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Collier Bankruptcy Case Update

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May 21, 2007

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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.

0507-071 Expedited relief from stay granted to foreclosing creditor where family farmer filed second case less than 180 days after voluntary dismissal of first case. (Bankr. M.D. Ga.)

PROCEDURAL POSTURE: Debtor had filed a previous case under chapter 12. During the chapter 12 case, creditors received relief from the automatic stay with respect to certain real property. Stay relief was granted and the creditors began foreclosure. The debtor then voluntarily dismissed the chapter 12 case and filed the instant chapter 13 case before the creditors could complete the foreclosure. The creditors moved for relief from stay on an expedited basis.

OVERVIEW: The case implicated 11 U.S.C. § 109(g)(2), which provided that no individual or family farmer could be a debtor if he had been a debtor in a previous case during the preceding 180 days and if he requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by 11 U.S.C. § 362. In this case, the creditors initiated foreclosure proceedings by advertising the property for sale in reliance on a grant of stay relief. Based on a straightforward application of 11 U.S.C. § 109(g)(2), the debtor was ineligible to be a debtor in the instant case. Granting of the creditors' motion on an expedited basis was warranted under 11 U.S.C. § 362(f), which authorized the court to grant stay relief with or without a hearing if necessary to prevent irreparable damage to the interest of an entity in property, if such interest would suffer such damage before there was an opportunity for notice and hearing.

In re Parten, 2007 Bankr. LEXIS 921 (Bankr. M.D. Ga. March 13, 2007) (Walker, B.J.). Collier on Bankruptcy, 15th Ed. Revised 2:109.08

§ 109(h)(1) Who May Be a Debtor; Mandatory Credit Counseling; Approved Nonprofit Agency.

0507-072 Case dismissed as filed 187 days after debtors received credit counseling due to delay in obtaining signature of incarcerated debtor due to prison rules. (Bankr. D. Idaho)

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss debtors' chapter 13 case, alleging that debtors were not eligible for bankruptcy relief because they had not completed credit counseling within the 180 days preceding the filing of their petition as required by 11 U.S.C. § 109(h)(1).

OVERVIEW: Debtors encountered financial difficulties after debtor husband was arrested and the family car was seized. Debtors sought credit counseling and followed a payment plan for a year. The husband was again incarcerated and the wife met with the same credit counselor with whom she had met before. It was decided that bankruptcy was debtors' best option. Debtors paid an attorney but the attorney allegedly refused to return their phone calls or set an appointment to meet with them again. Debtors met with another attorney, who prepared the bankruptcy filing. There was a delay in obtaining the husband's signature because of prison mail regulations. As a result, the bankruptcy petition was filed 187 days after debtors had completed their credit counseling. In granting the trustee's motion to dismiss, the court held that none of the express exemptions to the credit counseling requirement enumerated in section 109(h) applied to debtors. The court also held that 11 U.S.C. § 105(a) could not be used to modify the time limit in 11 U.S.C. § 109(h)(1), nor to craft an additional equitable exception to section 109(h)(1). The court held that there was no room for the exercise of judicial discretion.

In re Ruckdaschel, 2007 Bankr. LEXIS 910 (Bankr. D. Idaho March 20, 2007) (Pappas, B.J.). Collier on Bankruptcy, 15th Ed. Revised 2:109.09[1]

§ 362(c)(3)(A) Automatic Stay; Duration; Cases Refiled Within One Year of Dismissal of Single Prior Case; 30 Days Postpetition.

0507-073 Stay in debtor's third chapter 13 case terminated after 30 days as to debtor and debtor's property only, not property of the estate. (Bankr. D. Md.)

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion to extend the automatic stay under 11 U.S.C. § 362(c)(3)(B) and a motion for a declaratory judgment as to the continuation of the stay as to property of the estate.

OVERVIEW: Debtor filed a third chapter 13 case. Because the prior chapter 13 case was dismissed within the preceding year, section 362(c)(3) applied. Debtor filed a motion to extend the automatic stay under section 362(c)(3)(B), however, due to counsel's error, the motion was not filed until after the expiration of the 30-day time limit under section 362(c)(3)(A). The servicing agent for the holder of a deed of trust on debtor's residence objected on the basis that the motion could not be considered because it was untimely filed. Debtor countered with a motion for a declaratory judgment, arguing that the stay did not terminate as to property of the bankruptcy estate, such as her residence. The court held that it could not consider debtor's untimely filed motion to extend the stay because the automatic stay terminated by operation of law on the 30th day postpetition under section 362(c)(3)(A). The court, however, held that section 362(c)(3)(A) functioned to incrementally terminate the stay only as to actions against debtor and property of debtor, not property of the estate. The court held that the servicing agent was precluded from instituting foreclosure proceedings against the residence.

In re Tubman, 2007 Bankr. LEXIS 893 (Bankr. D. Md. March 26, 2007) (Gordon, B.J.). **Collier on Bankruptcy**, **15th Ed. Revised 3:362.06**[3]

§ 362(k) Automatic Stay; Remedies for Violation.

0507-074 Loan servicer violated stay by requiring debtors to pay prepetition property taxes. (Bankr. S.D. Tex.)

PROCEDURAL POSTURE: Debtors commenced an action, seeking damages pursuant to 11 U.S.C. § 362(k) for defendant loan servicer's alleged violation of the automatic stay. Pending was the loan servicer motion to reconsider the court's January 26, 2007, order granting in part debtors' summary judgment motion.

OVERVIEW: The motion alleged that the court erred when it found that the alleged prepetition escrow shortage in the amount of \$3,543 included past-due escrow amounts that were to be applied to debtors' 2006 property tax obligation. Essentially, the loan servicer argued that because it paid the tax claim postpetition, it should be treated either as a postpetition obligation or as an administrative expense. The court stated that debtors' liability for their 2006 property taxes was a prepetition debt. The court found that there was no basis on which the loan servicer could increase the escrow payment to pay for taxes that accrued prepetition. The court concluded that the shortage of \$3,543 did not include any amounts calculated to reimburse the loan servicer for payment of the 2006 property taxes and accordingly, amended its prior memorandum opinion. Nevertheless, this correction did not alter the fact that the loan servicer willfully violated the stay when it required debtors' postpetition monthly mortgage escrow payment to include an amount to pay their 2006 property taxes, a prepetition debt. There was no issue of material fact as to violation of the 11 U.S.C. § 362 stay.

Campbell v. Countrywide Home Loans, Inc. (In re Campbell), 2007 Bankr. LEXIS 936 (Bankr. S.D. Tex. March 15, 2007) (Isgur, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 3:362.11

§ 506(b) Determination of Secured Status; Allowance of Interest, Fees, Costs and Charges.

0507-075 Creditor's attorney could not recover fees pursuant to state statute where underlying claim did not arise under state law. (Bankr. D. Idaho)

PROCEDURAL POSTURE: The debtors filed for relief under chapter 12. The debtors were allowed, pursuant to 11 U.S.C. § 366(b) to provide adequate assurance that payment of their obligation to the creditor would be made by giving the creditor a first position, postpetition lien in the debtors' dairy herd and milk receivables. The creditor filed a subsequent application for expenses and attorneys' fees under 11 U.S.C. § 506(b).

