: Claimant retirees from bankruptcy debtors filed proofs of claim for medical expenses which were not reimbursed from the debtors' employee benefit plans, which were terminated prepetition by the debtors. The retirees sought allowance of their claims as priority unsecured claims under 11 U.S.C. § 507(a)(5), and a trustee of a creditors' trust objected to the priority of the claims.

OVERVIEW: The trustee contended that section 507(a)(5) provided priority treatment only for employees covered by the employee benefit plans, and not for retired former employees, and that the retirees' claims based on retirement health benefits were therefore not entitled to priority status and could be allowed only as unsecured claims. The bankruptcy court held, however, that the retirees' claims were allowable as priority claims. The retirees' health plans were clearly employee benefit plans which did not limit beneficiaries to active and current employees, and the plans included the retirees as participants in the plans. Further, interpreting section 507(a)(5) to exclude the retirees would encourage debtors to terminate retiree benefit plans just before filing bankruptcy, and other recent bankruptcy legislation indicated a strong legislative intent to protect the interests of retirees.

In re Consolidated Freightways Corp., *2007 Bankr. LEXIS 539 (Bankr. C.D. Cal. February 23, 2007) (Goldberg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:507.06**

§ 510(c)(1) Subordination; Equitable Subordination; Allowed Claims.

0407-059 **Terms of settlement agreement conceding that debts owed to non-participating lenders were allowable claims barred trustee's action for recharacterization and equitable subordination.** (*3d Cir.)*

PROCEDURAL POSTURE: Appellant trustee appealed from the District Court for the District of Delaware which dismissed the trustee's objections to a proof of claim. The appeal arose out of the 11 U.S.C. § 502 claim allowance process in debtor's chapter 11 bankruptcy liquidation and the question was whether the trustee could bring a recharacterization action and an equitable subordination action under 11 U.S.C. § 510(c)(1) against certain lenders.

OVERVIEW: The trustee asserted both recharacterization and equitable subordination, but the bankruptcy and district courts ruled that he was barred from asserting them by the terms of a previous settlement that the court entered as a consent order (settlement agreement) and the confirmed plan of reorganization. The dispute centered on the meaning of two sections of the settlement agreement. Because certain lenders did not participate in the settlement agreement, their loans were at issue. The court had to determine whether the trustee's actions for recharacterization and equitable subordination were precluded by the agreement. The court found that the debtors and creditors' committee conceded that the debts owed to the certain lenders were allowable claims. Their loans could not be both allowable claims and equity investments. Thus, by agreeing that the certain lenders' loans were allowable claims, the debtors and creditors' committee necessarily agreed that the certain lenders' loans were true loans. Accordingly, under the settlement agreement the action of the trustee for recharacterization was barred. Likewise, equitable subordination was also barred by the settlement agreement.

In re Insilco Techs., Inc., *2007 U.S. App. LEXIS 6409 (3d Cir. March 20, 2007) (Ambro, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:510.05**

§ 521(1)(B) Debtor's Duties; List of Creditors, Schedules, and Statement of Financial Affairs.

0407-060 **Debtor sufficiently described fair debt collection action in schedules so that misidentification of defendant did not proper investigation by trustee and could continue with lawsuit.** (*M.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff consumer filed a Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq., complaint against defendant holding company, then amended the complaint to dismiss the company and name defendant affiliate debt collection firm. The firm filed motions to dismiss as to both complaints, arguing the consumer failed to properly list the lawsuit on her bankruptcy schedules, thus divesting her of standing and the court of jurisdiction.

OVERVIEW: The amended bankruptcy schedules, filed after the amended complaint had been filed, had listed the holding company instead of the collection firm as the defendant. But, the consumer sufficiently itemized her lawsuit on her amended bankruptcy form, for purposes of 11 U.S.C. § 521(1)(B)(i), to enable her bankruptcy trustee to determine whether to investigate further, thus she was not precluded from continuing with her lawsuit. There was no evidence that when the consumer misidentified the defendant, particularly where she had repeatedly alleged that the company and the firm were closely-related entities, she prevented the trustee from being able to investigate the claim further. The trustee was put on notice of the existence of the lawsuit, and could have easily obtained further details. The consumer acted promptly when she amended her bankruptcy schedule two weeks after her initial petition was filed. Thus, the trustee abandoned the lawsuit pursuant to 11 U.S.C. § 554(c) at the time the bankruptcy proceeding was closed, and the consumer had standing.

