April 2007

Collier Bankruptcy Case Update

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April 23, 2007 Issue 4

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§ 109(g)(2) Who May Be a Debtor; Exception for Debtors with Certain Prior Dismissals; Voluntary Dismissal After Request for Relief From Stay.

0407-106 **Debtor who filed sixth case within 180 days of prior case was not an eligible debtor.** (*Bankr. E.D.N.C.)*

PROCEDURAL POSTURE: A debtor filed a motion to extend the automatic stay in his chapter 13 bankruptcy case. A creditor filed a motion to dismiss, pursuant to 11 U.S.C. § 109(g)(2).

OVERVIEW: The creditor obtained relief from the automatic stay in a prior case and filed a notice of default on December 1, 2006. The debtor had five prior bankruptcy filings, the most recent of which was dismissed on February 1, 2007, after his January 26, 2007, motion to dismiss. The debtor filed the present petition on January 29, 2007. The court found that he did not qualify as a debtor, pursuant to section 109(g)(2), because his prior case was pending within 180 days preceding the filing of the present case and he voluntarily dismissed, within close proximity to the notice of default, that case in which a motion for stay relief had been filed. Under an equitable approach, although the debtor's veteran status and residence in his grandmother's home weighed in his favor, it would have been absurd to allow a sixth bankruptcy filing to stop foreclosure after the creditor obtained relief. The chain of events suggested a direct causal connection between the notice and motion to dismiss. Strictly interpreting section 109(g)(2), the court held that the debtor could not be a debtor because he filed the case within 180 days of a pending case in which stay relief was sought and voluntary dismissal obtained.

***In re Tune**, 2007 Bankr. LEXIS 585 (Bankr. E.D.N.C. February 15, 2007) (Doub, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.08**

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

0407-107 **Incarcerated debtor was not entitled to permanent waiver of credit counseling requirement but was granted a 45-day extension.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Chapter 7 debtor filed a *pro se* voluntary chapter 7 petition and was granted permission to proceed in forma pauperis. He filed a motion for a permanent waiver of the credit counseling requirement of 11 U.S.C. § 109(h)(1) after the court issued a deficiency notice advising him that he needed to file a certificate of credit counseling. The U.S. Trustee objected to the debtor's motion.

OVERVIEW: The debtor contended that, as an incarcerated prisoner, he did not have access to the Internet or telephone and could only receive credit counseling services by mail. The U.S. Trustee argued that 11 U.S.C. § 109(h)(2), (4), specified the limited circumstances in which a debtor could receive a permanent waiver of the section 109(h)(1) credit counseling requirement and that the debtor did not qualify for such a waiver under section 109(h)(2) and (4), based on his incarceration. The court agreed that the debtor was ineligible for a permanent waiver of the credit counseling requirement under section 109(h)(4). The court had previously decided that incarceration did not render a debtor "disabled" for section 109(h)(4) purposes. The court stated that it would treat the debtor's motion as a certification of exigent circumstances under section 109(h)(3)(A) and Bankr. E.D. Va., Interim Bankruptcy Procedure 1007-1(J)(2). The court ruled that the debtor was entitled to a deferral because it was not possible for him to request credit counseling services prior to filing his bankruptcy petition. Pursuant to 11 U.S.C. § 109(h)(3)(B), the court could only grant a 45-day extension, from the bankruptcy filing date.

***In re Vollmer**, 2007 Bankr. LEXIS 587 (Bankr. E.D. Va. February 16, 2007) (Huennekens, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09**

0407-108 **Debtor who was disabled after being placed on life support for fourteen days granted exemption from mandatory credit counseling.** (*Bankr. E.D.N.C.)*

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

OVERVIEW: The debtors' current case was filed on January 5, 2007. The debtors' prior case was pending within the preceding one-year period and was dismissed on November 1, 2006. The court granted the debtors' motion to continue the stay because they demonstrated that the filing of the current case was in

good faith as to the creditors to be stayed and provided clear and convincing evidence sufficient to rebut the presumption that the case was not filed in good faith. The court found that there was a substantial change in the debtors' financial or personal affairs after the dismissal of the prior case because, during the prior case, they incurred $1,000 in monthly expenses for transporting the debtor husband to and from dialysis; that expense decreased to $400 per month; the prior expense of $1,000 in prescriptions had declined, with assistance, to $250 per month; the debtor wife continued to receive $2,300 in monthly state retirement; and the husband continued to receive $2,900 in monthly retirement and Social Security benefits.

In re Howard*, 2007 Bankr. LEXIS 575 (Bankr. E.D.N.C. January 25, 2007) (Doub, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09**

§ 110 Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions.

0407-109 **Bankruptcy petition preparer enjoined from providing further services due to multiple violations of Bankruptcy Code.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The United States Trustee filed a complaint against defendants, a bankruptcy petition preparer and her company, alleging violations of 11 U.S.C. § 110 and seeking injunctive relief.

OVERVIEW: Debtor contacted defendants seeking assistance with the preparation of bankruptcy papers and paid defendants approximately $300. The preparer's company had been operating under the name "Paralegal Paperworks, Inc." until changing the name to "Paraeagle Paperworks, Inc." after a court found that the name violated section 110(f)(1). The preparer listed only the last four digits of her Social Security number on the debtor's petition and the disclosure of compensation. The court imposed a fine of $250 because the term "Paraeagle" constituted a term similar to "legal" and defendants' use of the term was impermissible. The court imposed another fine of $250 because the preparer failed to list her Social Security number on each document prepared for filing. The court ordered defendants to disgorge all but $112.50 of the fee charged because that amount was the reasonable fee. The court issued a permanent injunction enjoining defendants from acting as bankruptcy petition preparers in the district without further order of the court because the preparer's violations of numerous provisions of section 110 were indicative of her unwillingness to change her practices.

Turner v. Burnworth (In re Carrier)*, 2007 Bankr. LEXIS 739 (Bankr. M.D. Fla. February 27, 2007) (Briskman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:110.01**

§ 327 Employment of Professional Persons.

0407-110 **Special counsel for debtor in possession was not entitled to reimbursement for non-appointed representation of debtor's surety.** (*Bankr. E.D. La.)*

PROCEDURAL POSTURE: Applicant, special counsel in a chapter 11 proceeding for debtor in possession, a construction company, sought an allowance of interim compensation and reimbursement of certain expenses. Objector, the owner of a renovation project on which debtor had been rendering services, objected to the application. At issue was whether applicant was entitled to reimbursement under 11 U.S.C. §§ 330(a) and 331.

