June 2007

Collier Bankruptcy Case Update

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June 4, 2007 Issue 1

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§ 101(14A) Definitions; "Disinterested Person"; Creditor, Equity Security Holder or Insider Excluded.

0607-001 **Legal fees accrued in defending debtor in support proceeding was not a nondischargeable domestic support obligation.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: A debtor's former divorce lawyer filed a motion for relief from the automatic stay concerning a prepetition fee award issued in post-divorce litigation between the debtor and his former wife. The debtor opposed the motion.

OVERVIEW: The debtor's former divorce lawyer requested a finding that the collection of the fee award from exempt property of the debtor was not subject to the stay as a domestic support obligation or to grant him relief from the stay to collect the award. The court denied the lawyer's motion to collect the fee award as a domestic support obligation against the exempt retirement accounts. The court held that, because the debtor timely filed an exemption claim and no party in interest objected thereto, the retirement accounts were exempt property and not property of the debtor's bankruptcy estate, pursuant to 11 U.S.C. § 522(d). The court held that the fee award was not a domestic support obligation under 11 U.S.C. § 101(14A) because the lawyer was employed by the debtor to represent him in the litigation and did not represent the debtor's former wife, their children or a guardian ad litem; therefore, the award resulted from and was occasioned by his representation of the debtor and, ultimately, was based upon the contractual relationship between client and lawyer.

***In re O'Brien**, 2007 Bankr. LEXIS 1347 (Bankr. D. Mass. April 17, 2007) (Somma, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.14A**

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

0607-002 **Petition preparers held jointly and severally liable for numerous violations.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: The United States Trustee filed a consolidated motion in two bankruptcy cases for the imposition of fines pursuant to 11 U.S.C. § 110(l)(1) and (2)(D) and for forfeiture of compensation pursuant to section 110(h) against two bankruptcy petition preparers.

OVERVIEW: One of the preparers offered to assist the debtor in retaining his home by avoiding foreclosure through bankruptcy. The preparer referred the debtor to a second preparer, who falsely represented himself as an attorney and prepared a petition that the debtor filed. The case was dismissed for failure to file a statement of financial affairs, schedules, and a plan. The preparer sent the debtor the required documents, which were filed by the debtor in a second case. None of the documents were accompanied by a bankruptcy petition preparer compensation disclosure statement. The court held that the preparers violated numerous provisions of section 110 by failing to sign and print their names and addresses, and place an identifying number, on the filed documents, failing to provide the debtor with the required written notice, failing to file the required bankruptcy petition compensation disclosure statement, and proffering legal advice. Finding the preparers jointly and severally liable, the court awarded the debtor damages in the amount of $3,424 for the first case and $2,274 for the second case. The court imposed fines of $7,500 in the first case and $13,500 in the second case.

***In re McGill**, 2007 Bankr. LEXIS 1379 (Bankr. E.D. Tenn. April 13, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:110.01**

§ 362 Automatic Stay.

0607-003 **Mortgage creditor violated stay by failing to explicate calculation of payoff figure, collecting overpayment and unauthorized pre- and postpetition charges.** (*Bankr. E.D. La.)*

PROCEDURAL POSTURE: Plaintiff chapter 13 debtor filed a complaint against defendant creditor, which held a mortgage on the debtor's home, to recover property of the estate.

OVERVIEW: The debtor's plan provided for prepetition arrearages on the mortgage to be paid to the trustee and postpetition payments paid directly to the creditor. Debtor obtained a commitment from

another lender to refinance the debt owed to the creditor. The debtor obtained a payoff balance from the creditor. The debtor's counsel was unable to obtain an accounting from the creditor explaining its calculations. The debtor was forced to remit the sums demanded or lose his loan commitment. The court held that the amount collected by the creditor at the closing of the refinancing was substantially in excess of the sums due. The creditor was ordered to return the overpayment, plus interest. The court also held that the creditor violated the automatic stay imposed by 11 U.S.C. § 362 by collecting both pre and postpetition charges from property of the estate without authorization. The court held that the creditor delayed returning the debtor's property for over one year, and failed to provide a reasonable accounting of the loan history from which the correct amounts due could have been ascertained. The court agreed to consider an award of sanctions at a separate hearing.

Jones v. Wells Fargo Home Mortg. (In re Jones)*, 2007 Bankr. LEXIS 1349 (Bankr. E.D. La. April 13, 2007) (Magner, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(a) Automatic Stay; Scope.

0607-004 **Stay lifted on payment default pursuant to agreement between debtor and creditor reimposed upon payment of outstanding amount.** (*Bankr. N.D. Ala.)*

PROCEDURAL POSTURE: Plaintiff chapter 13 debtor filed a complaint against defendant creditor, asking the court to determine that the automatic stay of 11 U.S.C. § 362(a) was either still in effect; and/or, to reimpose the stay against the creditor's foreclosure attempt against the debtor's residence.

OVERVIEW: The creditor held a mortgage on the debtor's mobile home. The debtor's schedules and plan indicated that he owed the creditor a prepetition arrearage. The debtor's plan proposed to cure the arrearage through plan distribution, and for the debtor to pay the current mortgage payments directly to the creditor. After debtor fell behind in his current mortgage payments, the creditor sought relief from the stay. The parties settled the dispute by an agreed court order conditionally denying relief from stay, but including a "drop-dead" clause against future default on the direct payments. The debtor again fell behind in payments. The debtor later made payments to bring the account almost current, which were accepted by the creditor. The court held that, although the stay lifted by operation of law when the debtor defaulted under the terms of the court's order, the equities balanced in favor of reimposing the stay pursuant to 11 U.S.C. § 105(a), conditioned on the debtor's timely remission to the creditor of any amounts due since the court's order. The court held that the facts included that the debtor had equity in the home and that the creditor had retained his post-default payments.

McGee v. Green Tree Serv., LLC (In re McGee)*, 2007 Bankr. LEXIS 1367 (Bankr. N.D. Ala. April 17, 2007) (Stilson, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

§ 362(a)(3) Automatic Stay; Scope; Acts to Obtain Property.

0607-005 **Creditor's postpetition retention of repossessed vehicle was a willful violation of stay.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Creditor filed a motion for relief from the automatic stay pursuant to 11 U.S.C. §§ 362 and 1301 to allow repossession and sale of chapter 13 debtor's vehicle and, in the alternative, for adequate protections pursuant to 11 U.S.C. § 1326(a)(1)(C). The court also considered whether creditor's postpetition retention of the vehicle was a willful violation of the automatic stay and if so, what damages, if any, debtor was entitled to.