Kuehn v. Cadle Co.*, 2007 U.S. Dist. LEXIS 18387 (M.D. Fla. March 15, 2007) (Hodges, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.03**

§ 522(f) Exemptions; Liens Impairing Exempt Property.

0407-061 **Debtor could not avoid post-petition, pre-conversion mechanics' lien against exempt homestead.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: Plaintiffs, debtors, filed a complaint against defendant creditor seeking a determination that the creditor's mechanics' lien was avoidable. The creditor moved for summary judgment.

OVERVIEW: The debtors cited 11 U.S.C. § 547 as the basis for avoiding the lien. That statute, however, applied only to prepetition transfers. The creditor's lien arose postpetition but prior to the debtors' conversion from chapter 13 to chapter 7. In addition to 11 U.S.C. § 547, the debtors also cited 11 U.S.C. §§ 502 and 506 as grounds for avoiding the creditor's lien. While section 502 governed the allowance of claims against the bankruptcy estate, it was not relevant in the instant case because the creditor did not file a proof of claim. While § 506 governed the determination of a creditor's secured status on an allowed claim, it too was irrelevant since the creditor did not file any claim and the debtors' homestead was no longer property of the estate. Further, 11 U.S.C. § 549(a) allowed for the avoidance of certain postpetition liens. For that "strong-arm" statute to apply, the subject property needed to be property of the estate. Finally, 11 U.S.C. § 522(f) allowed a debtor to avoid certain liens on exempt property. However, according to the parties' stipulated facts, the creditor did not hold a judgment lien or a non-purchase money security interest.

Aguirre v. Fullerton Lumber Co. (In re Aguirre)*, 2007 Bankr. LEXIS 647 (Bankr. D.S.D. February 21, 2007) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.11**

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

0407-062 **Stipulation in settlement agreement that debt was nondischargeable was not binding as contrary to public policy.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: Plaintiff judgment creditor brought an adversary claim against defendant debtors, seeking a finding that their claim was nondischargeable under 11 U.S.C. § 523(a)(2)(A), pursuant to the terms of a consent judgment. Debtors moved for summary judgment on the issue.

OVERVIEW: Creditors and one of the debtors entered into a pre-filing settlement agreement, wherein debtor consented to judgment and stipulated that the claim of the creditors was nondischargeable. The underlying suit had contained general allegations of "fraud/deceit/misrepresentation," but the settlement agreement contained no finding or admission of fraudulent misconduct by debtor, nor any stipulated facts that would support a finding of fraud, deceit, or misrepresentation that could be given preclusive effect by the bankruptcy court. Creditors relied upon the consent judgment in their complaint, and failed to allege any specific ground under section 523(a)(2)(A) under which to deny a discharge. Creditors' reliance on the settlement agreement and the judgment of confession were misplaced, as such prepetition agreements were against public policy. Even if the alleged fraudulent statements of the debtor

were considered, they were merely statements respecting an insider's financial condition, which were specifically excluded from coverage under section 523(a)(2)(A).

Spyke, Inc. v. Zufall (In re Zufall), *2007 Bankr. LEXIS 648 (Bankr. D.S.D. February 21, 2007) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

§ 523(a)(7) Exceptions to Discharge; Types of Debt Excepted; Fines, Penalties, or Forfeitures Owed to Governmental Unit.