OVERVIEW: Applicant sought and was granted employment as special counsel per 11 U.S.C. § 327(a), thereby allowing applicant to represent debtor in possession in several construction-related lawsuits, including that with objector. Objector's complaint related not to fees incurred in representing debtor therein but fees charged to debtor's surety, which was also represented by applicant. The court granted the application as to the former fees but denied the application as to fees incurred in representing the surety. Noting that it had not approved nor did it have power to approve the surety's employment of counsel, fees incurred by reason thereof could not be awarded under 11 U.S.C. § 330 or § 331 because 11 U.S.C. § 330 applied specifically to professionals employed under 11 U.S.C. § 327. Nor was applicant entitled to an award of fees as an administrative expense under 11 U.S.C. § 503(b)(3)(D) based on a "substantial contribution" theory. Applying the Fifth Circuit's analysis, the court found that because applicant could not articulate a benefit that its work for the surety had conferred upon the bankruptcy estate, reimbursement under section 503(b)(3)(D) was improper.

In re Roy Frischhertz Constr. Co.*, 2007 Bankr. LEXIS 716 (Bankr. E.D. La. March 2, 2007) (Brown, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:327.01**

§ 362 Automatic Stay.

0407-111 **Repossession of debtor's car violated stay regardless of lack of notice to creditor.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: A chapter 13 debtor filed a motion for turnover of a vehicle repossessed by a creditor in violation of the automatic stay of 11 U.S.C. § 362.

OVERVIEW: The creditor obtained stay relief in the chapter 13 case of the debtor's son. The debtor, who was a co-debtor on the son's vehicle loan, took no action to advise the creditor of her chapter 13. Without knowledge of the chapter 13 petition, the creditor repossessed the vehicle. The court granted the debtor's motion for turnover of the vehicle. The court held that the debtor filed for bankruptcy before the repossession and that the creditor's lack of notice of the bankruptcy did not excuse its violation of the stay under section 362. The court held that the creditor was required to return the vehicle to the debtor and re-establish the prepetition status quo.

***In re Miller**, 2007 Bankr. LEXIS 782 (Bankr. S.D. Fla. February 27, 2007) (Ray, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(c)(2)(C) Automatic Stay; Duration; All Other Acts; Until Discharge Granted or Denied.

0407-112 **Post-discharge motion to vacate stay to allow foreclosure was moot.** (*Bankr. E.D. Cal.)*

PROCEDURAL POSTURE: Debtor was discharged from all dischargeable debts, and movant creditor filed a motion, notice, and declaration requesting that the court vacate the automatic stay to permit movant to foreclose upon mortgaged property.

OVERVIEW: The trustee found that there was no property available for distribution from the estate over and above that exempted by debtor. The court found that under 11 U.S.C. § 362(c)(2)(C), the automatic stay of acts against debtor *in personam* expired when the debtor was granted a discharge. Although the debtor did not appear to have any equity in the property under section 362(d)(2)(A), since debtor was granted a discharge, the automatic stay expired as to debtor. Thus, the motion insofar as it was directed at the interest of debtor was moot but not as directed at the trustee's interest.

***In re Stewart**, 2007 Bankr. LEXIS 574 (Bankr. E.D. Cal. February 14, 2007) (Klein, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[2]**

§ 362(d)(1) Automatic Stay; Relief from Stay; For Cause.

0407-113 **Creditor was not entitled to relief from stay to pursue state court attachments.** (*Bankr. M.D. Ga.)*

PROCEDURAL POSTURE: Before a debtor filed a bankruptcy petition, investors who entrusted funds to the debtor for investment obtained a state-court attachment of property of the debtor and related entities and a partial summary judgment that the debtor was liable to the investors for violation of securities laws. The investors moved for relief from the automatic bankruptcy stay, pursuant to 11 U.S.C. § 362(d)(1), to allow the state action to proceed.

OVERVIEW: The investors contended that the perfected state-court attachments had priority over the bankruptcy trustee's interest in the debtor's property, and that the state action should be allowed to proceed to resolve completely the debtor's interest in the attached property. The bankruptcy court held, however, that relief from the stay was not warranted since allowing the investors to proceed in state court would prejudice the bankruptcy estate and other unsecured creditors, and allowing the trustee to proceed with fraudulent conveyance claims would inure to the benefit of all creditors, including the investors. The partial summary judgment entered in the state action was not a final judgment and did not serve to perfect the attachments, which merely conserved the property for execution after a final judgment. Further, the fraudulent conveyance claims asserted by the investors were in the nature of property of the estate, reserved to the trustee, and perfection of the investors' interest in the attachments was not the type of lien interest the perfection of which was excluded from the coverage of the stay.

***In re Bradshaw**, 2007 Bankr. LEXIS 618 (Bankr. M.D. Ga. February 16, 2007) (Waldrep, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[3]**

§ 365(p)(2) Executory Contracts and Unexpired Leases; Leases of Personal Property and Individual Debtor Lesees; Assumption By Individual Chapter 7 Debtor.

0407-114 **Debtor's agreement with creditor to assume prepetition motor vehicle lease was not enforceable due to lack of reaffirmation agreement.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: A bankruptcy debtor and a creditor stipulated that the debtor would assume prepetition vehicle lease agreements under 11 U.S.C. § 365(p)(2) and waive any effect of a bankruptcy discharge. The creditor moved for reconsideration of the bankruptcy court's orders that the debtor would not be deemed to assume the agreements in the absence of reaffirmation agreements under 11 U.S.C. § 524(c).

OVERVIEW: The creditor contended that the debtor's power to assume the leases, which was a recent addition to the Bankruptcy Code, was not expressly subject to the requirements for reaffirmation of debts. The bankruptcy court held, however, that the assumption agreements were between the creditor and the debtor, the consideration for the agreements was at least in part based on dischargeable debts, and thus the agreements were a form of reaffirmation agreement. Further, 11 U.S.C. § 365(p)(2) contained no express preclusion of reaffirmation requirements, which applied to all dischargeable obligations and were sufficiently flexible to accommodate lease obligations, and it was irrelevant that the lease obligations were not secured by property of the estate.

In re Creighton*, 2007 Bankr. LEXIS 579 (Bankr. D. Mass. February 16, 2007) (Somma, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:365.09[6]**

§ 521(i) Debtor's Duties; Individual Voluntary Debtor's Failure to File in Chapter 7 or Chapter 13 Case.