OVERVIEW: The debtors were given permission to provide the creditor with an assurance under 11 U.S.C. § 366(b). The debtors continued to have disputes with the creditor, a utility company, and the creditor ultimately filed its application for approval of an administrative expense and attorneys' fees. At the time of the hearing the creditor was oversecured based on the liens that it possessed and the fact that the debtors did not have an outstanding obligation to the creditor. It was undisputed that the creditor did not have a security agreement with the debtor that provided a right to recover attorney's fees. However the creditor claimed that it was entitled to fees under the language of 11 U.S.C. § 506(b), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and Idaho Code Ann. § 12-120(3). The court rejected the creditor's assertion that the amended 11 U.S.C. § 506(b) allowed for recovery of attorney's fees under the broad attorney fee statute under Idaho Code Ann. § 12-120(3). The creditor could not recover fees under a "state statute" unless the claim itself had arisen under a state statute that provided for attorney's fees and costs.

In re Astle, 2007 Bankr. LEXIS 892 (Bankr. D. Idaho March 22, 2007) (Myers, C.B.J.). Collier on Bankruptcy, 15th Ed. Revised 4:506.04

§ 507(a) Priorities; Order of Priorities.

0507-076 Claims by former spouse for payment of second mortgage on home was not based on support order and not entitled to priority status. (Bankr. M.D. Ala.)

PROCEDURAL POSTURE: A chapter 13 debtor objected to the 11 U.S.C. § 507(a) priority claim of his former spouse, which arose from the debtor's obligation under their divorce decree to pay a second mortgage on their marital residence.

OVERVIEW: A bank took a second mortgage on the spouse's home as collateral for a loan the debtor used for his business. Their divorce decree awarded the home to the spouse and required the debtor to pay the mortgage to the bank. The debtor objected to the priority status of his spouse's claim. The court concluded that the obligation to pay the mortgage on the home was not intended by the parties to provide support for the spouse and, thus, her claim was not entitled to priority in the chapter 13 case, pursuant to 11 U.S.C. § 507(a). The court found that the obligation was fixed in amount and not periodic, factors consistent with a property settlement; the obligation was not constructed to reduce the disparities in the parties' relative earning power; the spouse received an indirect benefit from the payment of the obligation directly to the bank; the debtor testified that the spouse knew that he was unable to comply with the decree when it was entered; and the decree did not denominate the obligation to pay the mortgage as alimony or property settlement, did not contain any such labels, and did not indicate whether the obligation was modifiable or terminable.

In re Davis, 2007 Bankr. LEXIS 953 (Bankr. M.D. Ala. March 15, 2007) (Williams, B.J.). Collier on Bankruptcy, 15th Ed. Revised 4:507.01

§ 521(a)(2) Debtor's Duties; Required Acts; Where Individual Debtor's Debt is Secured by Property of the Estate.

0507-077 **BAPCPA** eliminated "fourth" or "ride through" option with respect to secured debt. (Bankr. E.D. Pa.)

PROCEDURAL POSTURE: Before the court in the chapter 7 matter was debtor's Amended Motion to Redeem and Determine Rights in Property. A loan servicing agent opposed the Motion.

OVERVIEW: The issue presented was whether the so-called "fourth" or "ride-through" option, which previously allowed a debtor to keep her collateral if she was current on her payments to the secured creditor, even though she had not reaffirmed the debt or redeemed the collateral, remained the law following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Debtor argued that, because her postpetition payments were accepted by the loan servicing agent, she had chosen the ride-through option sanctioned in the Third Circuit's *Price* ruling. She asserted that the BAPCPA amendments in no way altered *Price*. The court concluded that amendments to the Bankruptcy Code made by BAPCPA effectively overruled the Price decision and eliminated the previously available ride-through option for debtors. Therefore, pursuant to 11 U.S.C. § 521(a)(2), debtor had to perform an intention with regard to the car. She could not simply continue to make payments and retain it postpetition. Section 521(a)(2) allowed the court to grant her additional time, for cause, to state and perform her intention with regard to the property in question.

In re Rice, 2007 Bankr. LEXIS 945 (Bankr. E.D. Pa. March 12, 2007) (Fitzsimon, B.J.). **Collier on Bankruptcy**, **15th Ed. Revised 4:521.10**

§ 524(1)(1) Effect of Discharge; Acceptance of Payments by Creditor; Before or After Filing of Reaffirmation Agreement.

0507-078 Reaffirmation agreement was unenforceable where payments exceeded funds available to debtor after expenses. (Bankr. E.D. Va.)

PROCEDURAL POSTURE: The debtor filed a motion for court approval of her reaffirmation agreement with the creditor. The debtor had an obligation with the creditor, which was secured by the debtor's automobile.

OVERVIEW: The debtor proposed in her motion to reaffirm that she owed a debt in the amount of \$5893 to the creditor, with a simple interest rate of 22%. The collateral securing the debt was a 1996 automobile originally purchased for the sum of \$7661 and valued upon the debtor's schedules at \$1175. The proposed payment on the reaffirmed obligation was 40 bi-weekly payments of \$147 each. The payments exceeded the amount that the debtor projected would be left over each month after considering the debtor's monthly income and expenses. The court noted that the debtor had done everything in her capacity to comply with the requirements of 11 U.S.C. § 362(h) and 11 U.S.C. § 521(a) and (d) was inapplicable to the case. The automatic stay and the discharge injunction would continue to protect the property of the debtor. The debtor was current on all of her payments owed to the debtor and had continued to maintain insurance on the vehicle postpetition. The court held that the creditor could continue to accept payments from the debtor, pursuant to 11 U.S.C. § 524(l)(1), but it could not repossess the vehicle without violating the automatic stay and the discharge injunction.

In re Stevens, 2007 Bankr. LEXIS 1045 (Bankr. E.D. Va. March 9, 2007) (Huennekens, B.J.). Collier on Bankruptcy, 15th Ed. Revised 4:524.10

§ 706(a) Conversion; By the Debtor.

0507-079 **Debtor's "atypical" behavior justified denial of motion to convert to chapter 11.** (Bankr. D. Utah)

PROCEDURAL POSTURE: Before the court was debtor's motion to convert to chapter 11. Debtor was one of five entities that were substantively consolidated in a separate chapter 11 case. Although the chapter 11 case was still pending, debtor commenced this chapter 7 case alone, and debtor sought to convert the case to chapter 11. The U.S. Trustee, the chapter 7 trustee, and two secured creditors objected. **OVERVIEW:** The objectors argued that the motion was made in bad faith. The court stated that, under 11 U.S.C. § 706(a) and (d), a chapter 7 debtor generally had a right to convert to chapter 11 so long as the debtor was eligible to be a debtor under chapter 11, has not previously converted the case to chapter 7 and was not converting the case in bad faith. Here, the totality of circumstances indicated a pattern of behavior whereby debtor had manipulated the provisions of the Bankruptcy Code and hindered the rights of its principal secured creditors in an effort to retain its farming property at any cost. Further, the court did not believe debtor was likely to be successful in another chapter 11 case when it was unsuccessful in the former chapter 11 case and with a certain person acting as its principal. Converting the case to chapter 11 was likely to further hinder and delay creditors and would have halted the trustee's

attempt to sell property of the estate. Debtor was the "atypical" debtor discussed in *Marrama*. Accordingly, the court elected to exercise its discretion under 11 U.S.C. § 105(a) and *Marrama* to deny the motion.