OVERVIEW: Debtor and his wife borrowed money from creditor in order to purchase a vehicle. Creditor repossessed the vehicle based on their failure to make two monthly installments. Debtor filed a chapter 13 petition and notified creditor of the filing. Creditor retained the vehicle until ordered to return it to debtor by the court. The court held that creditor's actions in retaining the vehicle after the bankruptcy petition was filed constituted a willful violation of the stay. The court held that creditor's erroneous belief that it had no obligation to return the vehicle until it received adequate protection payments or a chapter 13 plan was filed did not mitigate the willfulness of its conduct. The court held that debtor was entitled to be reimbursed for his counsel's fee to secure the return of the vehicle. Creditor sought relief from stay or adequate protection on the grounds that debtor had failed to make postpetition payments. In denying

creditor's motion, the court held that an exception to the postpetition, pre-confirmation payment requirement under 11 U.S.C. § 1326(a)(1)(C) was warranted because there was an adequate equity cushion.

In re Singer, *2007 Bankr. LEXIS 1439 (Bankr. E.D. Pa. April 20, 2007) (Sigmund, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03[5]**

§ 363(b) Use, Sale, or Lease of Property; Notice and Hearing.

0607-006 **Lobbying firm could be retained as political consultant to debtor.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: After the debtors petitioned for bankruptcy relief, the debtors filed an application seeking authority to employ a lobbying firm, pursuant to 11 U.S.C. § 327, as a political consultant to the debtors. The limited liability company objected to the application. The debtors thereafter amended their application, modifying their basis for relief to reflect approval pursuant to 11 U.S.C. § 363(b) as a use of cash.

OVERVIEW: The court found that the lobbying firm fell outside the definition of "professional persons" under the tests set forth in Johns-Manville, and American Tissue. The lobbying firm did not play a part in negotiating a plan, adjusting debtor/creditor relationships, disposing of acquired assets, or performing other duties of a debtor under the Bankruptcy Code. The lobbying firm could be retained pursuant to 11 U.S.C. § 363(b). Having considered the affidavit submitted by a member of the lobbying firm, the court concluded that the lobbying firm did not have any interest adverse to the debtors or their bankruptcy estates on the matters in which they were engaged, except as described in the affidavit submitted. The court allowed a consulting fee to the lobbying firm as political consultants to the debtor, pursuant to 11 U.S.C. § 363(b).

In re ITG Vegas, Inc., *2007 Bankr. LEXIS 1371 (Bankr. S.D. Fla. April 3, 2007) (Hyman, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.02**

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

0607-007 **Debtor's diversion of condominium association insurance proceeds to personal use resulted in nondischargeable debt.** (*Bankr. E.D. La.)*

PROCEDURAL POSTURE: Adversary plaintiff, a homeowners association, brought a claim to deny the discharge of a debt for insurance funds that debtors diverted for their own benefit in the rebuilding of two unit structures damaged by a fire. The association's allegations fell under the fraud and embezzlement provisions of 11 U.S.C. § 523(a)(2)(A) and (a)(4).

OVERVIEW: An electrical fire severely damaged two adjacent units in addition to the structural walls and roofs between them. Debtors owned one of the units, but did not have homeowner's insurance. The association and the insurance carrier both interpreted the policy that was in existence to not cover damages to the interior of the unit, but only the damages sustained by the structure of the unit itself. The association board voted to allow the debtors to manage the reconstruction of the structure. Debtors used a portion of the funds for living expenses, attorney's fees, and for work on the interiors of the two units. Debtors had the duty to settle claims held by the association against the insurance company, and knew that the funds provided were for association claims only, the debtors knowingly diverted funds for their personal benefit. The court found that debtors intended to defraud the association, and that the debt therefor was nondischargeable on embezzlement grounds under section 523(a)(4). The association did not prove that debtors made a representation through silence or an overt act, so the court did not impose liability under section 523(a)(2).

Port Louis Owners Ass'n v. Savage (In re Savage), *2007 Bankr. LEXIS 1383 (Bankr. E.D. La. April 13, 2007) (Magner, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.10**

§ 546(c) Limitations on Avoiding Powers; Seller's Right of Reclamation.

0607-008 **Reclamation claims against goods disposed of to pay prior lienholders were valueless.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: The court entered a reclamation order, establishing procedures for resolving reclamation claims. The debtors filed a notice and proposed reconciliation of some 132 reclamation claims, asserting a prior lien defense to the claims. The reclamation claimants, parties that had supplied prepetition goods to the debtors in the course of business just prior or during the debtors' insolvency, filed objections to the reclamation notice.

OVERVIEW: Debtors obtained a postpetition credit facility, which was used to pay their prepetition liens. Approximately $377 million of their outstanding prepetition indebtedness was secured by liens on substantially all of their assets, including liens on the reclaimed goods. The reclamation claims asserted against the debtors totalled more than $297 million. Debtors argued that the reclamation claims were subject to the superior rights of a holder of the security interest in the reclaimed goods, pursuant to the express terms of 11 U.S.C. § 546(c). The prior liens on the reclaimed goods rendered the otherwise valid reclamation claims valueless, and entitled to only general unsecured claim status, and not administrative claim status under 11 U.S.C. § 503(b)(9). Debtors also asserted that the reclamation claims were valueless because the goods subject to reclamation were effectively disposed of as part of a transaction to repay the prior lienholder's claims. The court rejected the reclamation claimants' argument that prepetition liens were paid from other sources, so their interest in the goods remained intact, and found the reclamation claims valueless.

In re Dana Corp.*, 2007 Bankr. LEXIS 1466 (Bankr. S.D.N.Y. April 19, 2007) (Lifland, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:546.04**

§ 547 Preferences.

0607-009 **Transfer via "convenience check" from one credit card issuer to pay balance on another card was preferential.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff trustee sought summary judgment on a complaint filed under 11 U.S.C. § 547 to avoid a transfer made by debtor about two months prior to her filing of a chapter 7 bankruptcy. At issue was whether the transfer, in which debtor used a "convenience check" from one credit card issuer to pay a large balance owed on another credit card, was a "preference" within the meaning of section 547 and whether the trustee was entitled to judgment thereon.

OVERVIEW: Debtor used a balance transfer check issued by one creditor (creditor 1) to pay off a large balance due to another creditor (creditor 2). Creditor 1 transferred the funds directly to creditor 2. The trustee then filed a complaint to avoid the transfer as preferential under section 547 and sought summary judgment. Debtor did not dispute that the trustee had met its burden of proving that the transfer was avoidable but asserted two non-statutory defenses to the claim. The court ruled for the trustee. In rejecting a defense based on the diminution of estate doctrine, the court found that the defense did not apply because the central issue was the quantum of control that debtor exercised over the property. It held that debtor's power to direct creditor 1 to pay creditor 2 demonstrated significant control over the property and foreclosed reliance on the diminution of estate doctrine. Nor did the equitable earmarking doctrine provide a defense. That was because it focused on the decision-making prior to the payment of creditor 2. Specifically, as it was debtor – and not creditor 1 – who decided to cause payment in a specific sum to be made to creditor 2, the earmarking doctrine did not apply.