0407-115 **Bankruptcy court declined to dismiss case for debtor's inadvertent failure to file two payment advices.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: Movant creditor sought an order confirming the automatic dismissal of the chapter 13 bankruptcy case based on one of the debtor's failure to comply with 11 U.S.C. § 521(i), where she inadvertently failed to timely submit two payment advice statements. The trustee and debtors moved the court to deny the dismissal order, asserting debtors promptly complied with the requirement and acted in good faith.

OVERVIEW: The two payment advices were in the same amount as debtor's other paychecks; however, her subsequent advices did not contain year-to-date totals covering the entire 60-day prepetition period. In interpreting the statute, court found that the trustee still had an opportunity to file a motion within the extended period granted by the court requesting that there be no dismissal if it would be based merely on the debtor's failure to file evidence of payment. The court found that the trustee met his burden of establishing not only that the debtors attempted in good faith to file the payment advice statements required pursuant to 11 U.S.C. § 521(a)(1)(B)(iv), but also that the best interests of creditors would be served, given debtor's plan to pay an 84 percent dividend.

In re Brickely*, 2007 Bankr. LEXIS 699 (Bankr. N.D.N.Y. March 1, 2007) (Gerling, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.24**

§ 523(a)(6) Exceptions to Discharge; Types of Debt Excepted; Willful and Malicious Injury to Another Entity or Property of Another Entity.

0407-116 **Judgment for sexual harassment and retaliation was based on willful and malicious injury and nondischargeable.** (*Bankr. E.D. Ark.)*

PROCEDURAL POSTURE: Plaintiff judgment creditor filed two complaints against defendant debtors, pursuant to 11 U.S.C. § 523(a)(6), concerning a judgment that the creditor obtained in an underlying civil lawsuit for employment discrimination. The two adversary proceedings were consolidated and the creditor filed motions for summary judgment.

OVERVIEW: The creditor filed an action for discrimination against the debtors and their business, and the jury returned a verdict for the creditor. One debtor was found liable for sexual harassment and retaliation and the second debtor was found liable for retaliation. The creditor claimed that the judgment obtained against the debtors was non-dischargeable under 11 U.S.C. § 523(a)(6) as a debt for willful and

malicious injury. The creditor also claimed that the debtors were precluded under the doctrine of collateral estoppel from challenging the determination that the debtors committed willful and malicious injury based on the three-day trial and jury findings in the civil action. The court found that based upon the trial record that the debtors acted with the intent to injure the creditor and with the knowledge that their actions were substantially certain to harm the creditor. There was extensive evidence that the one debtor sexually harassed the creditor and his conduct was intentional and committed with malice. Additionally, the other debtor intentionally committed retaliation against the creditor by forcing the creditor to withdraw her sexual harassment complaints or lose her job.

Sells v. Porter (In re Porter), *2007 Bankr. LEXIS 730 (Bankr. E.D. Ark. February 28, 2007) (Evans, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

§ 524 Effect of Discharge.

0407-117 **Approval of reaffirmation agreement denied as debtor's failed to rebut presumption of undue hardship.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Bankruptcy debtors asserted that, even though their projected income and expenses indicated that the debtors would be unable to continue to make payments on their vehicles, reaffirmation under 11 U.S.C. § 524 of debts to creditors secured by the vehicles would not impose an undue hardship in view of the debtors' post-bankruptcy need for their vehicles. The debtors moved for approval of reaffirmation agreements with the creditors.

OVERVIEW: The debtors recognized that undue hardship from reaffirmation was presumed in view of their apparent inability to continue making the required vehicle payments. However, the debtors contended that they needed the vehicles, which would be subject to repossession under their agreements with the creditors because the debtors were in default by filing for bankruptcy, even though the debtors were current in their payments. The bankruptcy court declined to approve the reaffirmation agreements since the debtors failed to overcome the presumption that reaffirmation would impose an undue hardship on the debtors. Because the debtors timely filed a statement of intent to reaffirm and timely performed such intent by executing the reaffirmation agreements, as provided under 11 U.S.C. § 362(h), the *ipso facto* clauses in the loan agreements were not enforceable, regardless of whether the reaffirmation agreements were approved or disapproved. Thus, unless the debtors failed to make required payments or were otherwise in default under the loan agreements, the creditors were precluded from repossessing the vehicles pursuant to the *ipso facto* clauses.

In Husain, *2007 Bankr. LEXIS 768 (Bankr. E.D. Va. March 5, 2007) (Huennekens, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.01**

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

0407-118 **Debts scheduled to become due may be deducted as expenses on Form B22A regardless of debtor's intent regarding payment or retention of collateral.** (*Bankr. M.D. Pa.)*

PROCEDURAL POSTURE: Movant U.S. Trustee ("UST") sought to dismiss the bankruptcy petition of respondent debtor pursuant to 11 U.S.C. § 707(b)(2).

OVERVIEW: The parties submitted a legal issue to the court — may a debtor deduct as an expense on Form B22A, debts he does not intend to pay that are secured by collateral that he does not intend to retain? The UST argued, that for purposes of the means test, Congress did not intend to permit debtors to deduct payments to secured creditors if they did not intend to reaffirm the debt and make the payments. Debtor asserted that the statutory language authorized him to deduct mortgage obligations for which he was contractually obligated notwithstanding his decision to surrender the property. The court's first task was to determine the meaning of 11 U.S.C. § 707(b)(2)(A)(iii)(I). It concluded that the phrase "scheduled as contractually due" referred to the payments due under a contract between a debtor and the secured creditor regardless of a debtor's intent with respect to retention of the collateral or reaffirmation of the debt. The court stated that a debtor's decision to surrender collateral securing a debt, while it may be a factor when analyzing abuse under the totality of the circumstances test under section 707(b)(3), could not be considered under the plain language of section 707(b)(2)(A)(iii)(I).

Stapleton v. Mundy (In re Mundy), *2007 Bankr. LEXIS 743 (Bankr. M.D. Pa. March 1, 2007) (France, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

0407-119 **Above-median debtors could take transportation ownership expense even for non-liened vehicles in calculating means test.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Two cases were before the court on the chapter 13 trustee's objections to confirmation of the debtors' chapter 13 plans.