In re George Love Farming, LC, 2007 Bankr. LEXIS 1095 (Bankr. D. Utah March 23, 2007) (Thurman, B.J.). Collier on Bankruptcy, 15th Ed. Revised 6:706.02

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

0507-080 Presumption of abuse rebutted as unclaimed deduction for vehicle owned free and clear would leave debtors with no monthly disposable income. (Bankr. E.D. Ky.)

PROCEDURAL POSTURE: The debtors filed for relief under chapter 7. The trustee filed a motion for dismissal of the debtors' petition, pursuant to 11 U.S.C. § 707(b)(2). The chapter 7 debtors opposed the trustee's motion.

OVERVIEW: As required by 11 U.S.C. § 704(b)(1)(a), the trustee reviewed the materials and filed a statement of presumed abuse. The trustee thereafter filed the motion to dismiss, pursuant to 11 U.S.C. § 707(b)(2). The debtors filed an amended form in an effort to substantiate additional expenses which, if approved, would lower their monthly net disposable income sufficiently to rebut, if not avoid, the presumption of abuse. The debtors claimed that the expenses in the amended form related to their vehicles should be factored in as special circumstances under 11 U.S.C. § 707(b)(2)(B)(i). The vehicle ownership expenses calculated for the debtors' vehicles were \$471 for the first car, and \$332 for the second vehicle. The court found that the debtors had not claimed the \$332 deduction on their schedules because they did not owe money on the second car, and if they were allowed to do so they would have no monthly disposable income. The court found that the debtors could deduct applicable ownership expenses for the second vehicle, pursuant to 11 U.S.C. § 707(b)(2)(A)(ii)(1). The increase resulted in a negative monthly disposable income and removed the presumption of abuse.

In re Ragle, 2007 Bankr. LEXIS 874 (Bankr. E.D. Ky. March 23, 2007) (Scott, B.J.). Collier on Bankruptcy, 15th Ed. Revised 6:707.05

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

0507-081 Amount of debtors' nondischargeable student loan debt established "special circumstances" rebutting presumption of abuse. (Bankr. W.D. Okla.)

PROCEDURAL POSTURE: The U.S. Trustee ("UST") moved to dismiss debtors' chapter 7 petition on grounds that they failed to rebut the presumption of abuse arising under 11 U.S.C. § 707(b)(2) by demonstrating "special circumstances."

OVERVIEW: Among other things, the parties stipulated that debtors' schedules reflected \$134,058 in unsecured debt, \$72,000 of which was from non-dischargeable student loans. They agreed that the only legal issue to be decided was whether the amount of debtors' non-dischargeable student loans represented special circumstances under 11 U.S.C. § 707(b)(2)(B) such that they rebutted the presumption of abuse. "Special circumstances" was a fact-specific consideration. The court concluded that debtors carried their burden to document the additional expenses for their student loans. It further found that they had provided a detailed explanation for the additional expenses, namely that the loans were used to pay for their education and pertinent living expenses. The key issue remaining was whether debtors were left without a reasonable alternative. The court concluded that debtors did not have any reasonable alternative other than to pay the student loans. Finally, the presumption of abuse could only be rebutted when the resulting calculations satisfied 11 U.S.C. § 707(b)(2)(B)(iv). Here, inclusion of the student loans in debtors' expenses resulted in negative monthly income.

In re Templeton, 2007 Bankr. LEXIS 1002 (Bankr. W.D. Okla. March 8, 2007) (Bohanon, B.J.). Collier on Bankruptcy, 15th Ed. Revised 6:707.05[2]

§ 1301 Stay of Action Against Codebtor.

0507-082 Foreclosure sale in debtor's third case in one year period violated co-debtor stay. (Bankr. D. Md.)

PROCEDURAL POSTURE: Movant debtor filed a motion to avoid a respondent creditor's postpetition foreclosure sale of the debtor's residence as violating the codebtor stay of 11 U.S.C. § 1301.

OVERVIEW: The debtor and his codebtor jointly owned property on which there was a deed of trust in favor of the creditor. The debtor notified the creditor, on the day of the foreclosure sale of the property, that she filed a third bankruptcy case. The court held that the automatic stay of 11 U.S.C. § 362 did not arise upon the filing of the petition by operation of 11 U.S.C. § 362(c)(4)(A)(i) because the debtor had two prior bankruptcy cases dismissed during the one-year period preceding the petition date in the present case. However, the court granted the debtor's motion to avoid the postpetition foreclosure sale, which violated the codebtor stay of 11 U.S.C. § 1301 and was void. As supported by 11 U.S.C. § 365(p)(3), the clear and unambiguous language of 11 U.S.C. § 1301 and 11 U.S.C. § 362(c)(4)(A) did not limit the applicability of the codebtor stay in cases where 11 U.S.C. § 362(c)(4) was applicable. The court held that the creditor did not articulate a compelling basis to annul the codebtor stay because the prior dismissals were due to filing deficiencies and not abuse and the creditor had actual knowledge of the commencement of the case prior to the foreclosure sale.

King v. Wells Fargo Bank (In re King), 2007 Bankr. LEXIS 875 (Bankr. D. Md. March 20, 2007) (Catliota, B.J.). Collier on Bankruptcy, 15th Ed. Revised 8:1301.01

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

0507-083 Confirmation denied as state court reformation of mortgage to cover two tracts of land prevented debtor from proposing to make payments on one tract and surrender the other. (Bankr. W.D. Ky.)

PROCEDURAL POSTURE: A secured creditor objected to confirmation of a debtor's proposed first amended plan of reorganization under chapter 13.

OVERVIEW: The creditor's state court complaint for foreclosure alleged that, due to a scrivener's error, the legal description inadvertently omitted the first of two tracts and that the debtor and creditor intended the mortgage to encumber both of the debtor's tracts. The state court granted the creditor's request to reform the mortgage to correct the error and held that the real estate was indivisible and could not be divided without materially impairing its value. The debtor's chapter 13 plan proposed to make payments on the first tract and to surrender the second tract in full satisfaction of the debt. The court denied confirmation, pursuant to 11 U.S.C. § 1322(b)(2), because the creditor held a claim secured by real property that served as the debtor's principal residence and the debtor could not modify its rights as proposed in the plan. The consolidation of the two tracts, the state court judgment that the property was a single indivisible tract, and the reformed mortgage compelled the court to conclude that there was a single tract of land comprised of both tracts and that the state court adjudication was *res judicata* against the debtor's relitigation of the divisibility issue.