0407-063 **Bankruptcy court could not discharge debtor's state imposed restitution obligation resulting from debtor's arson conviction.** (*10th Cir.)*

PROCEDURAL POSTURE: Appellant debtor pled guilty to arson for a fire that caused $800,000 of damage, and was ordered to pay $239,696 of restitution at a rate of $100 per month as a condition of his probation. The debtor filed for bankruptcy. A bankruptcy court discharged the debtor's restitution obligation. On appeal, the District Court for the District of Utah held that the restitution obligation was not dischargeable. The debtor appealed.

OVERVIEW: The sole issue on appeal was whether 11 U.S.C. § 523(a)(7) permitted the discharge of a restitution obligation imposed as part of a criminal sentence. The appellate court found that restitution obligations imposed as part of a criminal sentence were not dischargeable under 11 U.S.C. § 523(a)(7) because principles of federalism did not permit a bankruptcy court to interfere with a state criminal sentence. Utah's mandatory restitution provisions, Utah Code Ann. § 76-3-201(4)(c) and Utah Code Ann. § 76-3-201(5)(c), reflected the legislature's judgment that restitution was an important part of any criminal sentence not only because it forced the criminal to pay for the harm he caused but because of its rehabilitative effects as well. Permitting offenders to discharge their court-imposed obligations merely because they were no longer on probation would have subverted Utah's sentencing scheme and allowed bankruptcy courts to hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems.

Troff v. Utah, *2007 U.S. App. LEXIS 5953 (10th Cir. March 15, 2007) (Henry, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.13**

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

0407-064 **Debtor with incomplete doctorate and psychological problems granted undue hardship discharge of student loan debt.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: Debtor was 51 years old and had no dependents. She did not finish a doctoral program because her advisor resigned and she could not find a replacement. Her student loan debt totalled about $180,000.00. Her net monthly income was about $1,150.00. Her monthly expenses totalled about $1,463.57. She did not live extravagantly. Debtor filed a complaint seeking to discharge her student loan debt under 11 U.S.C. § 523(a)(8).

OVERVIEW: Debtor satisfied her burden with respect to the factors under the Brunner test. Although she was not employed commensurately with her education and abilities, this was not debtor's desire; it was necessitated by her condition. She could not work full time and her current employment was probably the best economically, considering her need for a flexible work schedule. A doctor testified that while she might have contributed to the exacerbation of her psychological problems due to her unwillingness to seek psychiatric treatment, the damage had been done and her situation was not likely to improve. He further testified that it was highly unlikely that debtor would have the capacity to work in a better or more advanced job even with medical care and a healthier lifestyle. There was no dispute that debtor had tried to repay her loans. She established that, despite a college education and some doctorate work, she would never be a doctor. All of these facts, together with the evidence presented about her age, physical and mental condition led the court to conclude that debtor was probably earning as much as she could and there was very little prospect for change in the future.

Dykstra v. Spellings (In re Dykstra), *2007 Bankr. LEXIS 640 (Bankr. D. Md. February 26, 2007) (Lipp, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

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

0407-065 **Debtor's estate had no interest in real property sold to former husband just prior to petition date pursuant to divorce decree.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff, chapter 7 debtor's former husband, filed a complaint against debtor, alleging that debtor had no ownership interest in certain property, that he did not owe debtor any monies with regard to the sale of the property, nor owe debtor any monies for child support, and that he was entitled to reasonable attorneys' fees and costs as a sanction for violation by debtor of Fed. R. Civ. P. 11(b).

OVERVIEW: Debtor and the husband were divorced. Pursuant to the terms of the divorce decree, when their child turned 18 years of age, a state court approved the sale of their residence to the husband and terminated the husband's child support obligation. The deed conveying the property was not filed in the county property records until after debtor had filed a chapter 7 petition. The court held that, because the sale occurred pursuant to a state court order and was conducted two days prior to the petition date, debtor, as of the petition date, did not have any legal or equitable interest in the property under 11 U.S.C. § 541(a) and therefore the automatic stay was never triggered as to the property because it was not property of the estate. The court held that the *Rooker-Feldman* doctrine barred the court from reviewing the state court order, including the termination of the husband's child support obligation. In denying the husband's request for attorney's fees and costs, the court held that debtor's claim was not frivolous because the law was not so clearly defined that debtor should have been held to account under Fed. R. Civ. P. 11.