OVERVIEW: At issue in both cases was whether above-median income debtors could take a transportation ownership expense for vehicles owned free and clear of any liens as part of the Internal Revenue Service Local Standards for transportation in calculating the means test under 11 U.S.C. § 707(b)(2) and in determining their disposable income under 11 U.S.C. § 1325(b)(2). The court concluded that the debtors were entitled to the transportation ownership expense even for vehicles owned free and clear of any liens. The court concluded that the applicable Internal Revenue Service Local Standards were fixed allowances, not caps. A plain reading of 11 U.S.C. § 707(b) allowed a deduction of the amounts listed in the Internal Revenue Service Local Standards even where the debtors' actual expenses were less. The court noted that while the Internal Revenue Manual did indicate that the transportation ownership standards were caps in the context of analyzing a taxpayer's ability to pay, 11 U.S.C. § 707(b)(2)(A)(ii)(I) deemed the debtors' expenses to be the "amounts specified" in the Local Standards. It nowhere incorporated wholesale all the IRS criteria for collection matters.

In re Crews, *2007 Bankr. LEXIS 729 (Bankr. N.D. Ohio February 23, 2007) (Haris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 727(a)(6)(A) Discharge; Grounds for Denial; Refusal to Obey Court Order; Any Lawful Order.

0407-120 **Debtor's failure to obey court order for turnover of income tax refunds was grounds for denial of discharge.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Defendant debtor filed his state and federal income tax returns which evidenced refunds in the amount of $6,258.00. The court ordered that debtor turnover to plaintiff trustee the nonexempt portion of his tax refunds. Receiving no payment from debtor, the trustee filed an adversary proceeding to deny discharge under 11 U.S.C. § 727 for refusal to follow the court's order. The trustee moved for summary judgment.

OVERVIEW: For purposes of 11 U.S.C. § 727(a)(6)(A), mere noncompliance with a court order was insufficient, by itself, to warrant denying a debtor's bankruptcy discharge. Instead, it was necessary to show that the debtor actually refused to obey the court order. A debtor would be found to have refused to obey a court order when the debtor's inaction would give rise to a charge of civil contempt. Here, the trustee met her burden with respect to each of the elements of the civil contempt test. In his answer to the trustee's complaint, debtor acknowledged that he received a copy of the court's order for turnover, and he did not contest the fact that he had not yet turned over his tax refunds to the trustee. Finally, the court's order for turnover was direct. The facts did not show that debtor's failure to turnover was defensible on the basis of impossibility or an inability to comply. The court found that debtor refused to comply with an order of the court in contravention to 11 U.S.C. § 727(a)(6)(A).

Parker v. Thompson (In re Thompson), *2007 Bankr. LEXIS 725 (Bankr. N.D. Ohio February 28, 2007) (Speer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.09[1]**

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

0407-121 **Hanging paragraph barred creditor's deficiency claim upon debtors' surrender of vehicle in full satisfaction of debt.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Bankruptcy debtors proposed a chapter 13 plan which provided for surrender of a vehicle to the creditor secured by the vehicle in full satisfaction of the debt to the creditor. The creditor objected to confirmation of the debtors' plan on the ground that it improperly precluded the creditor from asserting a deficiency claim.

OVERVIEW: It was undisputed that the debtors purchased the vehicle for their personal use and granted the creditor a purchase-money security interest in the vehicle within 910 days of their bankruptcy. The debtors contended that the unnumbered paragraph under 11 U.S.C. § 1325(a) was thus applicable to bar

any deficiency claim by the creditor, but the creditor argued that it was entitled to assert an unsecured claim for the deficiency. The bankruptcy court held that section 1325(a) applied to preclude bifurcation of the creditor's claim under 11 U.S.C. § 506(a) into a secured claim and an unsecured claim, and thus the creditor was barred from asserting an unsecured deficiency claim upon satisfaction of its secured claim.

***In re Harrell**, 2007 Bankr. LEXIS 763 (Bankr. E.D. Tenn. March 5, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0407-122 **Plan confirmed over objection of creditor to application of "hanging paragraph."** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: A secured creditor filed an objection to the proposed chapter 13 plan submitted by two chapter 13 debtors. The creditor's claim was secured by an automobile owned by the debtors. The debtors proposed, in their plan, to surrender the vehicle in full satisfaction of the debt owed to the creditor. The creditor contended that the proposed surrender of the vehicle did not meet 11 U.S.C. § 1325(a)(5) confirmation requirements.

OVERVIEW: The creditor argued that the surrender of the vehicle would be insufficient to satisfy its claim against the debtors. It objected to the plan on those grounds. The court noted that in prior decisions it had held that 11 U.S.C. § 1325(a) removed the ability of secured creditors to bifurcate their claims under 11 U.S.C. § 506(a) in certain circumstances. Pursuant to the "Anti-Cramdown Provision" in 11 U.S.C. § 1325, debtors were allowed to choose to surrender secured collateral under 11 U.S.C. § 1325(a)(5)(C) in full satisfaction of their debt, and the bankruptcy code left no avenues for creditors holding security interests in the surrendered collateral to claim a deficiency balance under state law or the Uniform Commercial Code. The requirements set forth in the "Anti-Cramdown Provision" applied to the debtors' case. They had purchased the vehicle for their personal use within the 910-day period proceeding the bankruptcy filing date, and the creditor had a purchase money security interest in the vehicle. Therefore, the debtors could surrender the vehicle, and the creditor could not bifurcate its claim under 11 U.S.C. § 506(a) or file an unsecured deficiency claim.

***In re Rice**, 2007 Bankr. LEXIS 548 (Bankr. E.D. Tenn. February 16, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06**

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

§ 1930(f)(1) Bankruptcy Fees; Waiver; Chapter 7 Debtor With Insufficient Income.

0407-123 **Debtors just over financial threshold for waiver of filing fee granted extension of payment schedule.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: The debtors filed a motion for reconsideration of the court's order denying their application for a waiver of the filing fee for their chapter 7 case under 28 U.S.C. § 1930(f)(1).

OVERVIEW: The debtors had a combined monthly income, all in the form of disability income, that exceeded 150 percent of the minimum poverty amount for a family of two by a relatively small amount. Thus, the court was prohibited from waiving the fee by 28 U.S.C. § 1930(f)(1). However, the court concluded that the debtors showed good cause why their installment payments should be extended for the full 180 days permitted by Fed. R. Bankr. P. 1006(b)(2). They were in still in the process of reconstructing their condominium following serious hurricane damage. The home remained unliveable because they ran out of FEMA funds and had no insurance on their own. They were using their disability income to make internal repairs as they were able to afford them. Thus, the court modified the payment schedule.