In re Cartwright, 2007 Bankr. LEXIS 866 (Bankr. W.D. Ky. March 23, 2007) (Stosberg, B.J.). Collier on Bankruptcy, 15th Ed. Revised 8:1322.06

§ 1322(b)(10) Contents of Plan; Discretionary Provisions; Payment of Postpetition Interest on Nondischargeable Unsecured Claims.

0507-084 Direct payment to student loan creditors allowed under plan for benefit of unsecured creditors. (Bankr. N.D. Ga.)

PROCEDURAL POSTURE: The debtors moved for confirmation of their chapter 13 plan in which they proposed to make regular monthly payments directly to their student loan creditors with a one percent payout to all other unsecured creditors. The chapter 13 trustee filed objections to confirmation on the grounds that the direct payments to the student loan creditors discriminated unfairly against the other unsecured creditors in violation of 11 U.S.C. § 1322(b)(10).

OVERVIEW: The debtors' student loan debt was a long term debt. If debtors were not allowed to continue their direct payments to the student loan creditors, they potentially faced the consequences of default upon completion of their chapter 13 plan payments, and such a result would have conflicted with the purpose of a fresh start. The alternative, disallowing direct payments to the student loan creditors, would have resulted in payment to the other, dischargeable, unsecured creditors of only an additional 0.2 percent dividend, which was negligible. Providing full payments to all unsecured creditors was not feasible. Because the debtors would have suffered needless accrual of interest and penalties if they could not make direct payments to the student loan creditors, and unsecured creditors would have enjoyed a disproportionately small benefit otherwise, balancing the equities supported confirmation of the plan. The court noted that, unlike cases that had disallowed direct payments on student loans, the debtors were not proposing to pay 100 percent of their student loans at the expense of their other unsecured creditors but simply proposed a continuation of the terms of the contract.

In re Webb, 2007 Bankr. LEXIS 978 (Bankr. N.D. Ga. February 22, 2007) (Murphy, B.J.). **Collier on Bankruptcy, 15th Ed. Revised 8:1322.13A**

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

Vehicle used for commuting but not for work related duties was for personal use so that debtors could not invoke hanging paragraph. (Bankr. W.D. La.)

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13. The creditor filed a claim based on a financing agreement made for the debtor's car. The creditor claimed that the car was acquired for personal use pursuant to 11 U.S.C. § 1325(a) and that the value of the creditor's claim could not be reduced to the value of the vehicle. The debtors objected to the creditor's claim.

OVERVIEW: The debtors claimed that the car was not acquired for personal use because one of the debtors used the vehicle to commute five miles each way to her place of employment. The debtor did not use the car at work and did not use the car to carry out any work-related duties. The debtors did not claim any deductions related to the car as business expenses on their federal tax returns. The creditor filed a secured claim for the entire balance of the loan. The court held that the vehicle at issue could be considered a personal use vehicle for purposes of applying 11 U.S.C. § 1325(a). The debtor testified that she acquired the car primarily for transportation to her place of employment, but that she did not use the car once she arrived at work. She did not use the car as part of a business or to carry out the functions of a job. Considering all of the facts and the totality of the circumstances, the court concluded that the car was acquired for personal use. Accordingly the debtors were precluded pursuant to section 1325(a) from reducing the value of the secured claim to the value of the vehicle.

In re Joseph, 2007 Bankr. LEXIS 1049 (Bankr. W.D. La. March 20, 2007) (Summerhays, 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.

0507-086 Bankruptcy court properly calculated "projected disposable income" in rejecting debtor's plan. (B.A.P. 1st. Cir.)

PROCEDURAL POSTURE: Appellant debtor challenged an order of the Bankruptcy Court for the District of New Hampshire denying confirmation of her chapter 13 plan. Appellee was the chapter 13 trustee.

OVERVIEW: Debtor procured a higher paying job just prior to her bankruptcy, and her proposed plan provided for no payment to her unsecured creditors. The issue on appeal was whether the bankruptcy court properly determined how to calculate a below-median income debtor's "projected disposable income," as that term was employed in 11 U.S.C. § 1325(b)(1)(B). The resolution of this question turned on whether (and/or how) the term "projected disposable income" differed from the unmodified term "disposable income," as defined in section 1325(b)(2). The court held that the income component of "projected disposable income" as set forth in section 1325(b)(1)(B) was the anticipated actual income of a debtor, subject to the Income Exclusions, during the plan commitment period. That construction gave meaning and effect to each of the terms "current monthly income," "projected," and "disposable income." The object was not to select the right form, but to reach a reality-based determination of a

debtor's capabilities to repay creditors. That object best preserved both the congressional formulation of section 1325(b) and the unaltered twin mandates of the Bankruptcy Code.

Kibbe v. Sumski (In re Kibbe), 2007 Bankr. LEXIS 1035 (B.A.P. 1st. Cir. February 20, 2007) (per curiam). **Collier on Bankruptcy, 15th Ed. Revised 8:1325.08[4]**

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

§ 101(5)(a) Definitions; "Claim"; Right to Payment.

0507-087 Case claiming injuries from exposure to benzene dismissed as claims existed at time of debtor's petition and plaintiffs received sufficient notice as "unknown creditors." (Bankr. M.D. Fla.)

PROCEDURAL POSTURE: Plaintiff debtors filed an adversary proceeding against defendants, a husband and a wife, to determine the dischargeability of defendants' claim against the debtors. Defendants had filed a personal injury action against the debtors alleging that they were injured because of exposure to benzene. Defendants filed a counterclaim for sanctions. The parties filed cross motions for summary judgment.

OVERVIEW: One debtor owned and operated a refinery in Houston, Texas, until March 1986. When the debtors filed for bankruptcy, they did not list defendants as creditors, because they were not known to the debtors. The debtors received a discharge in December 1986 after having sold the refinery to a third party. The husband had been employed as a fuel tank driver from 1971 to 1982 and alleged that in his position as a driver he had been exposed to benzene containing products from the debtor's refinery. Defendants filed a lawsuit against the debtor and 50 other unrelated parties alleging injury because of the benzene exposure. The court found that defendants were creditors with a claim, pursuant to 11 U.S.C. § 101(5)(a), at the time the debtors' chapter 11 petition was filed, even if the injury manifested itself after the confirmation of the plan. Defendants were properly categorized as unknown creditors, and publication notice satisfied their due process rights. The notice published by the debtors was reasonably calculated under the circumstances to provide notice of the need to file a proof of claim before the bar date. Defendants' claim was discharged pursuant to 11 U.S.C. § 1141(d).

Charter Int'l Oil Co. v. Young (In re Charter Int'l Oil Co.), 2007 Bankr. LEXIS 994 (Bankr. M.D. Fla. March 14, 2007) (Proctor, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 2:101.05

§ 108(c) Extension of Time; Actions Against Debtor.

0507-088 Look-back provision for fraudulent transfers in not tolled by operation of automatic stay. (Bankr. E.D.N.C.)

PROCEDURAL POSTURE: Defendant estranged husband filed a motion for summary judgment on plaintiff trustee's adversary proceeding, which sought to recover real property transferred by the debtor to the husband or, in the alternative, sought a sale of the husband's interest in the property with that of the debtor on the ground that the transfer was null and void under 11 U.S.C. § 548.

