July 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

July 2, 2007 Issue 1

Cases of Particular Interest in This Issue

Forward agreement for sale of natural gas by debtor was not a swap agreement so that transfers thereunder were avoidable.
Hutson v. Smithfield Packing Co. (In re Nat'l Gas Distrbs., LLC) (Bankr. E.D.N.C. May 24, 2007) **0707-001**

Refusal of university to release debtor's daughter's diploma and academic records did not violate stay.
In re Carter (Bankr. D. Md. May 24, 2007) **0707-004**

Potential loss of lease that would have eliminated chances for reorganization provided grounds for bona fide chapter 11 petition.
Fields Station LLC v. Capitol Food Corp. (In re Capitol Food Corp.) (1st Cir. June 6, 2007) **0707-009**

Existing credit relationship does not bar contemporaneous exchange for new value defense to avoidance.
Hechinger Inv. Co. of Del., Inc. v. Universal Forest Prods. (In re Hechinger Inv. Co. of Del., Inc.) (3d Cir. June 7, 2007) **0707-032**

For the latest bankruptcy news, click on the links below
Bankruptcy Practice Area Page at lexis.com

LexisNexis

QUESTIONS OR COMMENTS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in this publication or reprint permission, please call:
Kent K.B. Hanson, Esq. ..... 1-800-252-9257 (ext. 2247)
Julia Steele Reid ..... 1-800-252-9257 (ext. 2579)
or e-mail us at ..... CollierCaseUpdate@lexisnexis.com

For assistance with subscriptions, shipments, billing or other customer service matters, please call:
Your account manager or 1-800-833-9844
Outside the United States and Canada, please call 518-487-3000

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks, and Michie is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc. Collier on Bankruptcy is a registered trademark of Matthew Bender & Company, Inc.

Copyright © 2007 Matthew Bender & Company, Inc., a Member of the LexisNexis Group. All rights reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of $1 per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, MA 01923, telephone (978) 750-8400.

For more information, click on this link to visit the **LexisNexis™ Bookstore**.

For more information on ***Collier on Bankruptcy***, click on the banner below.

The most trusted name in bankruptcy law research –
Collier on Bankruptcy®
Available exclusively from LexisNexis™

POST-2005 ACT CASES IN THIS ISSUE

1st Circuit

§ 1112(b) Potential loss of lease that would have eliminated chances for reorganization provided grounds for bona fide chapter 11 petition.
Fields Station LLC v. Capitol Food Corp. (In re Capitol Food Corp.) (*1st Cir. June 6, 2007*)..... 0707-009

3d Circuit

§ 1307(c) Debtor's third case dismissed for bad faith with prohibition on further filings without leave of court.
In re Joobeen (*Bankr. E.D. Pa. May 23, 2007*) 0707-011

4th Circuit

§ 101(53B) Forward agreement for sale of natural gas by debtor was not a swap agreement so that transfers thereunder were avoidable.
Hutson v. Smithfield Packing Co. (In re Nat'l Gas Distribs., LLC) (*Bankr. E.D.N.C. May 24, 2007*)..... 0707-001

§ 362(a) Refusal of university to release debtor's daughter's diploma and academic records did not violate stay.
In re Carter (*Bankr. D. Md. May 24, 2007*)..... 0707-004

5th Circuit

§ 327(a) Attorney who was trustee of spendthrift trust of which debtor was beneficiary was not disqualified from representing debtor.
In re Marble (*Bankr. N.D. Tex. May 25, 2007*) 0707-002

§ 707(b) Debtor not entitled to Form B22A deductions for unborn child or transportation costs for unencumbered vehicle.
In re Pampas (*Bankr. M.D. La. May 21, 2007*)..... 0707-006

§ 1325(a)(5) Modification of confirmed plan denied due to debtor's inability to provide for payment of full value of collateral.
In re Rodriguez (*Bankr. S.D. Tex. May 24, 2007*)..... 0707-015