***In re Perez**, 2007 Bankr. LEXIS 738 (Bankr. S.D. Fla. February 27, 2007) (Olson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:9.05**

BANKRUPTCY RULES (Post-2005 Act)

Rule 3002(c) Filing Proof of Claim or Interest; Time for Filing.

0407-124 **Trustee permitted to pay late filed secured claim provided there were no objections.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Creditor, a homeowners' association, filed a motion to allow a late-filed proof of claim. Although no response opposing the motion was filed, nor did any party appear in opposition at the hearing, the court nevertheless had a concern whether a legal basis existed for granting the requested relief, and the court took the motion under advisement.

OVERVIEW: The court first concluded that a secured claim filed after the claims bar date in a chapter 13 case was subject to disallowance on that basis. Although a secured creditor 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 prior to the bar date in order to receive a distribution under the plan. To have imported the silence of Fed. R. Bankr. P. 3002(a) into the carefully-crafted exceptions in Fed. R. Bankr. P. 3002(c) would have defeated the very purpose of the claims bar date, which was to provide the certainty necessary to practical administration of a chapter 13 plan. To allow secured claims to be filed at any time during the plan period would throw distributions to other creditors into complete turmoil. However, the court noted that nothing its opinion suggested that the chapter 13 trustee was required to object to a late-filed claim or was prohibited (particularly after consulting with the debtor) from paying a late-filed claim if there was no prejudice to other creditors.

In re Arnold*, 2007 Bankr. LEXIS 711 (Bankr. E.D. Va. February 26, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:3002.03**

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

§ 305 Abstention.

0407-125 **Involuntary case dismissed where debtor had ceased operation and had limited assets.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Petitioning creditors filed an involuntary chapter 7 petition against the alleged debtor. The issue was whether the petition should be dismissed pursuant to 11 U.S.C. § 305.

OVERVIEW: The court concluded that a bankruptcy case was not in the best interests of the creditors or the debtor. The alleged debtor long ago ceased operations, and its assets were limited to an almost-completed lawsuit. There was little to administer but litigation. The litigation involved the alleged debtor's former chief executive officer and shareholder (CEO), who was also a petitioning creditor, and was essentially a two-party dispute. The evidence showed that the CEO filed the involuntary petition to affect the state court litigation, and the other petitioning creditors joined in lieu of filing the appropriate collection actions. However, the petitioning creditors had adequate remedies at state law, and the chance that the creditors would have realized a greater recovery in a liquidating bankruptcy was not borne out by the facts.

In re IBD, Inc.*, 2007 Bankr. LEXIS 702 (Bankr. D. Kan. March 3, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:305.01**

§ 327 Employment of Professional Persons.

0407-126 **Application of deceased debtor's counsel's law firm to be appointed as special counsel for administration of debtor's estate denied.** (*Bankr. N.D.W. Va.)*

PROCEDURAL POSTURE: The debtors, a husband and wife, filed for relief under chapter 11. While the matter was pending, the debtor husband died. Counsel for the debtors filed an application with the court to approve employment of the counsel's law firm as special counsel for the administration of the deceased debtor's estate, pursuant to 11 U.S.C. § 327. The creditors objected to the application.

OVERVIEW: The debtors filed a chapter 11 petition, listing assets in excess of $3.3 million and liabilities of $5 million. The creditors filed the only unsecured proof of claim, stating that they were owed about $4.5 million. After the debtor husband died, the court granted the debtors' authorization to employ the law firm for certain limited purposes. The court noted that the bankruptcy proceeding had been going forward, as much as possible, as if the death of the deceased debtor had not occurred. The proceeding largely involved the two unsecured creditors and the proposed plan would likely involve the disposition of property rather than being dependent on the future income of the deceased debtor. The debtors' property had become part of the chapter 11 bankruptcy estate at the time their petition was filed. Thus the deceased debtor's estate consisted of a contingent interest in any surplus, any property that had been exempted, and any property acquired after the petition was filed. The employment of the law firm as special counsel would serve to benefit the beneficiaries of the deceased debtor's estate, not the bankruptcy estate.

In re Estate of LaRosa*, 2007 Bankr. LEXIS 686 (Bankr. N.D.W. Va. February 28, 2007) (Flatley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.01**

0407-127 **Attorneys' fee application denied due to inadequate notice to creditors and illegible time records.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: The attorney who represented two bankruptcy debtors filed an application with the court seeking an award of $21,977.10 in attorneys' fees and $136.74 in costs for his representation of the debtors. The case was originally filed under chapter 7, it was later converted to a chapter 13 case, and it was changed back into a chapter 7 case in 2006. Both of the debtors died while the bankruptcy proceedings were pending.

OVERVIEW: The principal nonexempt asset owned by the debtors was a right to collect annual lottery payments. The chapter 13 trustee successfully moved to convert the case back to a chapter 7 case in 2006 after the sole surviving debtor failed to make payments under his confirmed chapter 13 plan and failed to turnover the lottery proceeds to her. The attorney filed his application in December 2006, two days before the surviving debtor died. The court noted that the application had to be denied because the attorney had not provided adequate notice to the debtors' creditors. Neither the application nor the notice of the hearing stated the date or the time of the hearing. The court disallowed, with prejudice, a $2,242.75 fee request for services provided by the attorney's secretary and other staff. The court's fee guidelines did not permit compensation for such services. It also disallowed, with prejudice, the attorney's claim for fees in connection with services that he provided when the case was a chapter 7 case, including his representation of the debtors during a 2001 adversary proceeding. Such chapter 7-related services fees did not qualify to be paid as a priority chapter 13 claim.

In re Keppert*, 2007 Bankr. LEXIS 573 (Bankr. N.D. Cal. February 15, 2007) (Tchaikovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.01**

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

0407-128 **Valuation established in chapter 13 case applied to redemption by debtors after conversion to chapter 7.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: After bankruptcy debtors' chapter 13 plan was confirmed and partially performed, the debtors' case was converted to chapter 7 and the debtors moved to redeem their vehicle at its published value, but the creditor secured by the vehicle asserted that the debtors were bound by the higher valuation for the vehicle which was established in the chapter 13 case.