OVERVIEW: The transfer between the debtor wife and her husband occurred on June 5, 2003. The couple entered into a separation agreement on August 4, 2003. The husband filed for bankruptcy on January 16, 2004. The debtor filed for bankruptcy on October 4, 2005. The court allowed the husband summary judgment on the trustee's claims to avoid the fraudulent transfer under 11 U.S.C. § 548 because the transfer occurred more than one year prior to the filing of the debtor's bankruptcy petition. The court rejected the trustee's argument that 11 U.S.C. § 108(c) allowed for tolling due to the imposition of the automatic stay in the husband's bankruptcy. The court held that the look-back provision of 11 U.S.C. § 548, requiring that the transfer be made or incurred within one year before the date of the filing of the petition, was a substantive element and was not a statute of limitations; therefore, the tolling feature of 11 U.S.C. § 108(c) did not apply and the one-year look-back period was to be determined from the date of the filing of the debtor's petition.

Murray v. Lyon (In re Lyon), 2007 Bankr. LEXIS 577 (Bankr. E.D.N.C. January 9, 2007) (Doub, B.J.). Collier on Bankruptcy, 15th Ed. Revised 2:108.04

§ 330(a)(1) Compensation of Officers; Determination of Amount; Awards to Trustees, Examiners or Professional Persons.

0507-089 Bankruptcy court erred in allowing firm to collect postpetition fees from prepetition retainer (B.A.P. 10th Cir.)

PROCEDURAL POSTURE: Prior to filing their bankruptcy petition, appellee debtors hired appellee law firm and, as a retainer, the debtors paid the firm a cash amount and assigned their interests in tax refunds to the firm. Appellant bankruptcy trustee sought review of the judgment of the Bankruptcy Court for the District of Kansas which allowed the firm to recover its postpetition fees from the prepetition retainer under 11 U.S.C. § 330(a)(1).

OVERVIEW: The trustee contended that the firm's postpetition fees were not recoverable from the debtors' estate because the firm was not formally employed by the trustee with court approval under 11 U.S.C. § 327. The firm argued that the assignment transferred full ownership of the retainer to the firm, subject only to the debtors' contingent right of reversion, and therefore the retainer funds were not the debtors' property nor part of their estate. The bankruptcy appellate panel held that, under state law, the firm held only a contingent interest in the retainer, and thus the retainer remained property of the estate and was not available for payment of the firm's postpetition fees in the absence of approved employment. The retainer was held by the firm in its trust account only until services were performed and fees were earned, and the retainer remained the debtors' money until then. Even though the debtors held only a contingent right of reversion in the retainer, to the extent fees were not earned, such right was within the broad definition of property of the debtors' estate.

Redmond v. Lentz & Clark, P.A. (In re Wagers), 2006 Bankr. LEXIS 3962 (B.A.P. 10th Cir. November 28, 2006) (Thurman, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 3:330.04

§ 362 Automatic Stay.

0507-090 Case reinstated upon creditor's consent where debtor's employer withheld plan payments but did not remit funds to chapter 13 trustee. (Bankr. M.D. Ala.)

PROCEDURAL POSTURE: The chapter 13 trustee filed a motion to dismiss debtor's case for her failure to make plan payments as required. Debtor filed no response to the motion, and an order dismissing the case was entered. Subsequent to the dismissal of the case, creditor bank repossessed debtor's vehicle. Debtor filed a motion seeking an emergency hearing to reconsider the dismissal of her chapter 13 case.

OVERVIEW: Debtor contended that her employer had withheld her chapter 13 plan payments from her earnings pursuant to the court's order. The employer, according to debtor, failed to remit these funds to the chapter 13 trustee. Despite these facts, however, debtor failed to respond to the trustee's motion to dismiss. The court noted that once the chapter 13 case was dismissed, the automatic stay of 11 U.S.C. § 362 terminated by operation of law. The court was unaware of any authority whereby the automatic stay, once terminated, could be reimposed. Hence, the court could not order the bank to return the repossessed vehicle to debtor. Yet, in this case, the bank agreed to voluntarily return the vehicle to debtor. The court opined that the bank was impressed by the apparent fact that debtor's employer had withheld her plan payments as required by the court's income withholding order, but that the employer had failed to remit these funds to the chapter 13 trustee.

In re McNair, 2007 Bankr. LEXIS 920 (Bankr. M.D. Ala. January 12, 2007) (Williams, B.J.). Collier on Bankruptcy, 15th Ed. Revised 3:362.01

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

0507-091 **Debtor could not claim exemption in property recovered by trustee despite lack of objection.** (Bankr. D.N. Mex.)

PROCEDURAL POSTURE: The chapter 7 trustee recovered a postpetition transfer under the authority of 11 U.S.C. § 550. The debtor, following the recovery, claimed a homestead exemption in the property. The trustee asserted that under the express language of 11 U.S.C. § 522(g), the debtor could not claim an exemption in the recovered property even though no objection to the debtor's claimed exemption was filed.

OVERVIEW: The debtor argued that her claim of exemption could not be questioned because no timely objection was filed. The court rejected the debtor's argument that once the deadline for objections passed, her exemption survived any enforcement of other Bankruptcy Code provisions with regard to the exempt property. The trustee was not contesting the debtor's right to claim the exemption under 11 U.S.C. § 522(d). Instead, the trustee was enforcing section 522(g)'s prohibition on the exemption of property recovered by the trustee under the avoidance and recovery provisions found in sections 549 and 550. The deadline for filing objections did not bar the application of section 522(g). The court also rejected the debtor's argument that the effect of her exemption was to remove the property from the bankruptcy estate, and thus, the transfer could not have been avoided because she did not transfer "property of the estate." The debtor's reasoning was flawed because at the time of the transfer, no chapter 7 creditors meeting had been held, and the time for objection to exemptions had not expired. Therefore, the property was not yet exempt and was part of the estate at the time of the transfer.

In re Villegas, 2007 Bankr. LEXIS 872 (Bankr. D.N. Mex. March 22, 2007) (McFeeley, B.J.). Collier on Bankruptcy, 15th Ed. Revised 4:522.09

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

Bankruptcy court erred in requiring creditor to pierce corporate veil in dischargeability proceeding alleging fraud by individual debtor. $(N.D.\ Ala.)$

PROCEDURAL POSTURE: Before the court was an appeal from an order by the Bankruptcy Court for the Northern District of Alabama entering judgment in favor of appellee debtor and against appellant on its complaint in an adversary proceeding.

OVERVIEW: Appellant had objected to the discharge of debts under 11 U.S.C. § 523(a)(2), (4) and (6). Appellant had also objected to discharge under 11 U.S.C. § 727(a)(2)–(6). The instant court concluded that the bankruptcy court did not apply the proper legal standard to the claim under 11 U.S.C. § 523(a). Appellant was clearly asserting fraud claims against the debtor individually and presented evidence in support of those claims. The bankruptcy court's legal conclusion (requiring appellant to pierce the corporate veil in order to hold the debtor, who was the corporation's sole shareholder, individually liable for fraud) was a gross misapplication of the general common law of fraud, which was the appropriate standard when considering whether the actions of a debtor rose to the level of fraud sufficient to prevent dischargeability under section 523(a)(2)(A). The bankruptcy court's findings of fact in this case were entitled to no deference and could not be credited. Had the bankruptcy court properly considered the claims that the debtor individually committed fraud under section 523(a), it was possible that it would have reached a different conclusion on the claims under 11 U.S.C. § 727.