Yoppolo v. MBNA Am. Bank (In re Dilworth)*, 2007 Bankr. LEXIS 1376 (Bankr. N.D. Ohio April 12, 2007) (Speer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.01**

§ 707(b)(3) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Considerations When Presumption Does Not Apply.

0607-010 **Case dismissed for substantial abuse where debtor's filing was due to excessive entertainment and lifestyle expenses and debtor could support chapter 13 plan.** (*Bankr. E.D. Mich.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss chapter 7 debtor's case for abuse under 11 U.S.C. § 707(b)(2) and (3).

OVERVIEW: Debtor, who was single, owned two cars free and clear. The trustee argued that debtor did not properly complete his Form B22A and that, if it were properly completed, a presumption of abuse would arise under section 707(b)(2). The court held that debtor was entitled to take reductions for ownership expenses on his Form B22A for the two vehicles even though he had no actual payments on either of them and was entitled to take reductions for IRS Local Standards operation expenses for both of his vehicles. The court, however, dismissed the debtor's case under section 707(b)(3)(B), because debtor had the ability to fund a chapter 13 plan. The court noted that debtor only filed bankruptcy because of excessive spending on entertainment and personal lifestyle choices. He had a substantial, above median income at a stable job, a substantial equity on his balance sheet, a substantial pension plan for when he retired, a substantial 401(k) account, and an ability to continue making contributions to his 401(k) and repay all of his loans to it while at the same time having an ability to repay a meaningful dividend to his creditors, all without making any sacrifices in his present lifestyle.

In re Zaporski*, 2007 Bankr. LEXIS 1449 (Bankr. E.D. Mich. April 17, 2007) (Shefferly, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3][b]**

§ 727(d)(1) Discharge; Grounds for Revocation; Fraud.

0607-011 **Discharge revoked for bad faith on motion of debtor's mother who did not receive notice and was not listed in schedules.** (*Bankr. N.D. Miss.)*

PROCEDURAL POSTURE: Defendant debtor had filed for relief under chapter 7 and had received a discharge. Plaintiff, the debtor's mother, filed an action to revoke the bankruptcy discharge previously granted to the debtor, because the mother had obtained a pre-discharge judgment and a judgment lien in state court against the debtor in the amount of $28,416.

OVERVIEW: The mother had obtained a money judgment and a judgment lien against the debtor in state court. The mother did not receive notice of the debtor's chapter 7 petition and was not included in the debtor's matrix or schedules. At trial, the debtor admitted that he had failed to disclose various pieces of personal property on his schedule, did not disclose credit card purchases, and did not disclose debts that were re-paid within weeks of the bankruptcy filing. The court held that the debtor's assertion of reliance on attorney advice under 11 U.S.C. § 727(a)(4) was not available in view of the overwhelming evidence that the debtor's reliance was not made in good faith. The bankruptcy case was filed in the wrong venue, the debtor did not disclose several valuable assets, the debtor failed to disclose transfer of assets made within months of the bankruptcy filing and repayment of sizeable debts. The debtor flagrantly abused available credit by obtaining cash advances weeks before filing for bankruptcy. Defendant's discharge was obtained surreptitiously and revocation was required because the discharge was obtained through fraud as contemplated by 11 U.S.C. § 727(d)(1).

In re McCarson*, 2007 Bankr. LEXIS 1362 (Bankr. N.D. Miss. April 6, 2007) (Houston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[2]**

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

0607-012 **Case dismissed due to debtor's unreasonable delays and inexcusably incomplete schedules.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Three matters were scheduled in a chapter 13 bankruptcy case. First, the debtor sought confirmation of her plan. Second, the trustee filed a motion to dismiss. Finally, the court alerted all parties that it would consider dismissing the case under 11 U.S.C. § 1307(c)(1) for unreasonable delay that was prejudicial to creditors.

OVERVIEW: In her second chapter 13 case, the debtor sought relief under the Bankruptcy Code in large part to resolve bitter, intractable legal disputes with her sister over certain real property. By filing her case, the debtor invoked the automatic stay provision against her sister as well as against a number of other creditors, including governmental entities with substantial tax and other claims against her. The court concluded that the debtor was unreasonably lax in her prosecution of the case and that this shortcoming merited dismissal under 11 U.S.C. § 1307(c)(1). The court first concluded that the fact that it had provided all parties in interest with almost one month's advance written notice of the potential for dismissal of the case satisfied the notice and hearing procedural requirements of section 1307(c). As to the merits, the debtor's bankruptcy schedules were inexcusably incomplete, particularly in light of the fact that this was her second filing. The fact that the debtor had not filed all prepetition tax returns created a further delay. The debtor also failed to take any action towards implementing the key provision of the plan, which was to sell the real estate.

***In re Jackson**, 2007 Bankr. LEXIS 1430 (Bankr. E.D. Pa. April 18, 2007) (Frank, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

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

0607-013 **Hanging paragraph barred bifurcation of claim where vehicle used for business purposes had been purchased with intent to meet personal needs.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Creditor filed an objection to confirmation of debtor's chapter 13 plan, objecting to the bifurcation of its claim and alleging that it should be paid as fully secured pursuant to the "hanging paragraph" at the end of 11 U.S.C. § 1325(a).

OVERVIEW: Creditor had a purchase money security interest in debtor's vehicle, which he acquired for his personal and business use within the 910 days preceding the date of the filing of the petition. Creditor filed a secured claim in the amount of $26,623 with 7.35 percent interest and listed the value of the collateral as $19,050. Debtor proposed to bifurcate the claim, paying $17,200 with 9.5 percent interest as secured, and the balance, $9,423, as unsecured with no interest. The court held that the "hanging paragraph" at the end of 11 U.S.C. § 1325(a) specifically exempted creditor's claim from bifurcation. The court also held that the "hanging paragraph" was applicable, despite the fact that debtor used the vehicle in part for business purposes, because the debtor purchased the vehicle with the intent to materially and significantly meet his own personal needs, regardless of any other intentions he may have had. The court noted that debtor admitted the he purchased a vehicle that was large enough to accommodate his entire family, in which to take his children to and from school, daycare, church, shopping, doctor's appointments, and extra curricular activities.