OVERVIEW: The debtors contended that the value of the vehicle as set out in a market publication was the proper amount required to pay to the creditor for redemption of the vehicle. The creditor argued that, in the chapter 13 proceedings, the debtors challenged the value of the vehicle by objecting to the amount of the creditor's secured claim, the objection was sustained and the debtors' valuation was accepted, and thus the debtors were bound by the previously established valuation. The bankruptcy court held that, since the valuation of both the vehicle and the creditor's allowed secured claim actually occurred in the chapter 13 proceedings, under 11 U.S.C. § 348(f)(1) the valuation established by the chapter 13 case applied for redemption of the vehicle in the debtors' converted case. The value of the vehicle and the

amount of the creditor's claim were directly placed in issue by the debtor's objection to the claim, and finally determined by the court, and thus valuation occurred to support the application of section 348(f)(1).

In re Kowalski, *2007 Bankr. LEXIS 772 (Bankr. N.D. Ohio March 1, 2007) (Whipple, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:348.07**

§ 362 Automatic Stay.

0407-129 **National Labor Relations Board filing of notice of unfair labor practice charge violated stay.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: The debtors obtained a court order to sell their property, and the court scheduled an in-court auction. The court issued a notice of opportunity to submit bids and qualified bidders were required to deliver fully executed asset purchase agreements. The regional director of the National Labor Relations Board ("NLRB") filed a notice of pendency of an unfair labor practice charge. The creditors' committee filed a motion to strike and sought sanctions.

OVERVIEW: The debtors and the creditors' committee claimed that the notice of an unfair labor practice was not well grounded in law or in fact and that the actions of the NLRB constituted a chilling effect on the debtors' upcoming sale. The NLRB contended that further action was not warranted because immediately upon the filing of the motion to strike, the NLRB filed a notice of withdrawal of the notice and had provided the notice of withdrawal to all of the interested parties and potential purchasers known to the NLRB. The NLRB had filed a prepetition proof of claim for back pay and restitution on behalf of certain employees of the hospital. The court declined to award sanctions under Fed. R. Bankr. P. 9011. The court could not impose sanctions against the NLRB under Fed. R. Bankr. P. 9011(c)(1)(B) because the NLRB was represented by counsel. However, the court determined that because it found that the NLRB violated 11 U.S.C. § 362, it could also find that the NLRB was in civil contempt for filing the notice with an improper purpose.

In re Pan Am. Hosp. Corp., *2007 Bankr. LEXIS 561 (Bankr. S.D. Fla. February 13, 2007) (Cristol, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

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

0407-130 **Debtor's sale of cattle that served as collateral without accounting for proceeds rendered debt nondischargeable.** (*Bankr. M.D. La.)*

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bankruptcy debtor, seeking a determination that a debt to the creditor was not dischargeable under 11 U.S.C. § 523(a) based on the debtor's sale of the creditor's collateral, and seeking to deny the debtor a discharge under 11 U.S.C. § 727(a). The bankruptcy court conducted a trial.

OVERVIEW: The debtor operated a cattle company and pledged cattle and other collateral to secure loans from the creditor, but the debtor sold the cattle and did not account for the sale proceeds. The bankruptcy court held that the debt to the creditor was not dischargeable based on the debtor's willful and malicious injury to the creditor, and that the debtor was not entitled to a discharge based on the debtor's wrongful sale of the collateral, lack of adequate records, and failure to obey the court's order to appear for examination. Although the creditor failed to show that the debtor made misrepresentations at the time the loans were made, or that the creditor and the debtor had a fiduciary relationship, the debtor's disposal of the creditor's collateral was substantially certain to cause the creditor financial harm. Further, while there was no showing that the debtor intended to defraud the creditor, the debtor intended to hinder and delay the creditor in selling the collateral. Also, the debtor's records were clearly inadequate for the debtor's substantial cattle operations, and advice of counsel did not credibly explain the debtor's failure to obey the court's direct order to appear.

Guaranty Bank & Trust Co. v. Sanford (In re Sanford), *2007 Bankr. LEXIS 537 (Bankr. M.D. La. February 16, 2007) (Dodd, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.07**

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

0407-131 **Debt based on checks drawn on insufficient funds was nondischargeable.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: Plaintiff creditor provided floor-plan financing to defendant debtor so that the debtor could purchase inventory for his used car business. Plaintiff filed a claim against debtor for non-dischargeability of amounts that were owed because the debtor wrote bad checks to the creditor. The creditor sought partial summary judgment, claiming that collateral estoppel prevented the debtor from relitigating his liability for the eight bad checks.

OVERVIEW: The creditor and the debtor had a floor plan financing agreement, which included a security interest in collateral. Pursuant to the terms of the agreement, the debtor tendered eight checks to the creditor for payment on the inventory. The checks tendered to the creditor were not honored by the bank because the debtor did not have sufficient funds in his account at the time that the checks were made. The debtor was convicted in state court for the issuance of bad checks. The debtor's conviction in state court necessarily included an element of fraudulent intent. The debtor was precluded under the doctrine of collateral estoppel from re-litigating liability for the dishonored checks. The element of justifiable reliance required by 11 U.S.C. § 523(a) was found because the creditor gave the debtor title to the vehicles in return for the checks. All of the requisite elements for determination of nondischargeablility under 11 U.S.C. § 523(a)(2)(A) were established by the state court proceedings and collateral estoppel precluded the debtor from relitigating those issues.

Automobile Fin. Corp. v. Gray (In re Gray)*, 2007 Bankr. LEXIS 602 (Bankr. D. Neb. February 15, 2007) (Saladino, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

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

0407-132 **Debtor's failure to remit lottery proceeds was a breach of fiduciary duties and rendered debt nondischargeable.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: Plaintiff lottery corporation, which had obtained a judgment against defendant debtor in a state court, brought an adversary proceeding against debtor seeking to hold outstanding debts nondischargeable under 11 U.S.C. § 523(a)(4).

OVERVIEW: The state court found that debtor entered into several contracts with the corporation, and that each of these contracts created a fiduciary relationship. It determined that debtor had a fiduciary duty to preserve and account for the lottery proceeds and that debtor's failure to remit the proceeds was a breach of his fiduciary duties. The corporation advanced the argument that under the doctrine of issue preclusion, the existence of the judgment precluded debtor from relitigating or disputing any factual issues that were decided by the state court. Georgia law on issue preclusion was determinative in the case. The court found that the four requirements for issue preclusion were satisfied. Thus, factual findings made by the state court were determinative. Turning to 11 U.S.C. § 523(a)(4), the creditor had to prove that: (1) the debtor stood in a fiduciary relationship with the creditor; (2) the fiduciary relationship existed prior to the creation of the debt; and (3) the debt resulted from an act of defalcation. The court concluded that all of the elements of section 523(a)(4) were determined by the state court. Therefore, the debt was nondischargeable pursuant to section 523(a)(4).