Elite Equip., Inc. v. Cornutt, 2007 U.S. Dist. LEXIS 22093 (N.D. Ala. March 19, 2007) (Guin, D.J.). **Collier on Bankruptcy, 15th Ed. Revised 4:523.01**

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

O507-093 Court ordered fees owed by debtor to former spouse's divorce counsel were dischargeable as not owed to spouse who was no longer obligated to the firm. (Bankr. S.D. Fla.)

PROCEDURAL POSTURE: Plaintiff law firm filed an action against defendant debtor, claiming that an attorney fee obligation to the law firm, which arose when the law firm represented the debtor's former spouse in divorce proceedings, was not dischargeable under 11 U.S.C. § 523(a)(5). The parties filed cross motions for summary judgment.

OVERVIEW: In 1995, the debtor's former spouse signed a retainer agreement with the law firm to represent her in a divorce proceeding. A state court dissolution proceeding ordered the debtor to pay \$43,000 in fees to the law firm. The law firm also obtained a charging lien against any proceeds obtained by the former spouse in the divorce proceedings. Almost 10 years later, the debtor petitioned for relief under chapter 7. The law firm brought an adversary proceeding seeking judgment under 11 U.S.C. § 523(a)(5) as a debt to a former spouse. At that time the former spouse did not have an enforceable obligation to pay the law firm under the retainer agreement. The court found that the fee judgment was a debt in the nature of support. However, it was not a debt that could be treated as a debt to a former spouse under 11 U.S.C. § 523(a)(5), because it was an obligation to a third party and the former spouse

was no longer liable on the debt. On the date of the bankruptcy petition, the former spouse was no longer liable under the retainer agreement.

Simon, Schindler & Sandberg, LLP v. Gentilini (In re Gentilini), 2007 Bankr. LEXIS 929 (Bankr. S.D. Fla. March 12, 2007) (Mark, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.11

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

0507-094 Debtor with HIV and caring for young son whose teaching career was hampered by criminal convictions granted undue hardship discharge of student loan debt. (Bankr. M.D. Ga.)

PROCEDURAL POSTURE: Plaintiff debtor brought a complaint against defendant creditor, the holder of nineteen consolidated, guaranteed student loans of debtor, seeking dischargeability of student loans pursuant to 11 U.S.C. § 523(a)(8). The United States, on behalf of the U.S. Department of Education ("DOE"), was a holder of thirteen consolidated, guaranteed student loans of debtor, and was also a defendant in the case. Pending was judgment.

OVERVIEW: The issue was whether debtor's repayment of her student loan debt would have imposed an "undue hardship" upon her and her son as that term was used in 11 U.S.C. § 523(a)(8). Debtor carried the burden of proving, under the first prong of the Brunner test, that she could not maintain, based upon her current income and expenses, a minimal standard of living for herself and her son if forced to repay her student loans, no matter how small the payment amount may have been. Debtor also satisfied her burden of proving that additional circumstances existed suggesting that her state of affairs was likely to persist for a significant portion of the repayment period of the loan. Debtor, stuck in poverty since 1999, had been hindered greatly by her criminal conviction, which affected the marketability of her teaching certificate, somewhat by her back injury and surgery, and in some degree by her serious HIV medical condition. She thus satisfied prong two of the Brunner test. Finally, she satisfied prong three of Brunner, which required a showing that she made efforts to satisfy the debt by all means — or at least by some means — within her reasonable control.

Douglas v. Educational Credit Mgmt. Corp. (In re Douglas), 2007 Bankr. LEXIS 928 (Bankr. M.D. Ga. March 14, 2007) (Laney, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.14

0507-095 **Student loan did not need to be federally administered to be nondischargeable.** (Bankr. D. Ariz.)

PROCEDURAL POSTURE: Plaintiff debtor filed a complaint for declaratory relief to determine the dischargeability of his student loan obligations to defendant creditor, a student loan financing corporation, under 11 U.S.C. § 523(a)(8).

OVERVIEW: The creditor extended educational loans to the debtor through a program that was not funded in any way by a governmental unit or nonprofit institution, but the program loans were classified as "qualified educational loans" by the IRS. It was undisputed that the debtor received the loans as an "educational benefit," and he was not seeking to discharge them based on undue hardship. The court concluded that the debtor's student loan was nondischargeable under the plain meaning of 11 U.S.C. § 523(a)(8). The court disagreed with the debtor's claim that loans from private lenders were not covered by the statute. The creditor was not a for-profit vocational training school that used financial aid to recruit students. Instead, it loaned money only to students who attended post-secondary schools that participated in federal student aid programs administered by the government. To hold that section 523(a)(8) applied to loans given only by governmental units or nonprofit entities departed from the plain meaning of the statute, which provided a broad description of obligations to repay money modified only by the words "received as an educational benefit."

Micko v. Student Loan Fin. Corp. (In re Micko), 2006 Bankr. LEXIS 3964 (Bankr. D. Ariz. December 5, 2006) (Curley, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.14

0507-096 Graduate and professional student account and deferment agreement constituted a nondischargeable student loan. (D. Or.)

PROCEDURAL POSTURE: Plaintiff debtor sought judicial review of a bankruptcy court's grant of summary judgment in favor of defendants, a university and an individual, and held that a debt was an educational loan under 11 U.S.C. § 523(a)(8) and was nondischargeable; and that defendants did not violate the discharge injunction.

OVERVIEW: The debtor executed a graduate and professional student account and deferment agreement in which she agreed to pay for educational services she obtained from the university. The debtor used the agreement to attend the university. The debtor filed a voluntary petition for bankruptcy under chapter 7 and an order that discharged her debts was issued and the case was closed. During the bankruptcy case, the debtor took no action to seek a specific determination that her debt to the university was discharged. The university obtained a judgment against the debtor. The debtor then filed an adversary proceeding against defendants alleging the debt had been discharged and defendants violated the discharge injunction. The district court found that the nature of the debt was to provide the debtor the convenience of charging tuition and related educational expenses to an account which would be paid monthly or late fees would be added. The debt was a student loan as contemplated by 11 U.S.C. § 523(a)(8) and was nondischargeable. Because the debt was not discharged, defendants did not violate the discharge injunction by attempting to collect it.

McKay v. Vanderbilt University (In re McKay), 2007 U.S. Dist. LEXIS 20143 (D. Or. March 19, 2007) (King, D.J.). Collier on Bankruptcy, 15th Ed. Revised 4:523.14

0507-097 Tuition obtained through college's deferred payment plan was a nondischargeable student loan. (Bankr. W.D. Mo.)