***In re Lorenz**, 2007 Bankr. LEXIS 1445 (Bankr. E.D. Va. April 19, 2007) (Adams, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0607-014 **Debt on vehicle purchased for transportation needs of non-debtor spouse while debtor was on extended absence for work was not subject to the "hanging paragraph" and could be bifurcated.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: Debtor proposed a second amended chapter 13 plan and sought its confirmation. Debtor's plan proposed to bifurcate creditor vehicle lender's claim into secured and unsecured components. The lender objected, arguing that its claim was protected from 11 U.S.C. § 506 bifurcation by the "dangling paragraph" following 11 U.S.C. § 1325(a)(9).

OVERVIEW: Debtor argued the "dangling paragraph" following 11 U.S.C. § 1325(a)(9) did not apply because the automobile in question had not been purchased for the personal use of debtor. According to debtor, the vehicle was purchased to meet the transportation needs of his non-debtor spouse. The evidence presented at the confirmation hearing established that debtor worked off-shore and was gone from home for extended periods of time. He drove his truck to a site near Houston, where it remained for the entirety of that particular employment trip until he utilized it to return home. Debtor testified without contradiction that he acquired the vehicle at issue in order to provide for the transportation needs of his wife during those repetitive, extended periods of time in which he and his vehicle are absent from home. The bankruptcy court held that, under the circumstances, the vehicle at issue was not acquired for the personal use of debtor. Accordingly, the lender was not entitled to the anti-bifurcation protection

afforded by the "dangling paragraph" following 11 U.S.C. § 1325(a)(9), and debtor's plan was not rendered unconfirmable by the cramdown provision under 11 U.S.C. § 506.

In re Adaway, *2007 Bankr. LEXIS 1387 (Bankr. E.D. Tex. April 10, 2007) (Parker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0607-015 **Where multiple vehicles served as collateral, debtor required to either pay portion representing purchase money security interest in full or surrender one vehicle in full satisfaction of claim.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: A creditor objected to confirmation of a chapter 13 plan, arguing debtor was trying to cram-down its claim in violation of the "hanging paragraph" following 11 U.S.C. § 1325(a)(9). Regarding the "hanging paragraph," the issue raised here was whether, when multiple vehicles served as collateral, a debtor could retain one vehicle and pay the portion of the loan attributable to that vehicle in full while surrendering the remaining collateral.

OVERVIEW: The vehicles in question were two cars and a motorcycle. Debtor proposed to surrender the cars in full satisfaction of the portion of the debt attributable to the cars. Debtor proposed to retain the motorcycle and to pay its value over the life of the plan. The court noted that the Bankruptcy Code did not define purchase money security interest ("PMSI"). Bankruptcy courts typically looked to state law for guidance. The court here determined that, under the Uniform Commercial Code as adopted by the Nebraska legislature, a Nebraska court would use the dual status rule (and not the transformation rule) to find that a refinancing or consolidation did not destroy a PMSI status as to the eligible portion of the loan. Here, the "hanging paragraph" applied to the portion of the creditor's claim representing PMSI incurred within 910 days of filing; that is, the portion of the debt representing PMSI for the motorcycle and one of the cars. Debtor could either pay those portions in full under the plan or surrender the motorcycle and/or the car for full satisfaction of the applicable claim amount.

In re Stevens, *2007 Bankr. LEXIS 1391 (Bankr. D. Neb. April 9, 2007) (Saladino, 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.

0607-016 **Debtor entitled to claim expenses for vehicle owned outright as well as full housing expense under IRS standards and to pay projected 60 month disposable income over 36 months.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Creditor filed an amended objection to the confirmation of chapter 13 debtor's amended plan.

OVERVIEW: Debtor was an above-median income debtor. Creditor objected to confirmation on the basis that debtor improperly claimed a transportation ownership expense based on the IRS Local Standard Transportation Expense Standards on Form B22C for a vehicle she owned free and clear of any liens, improperly claimed a housing expense based on the IRS Local Standards for a one member household, although such expense exceeded debtor's actual housing expense, and the phrase "applicable commitment period" referenced in 11 U.S.C. § 1325(b)(1)(B) required debtor's plan to have a term of 60 months, not the 36 months proposed by debtor. The court held that debtor could deduct the ownership expense for a vehicle that was not financed or leased and that debtor was entitled to take the full amount of the applicable housing deduction without consideration of debtor's actual expense. The court further held that debtor's plan satisfied the requirements of section 1325(b)(1)(B) because the plan proposed to pay debtor's projected disposable income over the 60-month applicable commitment period to unsecured creditors, albeit in a period of 36 months.

In re Swan, *2007 Bankr. LEXIS 1370 (Bankr. N.D. Cal. April 18, 2007) (Weissbrodt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

§ 1328(f)(1) Discharge; Where Discharge May Not be Granted; Discharge Under Chapter 7, 11 or 12 in Prior 4 Years.

0607-017 **Chapter 13 debtor was not eligible for discharge where less than four years had elapsed since discharge in converted chapter 7 case.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: Defendant trustee filed a motion for judgment on the pleadings declaring that plaintiff debtor was not entitled to a discharge in her chapter 13 case, pursuant to 11 U.S.C. § 1328(f)(1).

OVERVIEW: The debtor filed a chapter 13 case on June 17, 2004; converted the case to chapter 7 on January 12, 2006; received a chapter 7 discharge on April 19, 2006; and filed another chapter 13 case on July 1, 2006. In the adversary proceeding, the debtor sought a determination that, upon successfully completing her current chapter 13 case, she was entitled to a discharge by having complied with the two-year waiting period between bankruptcy filings, as provided by section 1328(f)(2). The trustee filed a motion for judgment on the pleadings, alleging that the waiting period between the debtor's bankruptcy filings was governed by section 1328(f)(1), which required a four year waiting period between filings. The court granted the motion. The court held that the four-year waiting period in section 1328(f)(1) applied where the debtor converted the case from chapter 13 to chapter 7 and received a discharge in chapter 7. The court held that the debtor was not eligible to receive a discharge in the current case because less than four years elapsed between the filing of the prior case and the current case.

Grice v. We Energies*, 2007 Bankr. LEXIS 1403 (Bankr. E.D. Wis. April 17, 2007) (Shapiro, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.06[1]**

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

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

0607-018 **Reconsideration of fee waiver denied as trustee failed to inquire about possible tax refund at creditors' meeting.** (*Bankr. D. Vt.)*

PROCEDURAL POSTURE: Movant, a chapter 7 trustee, sought reconsideration of the court's prior order denying his first motion to reconsider an order granting a fee waiver to a chapter 7 debtor under 28 U.S.C. § 1930(f)(1). At issue was whether the trustee had identified new evidence affecting the propriety of the waiver that was unavailable when the waiver was originally granted as well as any effect on the issues of Interim Fed. R. Bankr. P. 1006(b)(2).