Georgia Lottery Corp. v. Sadler (In re Sadler)*, 2007 Bankr. LEXIS 745 (Bankr. M.D. Ala. February 26, 2007) (Sawyer, B.J.).*

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

§ 523(a)(5) Exceptions to Discharge; Types of Debt Excepted; Alimony, Maintenance, or Support.

0407-133 **Postpetition support enforcement order against debtor violated stay and was void.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: This adversary proceeding was before the court upon a complaint in objection to defendant ex-husband's discharge filed by plaintiff ex-wife. The ex-wife sought a determination that monies owed to her by the ex-husband pursuant to a divorce decree were nondischargeable under 11 U.S.C. § 523(a)(5).

OVERVIEW: The parties filed jointly for chapter 13 bankruptcy prior to becoming divorced. In their divorce decree, the parties agreed to split payments to the chapter 13 trustee. Both parties made the payments for a certain period, but the ex-husband stopped making payments after he lost his job. The ex-husband then filed for chapter 7 bankruptcy and obtained an automatic stay. The ex-wife obtained a judgment from the state divorce court, which held the ex-husband responsible for the share of payments to the chapter 13 trustee that he failed to pay. The ex-wife then filed this action seeking a determination that the ex-husband's obligation to make the chapter 13 payments constituted spousal support and was nondischargeable. The court found that the state court judgment was void because the ex-wife was prohibited from commencing proceedings against him to enforce or collect under the divorce decree without first obtaining relief from the automatic stay. The court further found that the chapter 13 payments were not in the nature of support under 11 U.S.C. § 523(a)(5), but instead, were a division of the marital debts. Therefore, the ex-husband's liability for such payments was dischargeable.

Brooks v. Brooks (In re Brooks)*, 2007 Bankr. LEXIS 552 (Bankr. E.D. Tenn. February 15, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

§ 523(a)(6) Exceptions to Discharge; Types of Debt Excepted; Willful and Malicious Injury to Another Entity or Property of Another Entity.

0407-134 **Judgment for sexual exploitation of patient by debtor psychotherapist was based on willful and malicious injury and nondischargeable.** (*Bankr. M.D.N.C.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding, which sought to have a state court punitive damages award against defendant debtor excepted from discharge under 11 U.S.C. § 523(a)(6).

OVERVIEW: The creditor obtained a judgment against the debtor in North Carolina for $100,000 in punitive damages on negligence and sexual exploitation claims. The court held that the creditor proved by a preponderance of the evidence that the punitive damages award was a debt for willful and malicious injury by the debtor; therefore, the $100,000 due under the state court judgment was excepted from discharge, pursuant to section 523(a)(6). The court held that the debtor was bound, under collateral estoppel, by the findings of the jury in the state court action that the creditor, a patient, was injured when the debtor sexually exploited her, by sexual intercourse, touching of genitals, or other intentional acts listed in the jury instructions, while serving as her psychotherapist. The court held that collateral estoppel in tandem with the debtor's testimony that he knew that the acts described in the instructions were wrongful and certain to cause harm to a patient if committed by a psychotherapist were sufficient to show that engaging in the acts was unjustified and a knowing disregard of a patient's rights and, thus, that the injury was willful and malicious under section 523(a)(6).

Spell v. Longenecker (In re Longenecker)*, 2007 Bankr. LEXIS 801 (Bankr. M.D.N.C. February 26, 2007) (Stocks, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12**

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

0407-135 **Criminal restitution judgement payable to victim was nondischargeable.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 debtor filed an adversary proceeding complaint against defendants, the State of Arizona and a crime victim, seeking a determination of whether a criminal restitution judgment was a nondischargeable debt under 11 U.S.C. § 523(a)(7). The victim filed her own adversary proceeding complaint against the debtor addressing the same issue. The parties filed cross-motions for summary judgment in the consolidated proceedings.

OVERVIEW: The debtor was convicted of a crime in Arizona, and a criminal restitution judgment was entered against him. A state court later issued a transcript of a restitution lien under Ariz. Rev. Stat. § 13-806(A) for the unpaid restitution amount. It stated that, for federal bankruptcy law purposes, the judgment was a criminal penalty under section 13-806(l). The debtor alleged that 11 U.S.C. § 523(a)(7) did not apply to render the restitution judgment nondischargeable because the judgment actually benefitted the victim and not the State. The victim argued that the state court's order was binding and established the nondischargeable nature of the judgment. The court noted that the state court had ruled that the restitution judgment was a criminal penalty, but it had not ruled on whether the judgment was dischargeable for federal bankruptcy purposes. U.S. Supreme Court precedent held that the federal bankruptcy code should not be interpreted to allow for the remission of state criminal judgments. To interpret section 523(a)(7) as applying only when a government unit received the restitution proceeds would mean that restitution judgments would be treated differently in chapter 7 and chapter 13 cases.

***Reif v. Kaster (In re Reif)**, 2007 Bankr. LEXIS 562 (Bankr. D. Ariz. February 12, 2007) (Hollowell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.13**

§ 727(a)(4)(A) Discharge; Grounds for Denial; Fraud; False Oath or Account by Debtor.

0407-136 **Errors and omissions in schedules by financially unsophisticated debtors were not grounds for denial of discharge.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Creditor filed a complaint against chapter 7 debtors, seeking a denial of debtors' discharge pursuant to 11 U.S.C. § 727(a)(4)(A), alleging that debtors knowingly and fraudulently made false oaths in connection with their chapter 7 case.

OVERVIEW: Debtors, husband and wife, were the sole partners in a family business. Creditor was a former employee who was seriously injured in a work-related accident. Creditor was awarded a default judgment against debtors, who did not maintain workers compensation insurance. Creditor filed the instant adversary proceeding against debtors seeking a determination that his debt was nondischargeable and objecting to debtors' discharge. Creditor asserted that debtors made numerous false oaths and omissions on their Statement of Financial Affairs and in their bankruptcy schedules. The court dismissed the nondischargeability claim. In entering judgment against creditor on the denial of discharge claim, the court held that debtors were not financially sophisticated, and that the errors and omissions were the result of oversight and inadvertence rather than fraudulent intent. The court held that no assets were hidden, and the trustee's administration of the case was apparently not hindered by the errors. The court also held that most of the inaccuracies relied upon by creditor were technical, more in the nature of incorrect characterizations rather than wholesale omissions.