PROCEDURAL POSTURE: Defendant debt collector filed a motion for summary judgment in chapter 7 debtor's action, which alleged that the debt collector and defendant college violated the discharge injunction by attempting to collect a debt owed to the college by debtor that was discharged by the discharge order entered in debtor's bankruptcy case. Debtor filed a motion for summary judgment.

OVERVIEW: Debtor was a student at the college. The college agreed to allow debtor to pay tuition through its deferred payment plan. Debtor executed a contract and promissory note in favor of the college. Debtor owed the college money under the note when he filed for chapter 7 relief. Debtor did not file an adversary proceeding requesting the court to discharge his debt to the college. Debtor argued that his debt owed to the college was discharged pursuant to 11 U.S.C. § 523(a)(8) because it was not a loan as required under section 523(a)(8), and he did not receive a loan through a program funded by the college as required by section 523(a)(8). The court held that actual money need not have changed hands between debtor and the college, and that the parties' intent that the transaction was a loan was clearly evidenced by the contemporaneous execution of a promissory note. The court also held that the college "funded" the plan by extending credit to debtor in the form of a promissory note and in turn took the risk that should debtor default on the note it might not receive its right to repayment of the funds loaned pursuant to the note

Gakiny v. Columbia College (In re Gakinya), 2007 Bankr. LEXIS 860 (Bankr. W.D. Mo. March 20, 2007) (Dow, B.J.). Collier on Bankruptcy, 15th Ed. Revised 4:523.14

§ 524 Effect of Discharge.

0507-098 Discharged debtor who had not been pursued post-discharge could not claim violation of discharge injunction on behalf of non-debtor spouse. (Bankr. N.D. Ga.)

PROCEDURAL POSTURE: Plaintiff debtor brought an adversary complaint against defendants, a state judge, attorneys, and a creditor, alleging they conspired to commit fraud and violate the discharge injunction and automatic stay in violation of 11 U.S.C. § 524 for pursuing a judgment against his non-debtor wife on a discharged debt. The various defendants each filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

OVERVIEW: Debtor received a chapter 7 discharge in 2003. Included in the discharged debts was his obligation to creditor. In 2005, creditor commenced an action against the debtor's spouse as an alleged co-obligor on the account. The bankruptcy court concluded that defendant attorneys raised a basis for

dismissal under Fed. R. Civ. P. 12(b)(6) in their answer and so could later file a motion to dismiss, to be construed as a motion for judgment on the pleadings. The court noted that debtor himself had not been sued post-discharge by creditor to recover the discharged debt. Debtor's wife was not a party to the bankruptcy case and was not subject to the discharge order. Debtor therefore could not state a claim for any violation of the discharge injunction. The wife's allegations did not constitute a claim under title 11, and the matter was not related to the debtor's closed bankruptcy case for purposes of 28 U.S.C. § 157(c). Debtor could not collaterally attack the state judge's orders, entered in an official capacity in a case over which the judge was presiding. Appeal was the proper vehicle for his wife to pursue. The bankruptcy court thus also lacked jurisdiction.

Ghee v. Retailers Nat'l Bank (In re Ghee), 2007 Bankr. LEXIS 1021 (Bankr. N.D. Ga. February 23, 2007) (Bonapfel, B.J.).

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

§ 547(e)(2)(B) Preferences; Perfection and Effectiveness; Effectiveness; Perfection After 10 Days.

Transfer of security interets in property took place upon delivery which was outside of 90 days prior to filing and were not preferential. (Bankr. N.D. Ga.)

PROCEDURAL POSTURE: Chapter 7 trustee sought to avoid, as preferential transfers under 11 U.S.C. § 547(b), first and second priority purchase money security deeds held by creditor on debtor's residence that were presented for recording ten and six weeks, respectively, after their execution and funding and within 90 days of debtor's bankruptcy filing. Trustee and creditor filed cross-motions for summary judgment.

OVERVIEW: Debtor purchased a home and executed two security deeds in favor of creditor. The proceeds from the two loans were used to pay the purchase price due to the seller and to pay an amount to a bank to satisfy its existing security deed. The warranty deed from the seller by which debtor acquired the residence was recorded after recordation of the second priority security deed and at the same time as the first priority security deed. The court held that creditor's security deeds were perfected within the meaning of section 547(e)(1)(A) at the time they were executed and delivered because, under state law, a bona fide purchaser would have had inquiry notice of them at all times prior to their recordation based on debtor's absence of record title and the existence of the cancelled security deed on the property in favor of the bank. As such, the transfers took place under section 547(e)(2)(B) at the time of their execution and delivery, and the transfers were not for or on account of an antecedent debt and were not made within 90 days of the bankruptcy filing, as required by section 547(b)(2) and (b)(4) for trustee to prevail.

Watts v. Argent Mortg. Co., LLC (In re Hunt), 2007 Bankr. LEXIS 1020 (Bankr. N.D. Ga. February 23, 2007) (Bonapfel, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:547.05

§ 707(b) Dismissal; Substantial Abuse Test.

0507-100 Parochial school tuition, additional life insurance and soccer expenses were not reasonably necessary, leading to dismissal for substantial abuse. (Bankr. E.D. Mo.)

PROCEDURAL POSTURE: The United States Trustee ("UST") filed a motion to dismiss the debtors' chapter 7 bankruptcy case for substantial abuse under 11 U.S.C. § 707(b).

OVERVIEW: The debtors stipulated that they could pay 35% of their non-priority unsecured claims in a chapter 13 plan if they reduced their expenses by \$750. The court granted the UST's motion to dismiss the chapter 7 case for substantial abuse under 11 U.S.C. § 707(b) because the debtors had sufficient disposable income to fund a chapter 13 plan. The court found that the monthly \$505 expense for parochial school tuition was not reasonably necessary under 11 U.S.C. § 1325(b)(2) to support or maintain the debtors' children because the public school students had above average standardized test scores, the debtors' children could still participate in parish activities and athletics if they did not attend the parochial school, and construction at the public school was complete. The portion of the premium on the debtor husband's whole life policy that increased the policy's cash value and the entire premium paid for the children's life insurance policies did not constitute a reasonably necessary expense. The court held that the \$158

monthly expense for the children's soccer clubs and camps was not reasonably necessary because they could continue to play soccer for the local parish team.

In re Schott, 2007 Bankr. LEXIS 1027 (Bankr. E.D. Mo. March 23, 2007) (McDonald, B.J.). Collier on Bankruptcy, 15th Ed. Revised 6:707.04

§ 726(a)(3) Distribution of Property of the Estate; Order of Distribution; Tardily Filed Claims.

0507-101 Adversary proceeding and motion for relief from stay did not constitute informal proof of claim. (Bankr. N.D. Ind.)

PROCEDURAL POSTURE: The matter was before the court in connection with the chapter 7 trustee's objection to a proof of claim filed by a claimant, debtor's ex-wife.