6th Circuit

§ 523(a)(15) Debtor's hold harmless agreement with former spouse was incurred in connection with divorce or separation and nondischargeable.
Schweitzer v. Schweitzer (In re Schweitzer) (*Bankr. S.D. Ohio June 4, 2007*) 0707-005

§ 707(b)(2) In joint case filed by separated couple expenses from both households properly considered in ruling on presumption of abuse.
In re Armstrong (*Bankr. N.D. Ohio May 24, 2007*) 0707-008

§ 1322(b)(2) Secured claim in mobile home protected by anti-modification provision.
In re Davis (*Bankr. S.D. Ohio May 24, 2007*) 0707-012

7th Circuit

§ 1326(a)(1)(C) Debtors required to make monthly adequate protection payments to secured creditor to cover depreciation in motor vehicle.
In re Robson (*Bankr. N.D. Ill. May 23, 2007*)..... 0707-016

§ 1327(a) Creditor that failed to object to bifurcation of claim prior to confirmation was bound by plan.
In re Smith (*Bankr. E.D. Wis. May 29, 2007*) 0707-017

8th Circuit

§ 707(b) Chapter 7 case ordered dismissed unless converted as above-median debtors has ability to fund chapter 13 plan.
In re Freis (*Bankr. W.D. Mo. May 18, 2007*)..... 0707-007

§ 1129(b) Fair and equitable plan confirmed over objections of general unsecured creditors who would receive 95% on claims over three years.
In re Tegeder (*Bankr. D. Neb. May 23, 2007*)..... 0707-010

9th Circuit

§ 330(a) Attorneys' fees substantially reduced due to extensive pre-conversion services not likely to benefit estate.
In re Incredible Auto Sales LLC (*Bankr. D. Mont. May 18, 2007*)..... 0707-003

11th Circuit

§ 1325 Secured creditor entitled to interest payments at *Till* rate.
In re Yelverton (*Bankr. M.D. Ala. May 21, 2007*)..... 0707-013

§ 1325(a) Secured creditor was not entitled to deficiency upon debtor's surrender of vehicle under hanging paragraph.
In re Wiliams (*Bankr. M.D. Fla. May 21, 2007*)..... 0707-014

PRE-2005 ACT CASES IN THIS ISSUE

2d Circuit

§ 522(c)(1) Trustee could pay off liens with proceeds of sale of homestead even if impairment of exemption resulted.
Rupp v. Elmasri (In re Elmasri) (*Bankr. E.D.N.Y. May 24, 2007*)..... 0707-024

§ 523(a)(15) Post-dissolution property settlement was nondischargeable as detriment to former spouse outweighed benefit to debtor.
DeFeo v. DeFeo (In re DeFeo) (*Bankr. D. Conn. May 23, 2007*)..... 0707-029

§ 727(d)(1) Discharge revoked due to sophisticated debtor's unauthorized postpetition transfer of property to father.
Scribner v. Bosket (In re Bosket) (*Bankr. W.D.N.Y. May 25, 2007*)..... 0707-035

3d Circuit

§ 547(c)(1) Existing credit relationship does not bar contemporaneous exchange for new value defense to avoidance.
Hechinger Inv. Co. of Del., Inc. v. Universal Forest Prods. (In re Hechinger Inv. Co. of Del., Inc.)
(*3d Cir. June 7, 2007*)..... 0707-032

5th Circuit

§ 362(a) Postpetition tax sale violated stay and was void.
Green Tree Serv., LLC v. Ivy (In re Ivy) (*Bankr. N.D. Miss. May 18, 2007*)..... 0707-022

§ 522(d)(5) Debtors could not claim exemption in proceeds from sale of homestead transferred to son prior to petition date.
Brown v. Kaba (In re Kaba) (*Bankr. N.D. Tex. May 25, 2007*)..... 0707-025

§ 727(a) Bankruptcy court properly refused to deny discharge where debtor's omissions did not amount to failure to keep adequate records.
Cadle Co. v. Blakesley (*S.D. Tex. May 31, 2007*) 0707-034