Baumgardner v. Baumgardner (In re Baumgardner)*, 2007 Bankr. LEXIS 598 (Bankr. N.D. Tex. February 27, 2007) (Lynn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.02**

§ 541(a)(1) Property of the Estate; Creation and Composition of the Estate; All Legal or Equitable Interests.

0407-066 **State court fraudulent transfer action was property of the estate.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: The chapter 7 trustee filed a motion to approve a settlement agreement with creditors. The underlying cause of action was brought in state court by a creditor (plaintiff creditor) against two defendant creditors and alleged a fraudulent transfer. A threshold issue was whether this fraudulent transfer claim was property of the bankruptcy estate.

OVERVIEW: The court concluded that as of the petition date, the fraudulent transfer claim became property of the estate and it was solely within the power of the trustee to commence and prosecute. The court also rejected the plaintiff creditor's argument that because the applicable statute of limitations to prosecute fraudulent transfer claims had purportedly expired, the trustee had no standing to prosecute the claim. This position was wholly misplaced. A statute of limitations was an affirmative defense, not a jurisdictional prerequisite. The defendant creditors had executed tolling agreements extending any applicable statutes of limitations. Thus, there was no jurisdictional bar preventing the trustee from asserting the claim. Second, because the claim was property of the estate, the Trustee was free to file such claim himself or to seek to move to intervene in the New York state court action. Finally, the plaintiff creditor appeared to have timely filed the claim and the Trustee could have moved to intervene as a party plaintiff in state court action.

In re Zwirn*, 2007 Bankr. LEXIS 592 (Bankr. S.D. Fla. February 21, 2007) (Cristol, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.05**

§ 547(b) Preferences; Avoidable Transfers.

0407-067 **Transfers to creditor within 90 days of petition date were preferential given debtor's failure to prove ordinary course of business defense.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff trustee filed a motion for summary judgment on his complaint that a chapter 7 debtor made preferential transfers to defendant creditor under 11 U.S.C. § 547(b).

OVERVIEW: The debtor wrote checks to the creditor during the 90 days preceding the petition date. The court granted the trustee's motion, finding that he fulfilled each element of the cause of action to avoid the transfer in his statement of uncontested facts. The court found from the copies of invoices and payments submitted by the trustee and the fact that the creditor did not deny the trustee's allegation that the transfers were made to pay antecedent debt and that the debtor was presumed to be insolvent during the 90 days preceding the filing date and at the time of the transfers. The court found that the creditor waived and failed to prove the ordinary course of business defense under section 547(c)(2) because the creditor did not respond to a request for admissions and the affidavit of its employee, which stated that the payments from the debtor were untimely and that the creditor did not change its collection practices when the debtor's financial condition deteriorated, did not address the range of acceptable practices in the industry or establish a baseline of dealings to enable a comparison of the payment practices during the preference period with the prior course of dealing.

Maxwell v. Copy Corps. Of Ill., LLC (In re marchFIRST, Inc.)*, 2007 Bankr. LEXIS 652 (Bankr. N.D. Ill. February 21, 2007) (Schwartz, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

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

0407-068 **Attorney and investigator paid by debtor's law firm were not liable to trustee as immediate good faith transferees of law firm as initial transferee.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: An indicted officer of debtor company retained a law firm. Per the fee agreement, the law firm was to be paid a flat fee plus an investigator fee. The law firm brought in another attorney (not a member of the law firm). The law firm paid both the attorney and investigator (defendants) for services rendered. Plaintiff bankruptcy trustee sought to recover the payments to defendants as fraudulent conveyances. Defendants moved for summary judgment.