OVERVIEW: Debtor won a fee waiver per 28 U.S.C. § 1930(f)(1), which the trustee initially and unsuccessfully challenged by a motion to reconsider based on financial data disclosed during the case. After debtor won a discharge, the trustee filed a second reconsideration motion, arguing therein that debtor in fact did not qualify for a waiver given her receipt of tax refunds. The court again denied relief. First, the trustee was not entitled to reconsideration because the facts concerning the refunds would have been disclosed to him during the section 341 meeting had he questioned debtor as to the same. Thus, the existence of the refunds was not "new evidence" within the meaning of Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b). Also, while debtor did have an obligation to amend her schedules to list those refunds, debtor's failure to do so did not excuse the trustee's failure to inquire about refunds at the section 341 meeting. Noting that Interim Fed. R. Bankr. P. 1006(b)(2) anticipated that fee waiver eligibility was to be determined early in the proceeding and before the section 341 meeting, the court also ruled that the motion was filed too late, and announced its timing requirements for such motions.

In re Markison*, 2007 Bankr. LEXIS 1456 (Bankr. D. Vt. April 23, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:9.05**

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

§ 327 Employment of Professional Persons.

0607-019 **Affidavits of disinterestedness given by special counsel were filed in error and did not amount to fraud on the court.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Movants, a chapter 11 debtor and the debtor's officers and sole shareholders, filed a motion to reopen the debtor's bankruptcy case, claiming that certain attorneys perpetrated a fraud upon the court in connection with their applications to be retained as general or special counsel.

OVERVIEW: The debtor filed a chapter 11 petition and retained an attorney as its bankruptcy counsel. Prior to seeking bankruptcy relief, two other attorneys served as counsel for the debtor in a state court lawsuit. The two attorneys were authorized by the court to act as special counsel in connection with the lawsuit. Movants claimed that special counsel's affidavits that they were disinterested as required by 11 U.S.C. § 327(a) were incorrect because they represented the debtor prepetition and therefore held contingent prepetition claims against the debtor for attorneys' fees and costs. The court held that the attorneys did not intend to deceive the court because the references to disinterestedness, which was required by section 327(a) but not required by section 327(e), were mistakes and that it was always the court's understanding that it was approving retention of special counsel pursuant to section 327(e). Movants also claimed that bankruptcy counsel did not disclose that it had been on the opposite side of a case from the accounting expert hired by the debtor. The court held that the fact that they had previously been involved in an unrelated case did not constitute a fraud on the court.

In re Baron's Stores, Inc.*, 2007 Bankr. LEXIS 1372 (Bankr. S.D. Fla. April 12, 2007) (Hyman, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.01**

§ 327(e) Employment of Professional Persons; Attorney Employed for Special Purpose.

0607-020 **Prepetition claim against debtor was not grounds for diqualification of special counsel.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: A company that acquired an ownership interest in chapter 7 debtor objected to a proof of claim filed by debtor's special counsel and to special counsel's fee application, and filed a motion to disqualify special counsel.

OVERVIEW: The chapter 7 trustee filed an application under 11 U.S.C. § 327(e) to employ special counsel. The trustee disclosed that special counsel had a prepetition claim for services provided to debtor. The application was approved. After the company had acquired an ownership interest in debtor, it argued that special counsel was not qualified because it was not disinterested as required by 11 U.S.C. § 327(a). The court held that section 327(a) was not applicable; instead, section 327(e) provided that special counsel could not represent or hold any interest adverse to the debtor or to the estate. The court concluded that special counsel did not hold or represent an interest adverse to debtor or the estate because, although special counsel held an interest of its own as a prepetition creditor and had previously represented debtor, those interests were not competing interests. The court held that the bankruptcy estate, debtor, and special counsel were all best served if the bankruptcy estate was maximized. The court left for future proceedings the company's objections based on legal theories other than the claim that special counsel was not disinterested or held an adverse interest.

In re Tri-State Ethanol Co. LLC*, 2007 Bankr. LEXIS 1412 (Bankr. D.S.D. April 18, 2007) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.04[9]**

§ 329(a) Debtor's Transactions with Attorneys; Attorney Must File Statement of Compensation.

0607-021 **Debtor's attorney ordered to disgorge undisclosed fees received within one year of petition date in contemplation or in connection with bankruptcy.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: The chapter 7 trustee sought an order compelling attorneys for debtor to disgorge undisclosed fees received by them within one year before the filing of debtor's bankruptcy petition allegedly "in contemplation of or in connection with" his bankruptcy case. Debtor's attorneys objected to the disgorgement of fees.

OVERVIEW: Courts broadly applied a subjective test to determine whether attorneys fee payments were made "in contemplation of" bankruptcy. In the instant case, among other things, the language of the retainer agreement belied any notion that a certain tract of land, the "Oregon Property," was not transferred in contemplation of bankruptcy. The effect of the transfer was to further deplete estate assets. The critical date concerning debtor's state of mind was the date of the transfer of the property, and debtor's deposition testimony as to his state of mind on that date lacked credibility when weighed against the facts as they existed 97 days prior to bankruptcy. The facts supported a finding that debtor was contemplating the possibility or imminence of bankruptcy when he transferred the property to the attorneys on January 14, 2005, and that the transfer was subject to review under 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2017(a). The attorneys' failure to disclose both the retainer agreement with debtor and receipt of the property pursuant to such agreement, as mandated by 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b), warranted disgorgement of the property and denial of fees.

***In re Perrine**, 2007 Bankr. LEXIS 1432 (Bankr. C.D. Cal. April 13, 2007) (Carroll, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:329.03**

§ 503(b)(1)(A) Allowance of Administrative Expenses; Types of Expenses Allowed; Estate Expenses; Preservation of the Estate.

0607-022 **Directors of corporate debtor were not entitled to administrative expense for postpetition services.** (*Bankr. E.D. La.)*

PROCEDURAL POSTURE: Former directors of a corporate bankruptcy debtor continued to perform services for the debtor after its bankruptcy, and the directors asserted that they performed actual and necessary services to preserve the bankruptcy estate for the benefit of creditors. After the debtor's plan of reorganization was confirmed, the directors moved for allowance of compensation to the directors as an administrative expense under 11 U.S.C. § 503(b)(1)(A).