***Behnke v. Murphy (In re Murphy)**, 2007 Bankr. LEXIS 709 (Bankr. C.D. Ill. February 27, 2007) (Perkins, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.04**

0407-137 **Intentional errors and omissions in schedules made with intent to deceive were grounds for denial of discharge.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: An adversary proceeding was before the court upon the Complaint filed by plaintiff trustee objecting to the discharge of defendant debtors. The objection to discharge was grounded on 11 U.S.C. § 727(a)(2)(A), (a)(2)(B) and (a)(4)(A).

OVERVIEW: The court found that debtors' Statement of Financial Affairs and their bankruptcy schedules contained numerous material false statements and omissions. These omissions were glaring and were made intentionally, with the intent to deceive, or at the very least, with a reckless indifference

for the truth contained therein. As such, the trustee met his burden of proof that debtors were not entitled to a discharge pursuant to 11 U.S.C. § 727(a)(4)(A), the false oath or account provision. Additionally, debtors transferred funds and property within the year preceding the filing of their bankruptcy case, consisting of $8,200 to debtor's mother, and real property, with the intent to hinder, delay, and/or deceive their creditors, justifying a denial of discharge under section 727(a)(2)(A). Finally, their concealment of postpetition rental income also supported the denial of discharge under section 727(a)(2)(B). Overall, the record was replete with undisclosed transfers by debtors and with false statements and oaths. The lack of disclosure was so pervasive, with the actions of debtors so intertwined, that the court addressed the section 727(a)(2)(A), (a)(2)(B) and (a)(4)(A) issues collectively.

Roberts v. Montgomery (In re Montgomery)*, 2007 Bankr. LEXIS 722 (Bankr. E.D. Tenn. February 27, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.04**

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

0407-138 **Extended warranty service did not add value to vehicle for purposes of determining replacement cost.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Debtors moved to confirm their proposed chapter 13 plan. The creditor which held a security interest in the debtors' vehicle filed an objection. The issue was whether, by reason of an extended warranty, the creditor's secured claim was greater than the value of the vehicle.

OVERVIEW: The creditor included in the loan to finance the vehicle an advance to purchase the extended service warranty. The court stated that the warranty was similar to other types of improvements to collateral that became part of that collateral (such as a paint job). That the warranty was inseparable from the vehicle and so was subject to the creditor's lien, however, did not mean that the creditor was entitled, as it urged, to increase its secured claim by the discounted cost of the warranty. Because the debtors commenced their case prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the pre-BAPCPA law required the debtors to pay the replacement cost of the vehicle. There was no evidence before the court that the warranty added value to the vehicle above the replacement value, and the warranty did not justify adjustment to that value calculation.

Citifinancial Auto, Ltd. v. Flores (In re Flores)*, 2007 Bankr. LEXIS 599 (Bankr. N.D. Tex. February 13, 2007) (Lynn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06**

0407-139 **Creditor subject to "hanging paragraph" had no basis to assert unsecured claim after surrender of vehicle.** (*Bankr. N.D. Ala.)*

PROCEDURAL POSTURE: The debtor moved to confirm her chapter 13 plan. Creditor filed an objection to confirmation on the grounds that it was not adequately protected by the debtor's proposed plan pursuant to which the debtor proposed to surrender the creditor's collateral, a vehicle, in full satisfaction of the creditor's claim.

OVERVIEW: The issue was whether surrender under 11 U.S.C. § 1325(a)(5)(C) was in full satisfaction of a debt described in what was commonly referred to as the "hanging paragraph" following 11 U.S.C. § 1325(a). The court concluded that the hanging paragraph following 11 U.S.C. § 1325(a) applied to both 11 U.S.C. § 1325(a)(5)(B) and 11 U.S.C. § 1325(a)(5)(C). Without 11 U.S.C. § 506, a "910 creditor," *i.e.*, a creditor whose claim was subject to the hanging paragraph, had no statutory basis to assert an unsecured claim after surrender of its collateral.

In re Moon*, 2007 Bankr. LEXIS 593 (Bankr. N.D. Ala. January 26, 2007) (Caddell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06**

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

§ 1334(b) Bankruptcy Cases and Proceedings; Proceedings Arising Under or Arising In or Related to Cases Under Title 11.

0407-140 **Bankrutpcy court lacked jurisdiction over adversary proceeding alleging claims agains the President of the United States and Secretary of State not arising under Title 11 or relating to debtor's bankruptcy.** (*Bankr. D. Hawaii)*

PROCEDURAL POSTURE: Plaintiff claimant, appearing *pro se*, brought an adversary proceeding in which he filed a "Motion for Injunctive Relief and an Order Granting Claims for Relief, for Fraud by the Court." The debtor in the underlying case was an airline company. Also named as defendants were President George W. Bush and Secretary of State Condoleezza Rice, neither of whom appeared.

OVERVIEW: Though plaintiff's company, which appeared to be a corporation, had filed a proof of claim in the underlying chapter 7 liquidating bankruptcy, plaintiff filed the adversary proceeding as an individual. Therein, he asserted claims relating to dischargeability under 11 U.S.C. § 523(a)(2), (4) and (6) and also made claims relating to the sovereignty of the island of Kauai. The court sua sponte dismissed the complaint. Noting that the jurisdictional basis for an adversary proceeding was detailed in 28 U.S.C. § 1334(b) and required that such complaints "arise" under Title 11 or be related to cases thereunder, the court held that no such claim was made in the instant complaint. Surmising that plaintiff might have intended to seek dismissal of the underlying chapter 7 case, the court pointed out that the proper procedure for dismissal was by the filing of a motion under Fed. R. Bankr. P. 9014(a). Here, because there was no jurisdiction for the adversary proceeding instituted by plaintiff, the court held that the complaint was properly dismissed. It allowed plaintiff a short period of time within which to amend and, failing that, ordered the complaint dismissed with prejudice.

Waialeale v. Office of the Commander in Chief for the United States of America (In re Trans Hawaiian Servs.), *2007 Bankr. LEXIS 734 (Bankr. D. Hawaii March 1, 2007) (King, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:3.01[4]**