OVERVIEW: Defendants argued that 11 U.S.C. § 550(b) applied as a defense to the fraudulent conveyance claims. Under section 550(b), an immediate transferee from the initial transferee could avoid liability if the immediate transferee could prove that she took the transfer for value and that she did not have knowledge that the transfer in question was avoidable. The law did not provide the initial transferee this defense. The court ruled that defendants were immediate transferees to whom the section 550(b) defense applied. Both defendants provided services at the request of the law firm and were paid for those services. The services were ultimately to benefit the indicted officer. The trustee did not contest defendants' claims that they provided services which were reasonably equivalent in value to the money paid. The court noted that a defendant need not prove that he gave value to debtor, but rather to the initial transferor. The law firm was the initial transferor and the recipient of value. Defendants were immediate transferees of the law firm. The evidence was uncontroverted that both defendants gave value and acted in good faith without knowledge of the avoidability of the transfers.

Alexander v. J. Martin & Assocs. (In re Terry Mfg. Co.)*, 2007 Bankr. LEXIS 564 (Bankr. M.D. Ala. February 20, 2007) (Sawyer, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 5:550.03**

§ 727(d) Discharge; Grounds for Revocation.

0407-069 **Reinstatement of case did not reset deadline for opposing discharge that expired prior to dismissal.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding complaint, alleging that defendant chapter 7 debtor should be denied a discharge under 11 U.S.C. § 727(a), (d). The debtor contended that the creditor's objection was untimely filed under Fed. R. Bankr. P. 4004(a).

OVERVIEW: The court set February 7, 2006, as the deadline for opposing discharge in the debtor's case. The debtor's case was dismissed in March, 2006, after he failed to appear at the 11 U.S.C. § 341 creditors' meeting. The dismissal order was later vacated and a new creditors' meeting was set for August 25, 2006. The creditor filed its objection on October 3, 2006. It argued that its objection was timely filed because, pursuant to Fifth Circuit precedent, a new time period for filing objections arose after the case was reinstated. The debtor argued that the precedent did not apply because the time period for filing objections had expired before the case was dismissed and reinstated. The court agreed with the debtor and found that the creditor's objection was untimely filed. Pursuant to Fed. R. Bankr. P. 4004(a), the creditor had 60 days after the first date of the creditors' meeting to file its objection. It had not acted in a timely manner, but had waited 300 days to file its objection. The dismissal and reinstatement of the case did not reset the clock for R. 4004(a) purposes because the period for objecting to the discharge had expired before the case was dismissed.

Laboratory Corp. of Am. V. Avalos (In re Avalos)*, 2007 Bankr. LEXIS 622 (Bankr. S.D. Tex. February 22, 2007) (Isgur, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15**

§ 727(d)(3) Discharge; Grounds for Revocation; Refusal to Obey Court Order.

0407-070 **Failure of debtor to turn over portion of tax refund as required was not grounds for revocation of debtor spouse's discharge.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Defendant debtors filed a petition for relief under chapter 7. Plaintiff trustee filed a complaint for turnover and revocation of the discharge to one of the debtors, pursuant to 11 U.S.C. § 727(d)(3).

OVERVIEW: The debtors were advised at their 341 meeting that they could not spend any of their income tax refunds and that the trustee was entitled to receive a portion of the refund for the estate. It was undisputed that the trustee was entitled to $5,743 of the refunds received. The debtors never turned over the refund amount to the trustee. The trustee filed an action seeking turnover and revocation of the discharge received. The debtor wife responded to the complaint, saying that the debtor husband spent the majority of the tax refund on illegal drugs. The debtor wife had filed for divorce and obtained a protective order of abuse from the debtor husband. The court found that the order of turnover was lawful. However, under the facts of the case, the court determined that the debtor wife's discharge should not be revoked. There was no evidence that the debtor wife either received or spent the refund. The debtor wife did not derive any benefit from the refund, and the debtor wife did not have any ability to recover the refund. The actions by the debtor wife did not amount to a willful, intentional disobedience of the turnover order.

Morris v. Wheeler (In re Wheeler)*, 2007 Bankr. LEXIS 558 (Bankr. D. Kan. February 22, 2007) (Somres, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[5]**