OVERVIEW: The directors contended that their compensation was warranted as an actual and necessary expense of preserving the estate, but the distribution trustee and others argued that the directors unnecessarily delayed estate administration, negotiated benefits for themselves over creditors, mismanaged the company, and failed to protect assets. The bankruptcy court held that there was no basis for allowing an administrative claim for compensation of the directors. Although the directors continued to perform corporate duties after the debtor's bankruptcy case commenced, the directors were compensated prepetition by warrants or shares of stock, and there was no showing of any alternate arrangement with the debtor to pay the directors in some other manner after the practice of payment by warrants or shares ceased. Further, a portion of the directors' services went beyond normal director action and constituted services involved in the administration of the debtor's estate, but the directors were not approved by the court as retained professional persons entitled to compensation from the estate.

***In re Fortune Natural Res. Corp.**, 2007 Bankr. LEXIS 1350 (Bankr. E.D. La. April 12, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06**

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

0607-023 **Loan debt was dischargeable where alleged misrepresentations were not made by debtor but by debtor's father.** (*Bankr. D.N.M.*)

PROCEDURAL POSTURE: Plaintiff creditor filed a complaint against defendant debtor, seeking a determination that debt owed it was nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (B). The debtor requested attorneys' fees and costs under 11 U.S.C. § 523(d).

OVERVIEW: The debtor's financial condition was not very good. His father was president of a company that was a sister company of the creditor. The debtor and his father went to the creditor to obtain a loan. A loan information sheet was prepared in connection with the loan. The debtor did not prepare or sign the loan information sheet, which contained false information. The debtor sat in a chair while his father and the creditor's manager met separately. The creditor loaned the debtor money, which he was unable to repay. In finding that the creditor failed to satisfy the requirements of either section 523(a)(2)(A) or (B), the court held that there was no evidence that the debtor made any representations to the creditor because any questions that the creditor had regarding the debtor's character and creditworthiness were addressed to the debtor's father. The court held that the debtor's mere presence at the creditor's offices did not constitute a false representation, nor did it evidence an intent to defraud. The court also held that the debtor made no written representation to the creditor regarding his financial condition because he did not prepare or sign the loan information sheet.

Southwest Fin. Of Alamogordo, Inc. v. Valdez (In re Valdez), *2007 Bankr. LEXIS 1398 (Bankr. D.N.M. April 17, 2007) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08**

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

0607-024 **Late dischargeability complaint was not time barred as creditors were not listed and received only four days notice of bar date.** (*Bankr. E.D. Tenn.*)

PROCEDURAL POSTURE: Plaintiff sought a determination that any judgment for damages obtained by plaintiff in a pending state court action against defendant debtor be declared nondischargeable under 11 U.S.C. § 523(a)(2), (4) or (6).

OVERVIEW: Plaintiff was the conservator for the debtor's half-sister. Plaintiff filed a complaint in state court, alleging that the debtor defrauded his half-sister by inducing her into signing a warranty deed transferring her home to him while leading her to believe that she was simply pledging the house as collateral for a loan. The debtor did not schedule plaintiff as a creditor. Plaintiff's attorney received actual notice of the debtor's bankruptcy case four days before the deadline for filing a complaint to determine the dischargeability of a debt. Plaintiff filed the instant complaint two months after the deadline. The court held that the complaint was not time barred pursuant to section 523(a)(3)(B) because neither plaintiff nor the half-sister were listed as a creditor and four days notice was not reasonable notice under section 523(a)(3)(B). The court also held that the elements of an exception to discharge under section 523(a)(2)(A) had been met because the debtor misrepresented the facts with an intent to deceive his half-sister, and the half-sister's reliance upon the debtor's representations was justifiable, considering their familial relationship, and her physical and educational limitations.

Tomblin v. Robbins (In re Robbins), *2007 Bankr. LEXIS 1419 (Bankr. E.D. Tenn. April 19, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

0607-025 **Judgment lien based on debtor's fiduciary fraud under statutory trust involving misuse of collected health club fees was nondischargeable.** (*Bankr. E.D.N.Y.*)

PROCEDURAL POSTURE: Plaintiff State, on behalf of its citizens, brought an adversary proceeding against defendant bankruptcy debtor, alleging that a debt for restitution arising out of a consent order and judgment against the debtor was nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (a)(4) based on the debtor's fraud and fiduciary defalcation. The bankruptcy court conducted a trial.

OVERVIEW: The debtor collected fees from prospective customers of a health and fitness club which the debtor intended to build and operate, and the State obtained the restitution order to reimburse the customers after the club opened briefly and then closed. The State contended that the debtor misrepresented the availability of club services, the club's opening date, and the club's lack of need for a bond. The State also argued that state consumer protection laws requiring fees to be placed in escrow created fiduciary obligations which the debtor breached. The bankruptcy court first held that the State failed to show fraud to support nondischargeability of the debt, since the debtor's substantial efforts to finance and open the club indicated that statements concerning the club's services and opening date were not knowingly false when made. Further, while the debtor's statement that the club was not required to post a bond was false, the debtor's recklessness in making the statement did not indicate an intent to deceive. However, the State's substantial regulation of health clubs created a statutory trust, and the debtor's misuse of the fees constituted fiduciary defalcation under the trust.

New York v. Suarez (In re Suarez)*, 2007 Bankr. LEXIS 1390 (Bankr. E.D.N.Y. March 23, 2007) (Stong, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

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

0607-026 **"Property settlement" owed by debtor to former spouse in ten years of monthly payments was in the nature of support and nondischargeable.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Plaintiff former spouse sued defendant debtor, seeking a determination that the debtor's obligation to pay a sum monthly for a period of 10 years pursuant to the parties' divorce decree was nondischargeable under 11 U.S.C. § 523(a)(5) and (a)(15).

OVERVIEW: The monthly payment was labeled as a property settlement in the parties' divorce decree. Notwithstanding that label, the court concluded that the debtor's obligation to pay the monthly sum for a period of 10 years pursuant to the parties' divorce decree was nondischargeable pursuant to 11 U.S.C. § 523(a)(5) as an obligation that was in the nature of alimony, maintenance, or support of a former spouse or minor child. One could only surmise why the label of property settlement was attached to the obligation. Perhaps it was some attempt to structure tax benefits or deductions. The parties both testified that the provision was not discussed between them. Having considered the financial condition of the parties at the time of the divorce, the court concludes that the payment as set forth was not unreasonable.

Pike v. Currin (In re Currin)*, 2007 Bankr. LEXIS 1360 (Bankr. E.D. Tenn. April 13, 2007) (Stinnett, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

§ 524(a) Effect of Discharge; Avoidance And Injunctive Relief.

0607-027 **Discharge injunction did not prevent enforcement of *in rem* interest.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: In 2000, debtor executed a non-recourse promissory note payable to defendant bank. The note was secured by a deed of trust of real property that debtor claimed as homestead. In 2004, debtor filed for chapter 7 relief and received a discharge. Debtor filed an adversary proceeding, asking the court to enjoin the bank from prosecuting a state court suit for reformation of an *in rem* deed of trust against the homestead. The bank moved to dismiss.