OVERVIEW: The deadline for filing claims expired on August 11, 2004. Both the claimant and her counsel received appropriate notice of it. One day after it passed, the claimant's counsel filed a claim on her behalf for more than \$3,200,000. Because it was filed after the bar date had passed, the trustee, pursuant to 11 U.S.C. § 726(a)(3), asked that any distribution it might receive be subordinated to full payment of all timely filed claims. In response, the creditor's current counsel argued that an adversary proceeding, as well as a motion for relief from stay and abandonment, which had been filed on the creditor's behalf before the expiration of the bar date, constituted an informal proof of claim and that the late claim should be viewed as an amendment of those earlier filings. As such, it should relate back to the date they were first submitted and becomes timely. The court stated that it had no equitable power to allow late claims except under the circumstances specified by the Bankruptcy Code and the applicable rules of procedure, and that the informal claim concept should be tethered rather closely to its roots. The claimant's filings did not qualify as an informal proof of claim.

In re Fink, 2007 Bankr. LEXIS 1149 (Bankr. N.D. Ind. March 15, 2007) (Grant, B.J.). **Collier on Bankruptcy**, **15th Ed. Revised 6:726.02**[3]

§ 727(a)(4) Discharge; Grounds for Denial; Fraud.

0507-102 Discharge denied due to debtor's failure to list maiden name in which she took title to certain property and due to unexplained loss of assets. (Bankr. S.D. Fla.)

PROCEDURAL POSTURE: Chapter 7 trustee sought denial of debtor's discharge pursuant to 11 U.S.C. § 727(a)(3), (a)(4) and (a)(5).

OVERVIEW: Trustee alleged that debtor was the title owner of numerous parcels of real property, but could offer no information regarding the property transfers when questioned at her examination. The court held that debtor's limited education and business experience, her general reliance on her children, and the fact that the real estate transactions were orchestrated by debtor's son and former daughter-in-law, all supported debtor's justifiable expectation that she did not have to maintain records of the real estate transactions. Trustee also argued that debtor knowingly and fraudulently made a false oath on her schedules, within the meaning of section 727(a)(4) by failing to list her maiden name, which she used to take title to certain parcels of real property. The court held that debtor's omission of her maiden name was a deliberate false oath and that the false oath was material because omission of the name by which debtor knowingly held title to property interfered with trustee's ability to determine debtor's eligibility for discharge. The court also held that a denial of discharge was warranted because debtor failed to present satisfactory evidence to explain the loss of certain assets.

Dunn v. Quiepo (In re Quiepo), 2007 Bankr. LEXIS 1040 (Bankr. S.D. Fla. March 23, 2007) (Isicoff, B.J.). **Collier on Bankruptcy, 15th Ed. Revised 6:727.04**

§ 727(a)(8) Discharge; Grounds for Denial; Previous Chapter 11 Discharge within Six Years.

Bankruptcy court properly denied discharge in converted chapter 7 case filed within eight years of prior chapter 7 discharge. $(N.D.\ Cal.)$

PROCEDURAL POSTURE: Appellant debtor appealed the decision of the bankruptcy court that denied her discharge pursuant to 11 U.S.C. § 727(a)(8).

OVERVIEW: The debtor had filed for relief under chapter 11 in 1998. The bankruptcy court converted the case to a debt liquidation case under chapter 7 and discharged the debts. The case closed in 2002. In 2000, the debtor filed a second bankruptcy petition under chapter 11. The bankruptcy court converted the second petition to a chapter 7 case, and the debtor appealed the order of conversion. While the appeal was pending, the United States trustee filed a complaint and opposed the discharge of the debts under the second bankruptcy petition. The debtor never responded to the complaint and the bankruptcy court issued an order to show cause why judgment should not be entered. The bankruptcy court considered the merits of the debtor's opposition before it denied discharge. The district court found that the debtor was not denied a discharge as a result of a default judgment entered against her; she was denied a discharge because she was ineligible to receive one as a matter of law. The bankruptcy judge did not exhibit prejudice or bias that amounted to a violation of 28 U.S.C. § 455(b)(1); the debtor's accusations amounted to little more than disagreement with the judge's rulings.

McColm v. Kistler, 2007 U.S. Dist. LEXIS 21306 (N.D. Cal. March 7, 2007) (Illston, D.J.). **Collier on Bankruptcy**, **15th Ed. Revised 6:727.11**

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

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

0507-104 Adversary proceeding that would not involve substantial decisions under non-bankruptcy law did not call for withdrawal of reference. (S.D. Ohio)

PROCEDURAL POSTURE: Defendants filed a motion to withdraw the reference of an adversary proceeding from the bankruptcy court.

OVERVIEW: Defendants' motion advanced three reasons for the withdrawal: that it was required under 28 U.S.C. § 157(d); that the court was permitted to withdraw the case under that statutory section, and because the movant, who are defendants in the adversary proceeding at issue, had demanded a jury trial which could not be conducted in the bankruptcy court. The court noted that in order for the mandatory provision of section 157(d) to apply, the bankruptcy court was required to make more than a passing or incidental reference to non-bankruptcy law in order to decide the matter before it. The court concluded that the adversary proceeding was not one which would necessarily involve decisions under non-bankruptcy federal law in order to resolve the trustee's claims. The trustee suggested that it could be possible to resolve the issues in the adversary proceeding without reaching the legal claims that the bankruptcy court ordered substantive consolidation of the parties.

Nicole Energy Servs. v. McClathey, 2007 U.S. Dist. LEXIS 21171 (S.D. Ohio March 26, 2007) (Smith, D.J.). Collier on Bankruptcy, 15th Ed. Revised 1:3.04

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

0507-105 Unliquidated tort claim based on exposure to PCBs manufactured by debtor was not subject to mandatory abstention. (S.D.N.Y.)

PROCEDURAL POSTURE: Plaintiffs, employees of an electric company, filed an action against defendants, three corporations that were formed from a company that had manufactured polychlorinated biphenyls ("PCBs"), claiming that they suffered serious personal injuries because of exposure to PCBs. Defendants removed the action from state court. Before the court was plaintiffs' motion to remand the action to state court.

OVERVIEW: One of the defendant corporations, hereinafter referred to as the debtor, had agreed to indemnify the other two defendant corporations and had filed a chapter 11 bankruptcy petition. Noting that plaintiffs sought damages in the billions of dollars and that any judgment obtained against the non-debtor defendants would be passed on to the debtor, the court concluded that the action was properly removed pursuant to 28 U.S.C. § 1334(b) and 1452(a) because the outcome of the instant action could have had a substantial effect on the debtor's bankruptcy estate. The court was not required to abstain from entertaining state law claims because 28 U.S.C. § 157(b)(4) provided that mandatory abstention under 28 U.S.C. § 1334(c)(2) did not apply to unliquidated personal injury tort claims against a bankruptcy estate. The court declined to exercise its discretion under 28 U.S.C. § 1334(c)(1) and 1452(b) to abstain from exercising jurisdiction because an equitable remand was not appropriate where the state's interest in the

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case did not outweigh concerns of efficient resolution, relatedness to the bankruptcy proceeding, and possible preemption by federal defenses.

Abbatiello v. Monsanto Co., 2007 U.S. Dist. LEXIS 19790 (S.D.N.Y. March 8, 2007) (Wood, D.J.). **Collier on Bankruptcy, 15th Ed. Revised 1:3.05**