OVERVIEW: The court noted that, if debtor had been personally liable on the note, then debtor's obligation (including the obligation to pay attorneys' fees) would have been discharged. If those were the facts, then a postpetition attempt to collect these fees would have violated 11 U.S.C. § 524(a). However, the note was non-recourse, and the note was not a debt discharged in the bankruptcy case. Therefore, section 524(a) was not implicated. The complaint failed to state a claim on this issue. Debtor argued that the bank violated the discharge injunction by seeking to correct a property description error in the deed of trust. The court rejected debtor's argument. The court noted that the parties vigorously argued whether the defect in the property description in the deed of trust was major (and could not be corrected under state law) or whether it was a minor scrivener's error that was easily and appropriately correctible. The court left that matter for determination by the state court. The court saw no impediment in section 524(a) to the state court making that determination. Section 524 did not preclude enforcement of prepetition liens *in rem*.

Young v. Wells Fargo Bank (In re Young)*, 2007 Bankr. LEXIS 1417 (Bankr. S.D. Tex. April 16, 2007) (Steen, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

§ 524(a)(2) Effect of Discharge; Avoidance And Injunctive Relief; Injunction Against Actions to Recover a Debt as Personal Liability of Debtor.

0607-028 **Report to credit agency by creditor whose debt had been discharged did not violate discharge injunction.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7. The debtor was granted a discharge and the case was closed. The debtor sought to reopen the closed case, pursuant to 11 U.S.C. §§ 350(b) and 524(a)(2), in order to seek sanctions from the credit union for an alleged violation of the discharge injunction.

OVERVIEW: The debtor claimed that the credit union violated the discharge injunction when it reported a discharged debt to a credit reporting agency as "charged off." When the debtor had filed for relief in April 2001, he listed an obligation to the credit union of $3,057. The chapter 7 trustee had filed a report of no distribution. The court held that the debtor had not established grounds for reopening the claim based on the credit union's incorrect report to the reporting agency because the debtor had not established that the credit union made the report for the improper purpose of attempting to collect on the discharged debt. At most, the debtor had shown that the credit union was careless when it reported the discharged debt. The act of reporting to the agency, on its face, was not an act to collect a debt, and the debtor failed to show that the conduct was intended for that purpose. The credit union also showed that any misreporting of the debtor's statue was not done for the purpose of pressuring the debtor into making a payment.

In re Jones*, 2007 Bankr. LEXIS 1400 (Bankr. E.D. Va. April 17, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

0607-029 **Creditor and state violated discharge injunction by seeking and granting suspension of debtor's driver's license.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: Plaintiff debtor obtained the entry of default against defendants, a creditor and its attorneys, on her adversary proceeding alleging that they knowingly and purposefully violated the chapter 7 discharge injunction under 11 U.S.C. § 524(a)(2). A hearing was set in order to fix the amount of damages awarded to the debtor.

OVERVIEW: Notwithstanding the discharge, the creditor's attorneys wrote to the debtor and sought to collect a debt and use the processes of the motor vehicle laws, which resulted in the suspension of the debtor's driving privileges. After the debtor again advised the creditor and attorneys of the bankruptcy, they continued their efforts to collect the discharged debt. The court held that the actions of the creditor and attorneys constituted a knowing and calculated violation of the discharge under 11 U.S.C. § 524(a)(2). The court held that the debtor presented satisfactory proof of her entitlement to actual damages, reimbursement for her attorney's fees, and punitive damages for the continuing contempt because, on account of the violation of the discharge injunction, the debtor was unable to operate her vehicle in or outside the state for over four months. The court held that the State of Maryland acted in direct violation of 11 U.S.C. § 525(a) by refusing to renew unconditionally the debtor's driver's license because the underlying debt was discharged and, as recognized by the New York motor vehicle authorities, the 10-year-old judgment outstanding against the debtor was discharged.

Sharpe v. Hertz Corp. (In re Sharpe)*, 2007 Bankr. LEXIS 1435 (Bankr. D. Md. April 18, 2007) (Mannes, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

§ 541(c)(2) Property of the Estate; Restrictions Voided; Effect of Composition; Restrictions on Transfer of Interests in Trusts Unaffected.

0607-030 **ERISA welfare benefit plan that did not involve beneficial interest in trust was property of the estate.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: An insurer cancelled debtors' medical coverage. Debtors sued in state court for bad faith, breach of contract, and unjust enrichment. The state court found that debtors' claims were for the recovery of a plan benefit under the Employee Retirement Income Security Act ("ERISA"). The chapter 7 trustee moved to compromise debtors' claims (the motion was subsequently withdrawn). Debtors moved to dismiss/and or bar the trustee from state action.

OVERVIEW: Debtors argued that because their medical insurance plan was an ERISA plan and, thus, their claims and remedies were governed by ERISA, their claims were excluded from the estate under 11 U.S.C. § 541(c)(2). The bankruptcy court held debtors failed to show that their claims represented a beneficial interest in a trust or that there was a restriction on the transfer of that interest. The ERISA plan at issue was an employee welfare benefit plan, not a pension plan. The bankruptcy court noted that, just because a welfare benefit plan was an ERISA plan, it did not automatically follow that its assets were held in trust. To the extent that the welfare benefit plan at issue here was funded through the purchase of insurance policies, debtors did not have a beneficial interest in a trust. The bankruptcy court could not find, as debtors' argument required, that they had met the requirements of section 541(c)(2) simply based on the fact that the state court had determined their claims against the insurer were governed by ERISA. None of the cases cited by debtors stood for the proposition that a debtor's interest in any ERISA-qualified plan was excluded from property of the bankruptcy estate.

In re Tobis*, 2007 Bankr. LEXIS 1361 (Bankr. N.D. Ohio April 11, 2007) (Whipple, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.11[2]**

§ 548(a)(1) Fraudulent Transfers and Obligations; Elements of Fraudulent Transfers; Avoidable Transfers.

0607-031 **Debtor's transfer of CD proceeds into childrens' bank accounts within one month prior to filing was avoidable.** (*Bankr. N.D. Miss.)*

PROCEDURAL POSTURE: Plaintiff trustee filed a motion for partial summary judgment on his adversary complaint to avoid, pursuant to 11 U.S.C. § 548(a)(1), the transfers by defendant debtors of the proceeds from certificates of deposit (CDs) into bank accounts opened in the names of defendant children.

OVERVIEW: The CDs vested in the debtor wife, the payable on death beneficiary, on September 10, 2001, when their owner died. On September 12, 2001, the wife used the proceeds from the CDs to open bank accounts for her children for no consideration. On October 4, 2001, the debtors filed for bankruptcy. The court held that the transfer of the proceeds from the wife to her children were made within one year preceding the filing of the wife's petition for bankruptcy, while the debtors were insolvent, and for less than reasonably equivalent value; consequently, all of the elements required by 11 U.S.C. § 548(a)(1)(B) were established by the undisputed facts, regardless of whether there was actual fraud, and the trustee was entitled to summary judgment against the children, pursuant to 11 U.S.C. § 550(a)(1), for the value of the proceeds. The court held that, pursuant to Miss. Code Ann. § 81-5-63, the CDs vested exclusively in the designated beneficiary, the wife, at the owner's death and that the children could not re-write or modify the named beneficiary by asserting that the owner made a verbal promise to leave them the CDs as an inheritance.

Applewhite v. Akin (In re Akin)*, 2007 Bankr. LEXIS 1385 (Bankr. N.D. Miss. March 20, 2007) (Houston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:548.04**

§ 727(a)(2)(B) Discharge; Grounds for Denial; Fraudulent Transfer or Concealment of Property; Property of the Estate.

0607-032 **Discharge denied where debtor conveyed interest in property to brother and spouse postpetition.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: Plaintiff United States Trustee filed an adversary complaint under 11 U.S.C. § 727(a)(2)(B) seeking a denial of defendant debtor's discharge in chapter 7.

OVERVIEW: The debtor filed for bankruptcy on June 14, 2005. On June 22, 2005, he conveyed his one-half interest in property to his brother. On June 27, 2005, the debtor conveyed his undivided interest as a tenant in common in property to his wife. The debtor acted out of panic so as not to lose his house. The court found, by a preponderance of the evidence, that the trustee met his burden under section 727(a)(2)(B) of proving that the debtor sought, by his transfers, to delay the trustee and the liquidation of the debtor's assets. The court found that the transfers bore certain recognized values of fraud, namely, the debtor's insolvency, the lack of consideration for the conveyances, the relationship between the debtor and the transferees, and the debtor's retention of possession of the property.

McDow v. Tobar (In re Tobar), *2007 Bankr. LEXIS 1380 (Bankr. D. Md. April 17, 2007) (Mannes, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.02**

§ 727(b) Discharge; Debts Affected.

0607-033 **Postpetition debt arising out of postpetition events was not affected by discharge.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: The matter before the court was the motion for summary judgment of plaintiff, debtor's stepmother, on the count which she alleged under 11 U.S.C. § 523(a)(6) based upon fraudulent transfer of property from her ex-husband to debtor, her stepson. Debtor cross-moved for summary judgment.

OVERVIEW: The stepmother contended that debtor was estopped from interposing any defense given the findings in a state court decision in her fraudulent transfer action. The instant court observed that, as a result of the judgment in that action, 50 percent of the proceeds of the sale of the property was being held in escrow pending a determination of the former spouses' interests in that portion of the proceeds. No one disputed that the proceeds were not property of the estate. The stepmother and debtor had not identified any residual claim that she held against him as a result of the state court judgment. Therefore, debtor was correct that there was no debt from that judgment for which the court could make a dischargeability determination. Under 11 U.S.C. § 727(b) and (a) discharged a debtor from all debts that arose before the date of the order for relief. Debtor's present debt to her for $25,000 arose after debtor filed his petition and was issued based upon events that occurred after the petition date. As such, it was a postpetition debt unaffected by the discharge. Because there were no outstanding prepetition debts which debtor owed to plaintiff, she could not prevail.

Hermosilla v. Hermosilla (In re Hermosilla), *2007 Bankr. LEXIS 1471 (Bankr. D. Mass. April 19, 2007) (Hillman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.13**

§ 727(d) Discharge; Grounds for Revocation.

0607-034 **Discharge revoked due to debtor's false oaths regarding interest in vehicles and real estate.** (*Bankr. E.D. Ark.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed a complaint against defendant debtor to revoke the debtor's discharge pursuant to 11 U.S.C. § 727(d).

OVERVIEW: After the debtor received a discharge in a no asset case, the trustee was approached by a third party with information that convinced the trustee that the debtor had not reported his assets accurately. Seven weeks before they were married, the debtor sold two vehicles to his girlfriend. After the marriage, the debtor regularly utilized the vehicles and continued to act as if the vehicles belonged to him. The debtor and the girlfriend also owned a lot which they sold to a close friend of the girlfriend for $1. When the debtor filed his bankruptcy petition, he did not list any interest in either the vehicles or the lot on his schedules, nor did he disclose the transfer of his interests in his statement of financial affairs. In revoking the debtor's discharge, the court held that the debtor's statements under oath regarding his schedules and financial statements were false, the debtor knew the statements were false, the debtor made the statements with fraudulent intent, and the statements related materially to the debtor's bankruptcy case.

Dupwe v. Darrell (In re Massey), *2007 Bankr. LEXIS 1418 (Bankr. E.D. Ark. April 17, 2007) (Evans, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 3001(b) Proof of Claim; Who May Execute.

0607-035 **71 asbestos-related claims filed by single law firm denied as based on client authorizations that were either undated or dated after bar date.** (*Bankr. D. Del.)*

PROCEDURAL POSTURE: Debtors moved for an order disallowing and expunging 71 property damage claims signed by a named law firm on purported behalf of various clients and filed thereafter on the ground that the firm had failed to establish that it had authority, prior to the bar date, to file such claims. At issue was whether the claims were executed by each client's "authorized agent" within the meaning of Fed. R. Bankr. P. 3001(b).

OVERVIEW: More than 4000 asbestos property damage claims were filed in debtors' chapter 11 case, the majority of which were filed by a single law firm. On this motion, debtors sought disallowance and expungement of 71 claims filed by that firm because the written authorizations on which the firm was relying in filing them were either undated or bore dates later than the bar date. The court agreed that the claims were unauthorized and ordered them disallowed and expunged. It rejected the firm's argument that, in each case, the particular client had ratified the firm's filing of each client's claim because the doctrine of ratification, while it might save claims that were timely but unauthorized at the moment of filing, could not be used to retroactively authorize an act after the deadline for the commission of the act had passed. Here, the purported authorizations were granted only after the bar date or their granting prior to the bar date could not be proved. Because a client could not have filed a claim on his own behalf after the bar date, the client could not authorize a filing thereafter. Thus, given that the bar date had passed, the claims were properly disallowed and expunged.

In re W.R. Grace & Co.*, 2007 Bankr. LEXIS 1393 (Bankr. D. Del. April 17, 2007) (Fitzgerald, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 9:3001.06**