6th Circuit

§ 109(e) Chapter 13 case properly dismissed where sum of debt secured by two properties exceeded limit.
Glance v. Carroll (In re Glance) (*6th Cir. June 1, 2007*) 0707-020

§ 523(a)(2)(A) Investment in debtor's business paid by creditor's domestic partner was a gift to creditor who held a nondischargeable claim against debtor due to misrepresentation.
Messina v. Monaco (In re Monaco) (*Bankr. N.D. Ohio May 22, 2007*) 0707-027

7th Circuit

§ 101(10) Debtor's failure to make payments to former spouse under dissolution order did not give rise to claim by spouse's parent.
In re Karp (*Bankr. N.D. Ill. May 22, 2007*) 0707-018

9th Circuit

§ 362(a) Two year limitation on trustee's powers does not end the automatic stay.
Flores v. DDJ, Inc. (*E.D. Cal. May 22, 2007*) 0707-021

§ 362(b)(9) State tax collection letter sent during pendency of chapter 13 plan properly found not to violate stay.
Diwa v. California Franchise Tax Board (In re Diwa) (*N.D. Cal. May 18, 2007*) 0707-023

§ 541(a) Car titled in name of debtor's mother to whom debtor made payments was not estate property absent further proof of ownership.
Rainsdon v. Long (In re Long) (*Bankr. D. Idaho May 21, 2007*) 0707-030

10th Circuit

§ 101(31)(A) Bank of which debtor was a non-controlling "director emeritus" was not an insider.
Rupp v. United Sec. Bank (In re Kunz) (*10th Cir. June 5, 2007*) 0707-019

§ 523(a)(5) Debtor's obligation to pay second mortgage for former spouse was in the nature of support and nondischargeable.
Busch v. Hancock (In re Busch) (*B.A.P. 10th Cir. June 4, 2007*) 0707-028

11th Circuit

§ 523(a) Stripping assets of LLC by debtor and transfer to company controlled by debtor resulted in nondischarageable debt.
Bar-Am v. Grossman (In re Grossman) (*Bankr. M.D. Fla. May 22, 2007*) 0707-026

§ 547(b) Funds deposited by debtor to cover overdrafts were preferential transfers.
Feltman v. City Nat'l Bank (In re Sophisticated Communs., Inc.) (*Bankr. S.D. Fla. May 25, 2007*) 0707-031

D.C. Circuit

§ 547(c)(2) Preference period payments to vendor were consistent with prior practice and with industry standards and coverd by "ordinary course" defense.
Webster v. Fujitsu Consulting, Inc. (In re NETtel Corporation, Inc.) (*Bankr. D.D.C. May 22, 2007*) 0707-033

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

§ 101(53B) Definitions; "Swap Agreement".

0707-001 **Forward agreement for sale of natural gas by debtor was not a swap agreement so that transfers thereunder were avoidable.** (*Bankr. E.D.N.C.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant purchaser of natural gas from a bankruptcy debtor, seeking to avoid transfers of gas to the purchaser as fraudulent under 11 U.S.C. § 548(a)(1). The purchaser moved to dismiss the complaint or, in the alternative, for summary judgment, because the transfers were made in connection with a swap agreement and thus not subject to avoidance under 11 U.S.C. § 546(g).

OVERVIEW: The trustee contended that the debtor sold natural gas to the purchaser at below market prices as part of a scheme to defraud creditors. The purchaser argued that the periodic transfers from the debtor were made pursuant to a swap agreement as defined in 11 U.S.C. § 101(53B) and thus it was conclusively established that the purchaser gave reasonably equivalent value for the gas. The bankruptcy court held that, even assuming that the agreement between the debtor and the purchaser was a forward agreement, the agreement was not a swap agreement, and thus avoidance of transfers under the agreement was not precluded. The mere fact that the agreement provided for future delivery dates did not by establish that the agreement was a swap agreement, nor did the fact that agreement involved sales of a commodity. The restrictive reference to recurrent trade in the definition of a swap agreement indicated that such an agreement focused on financial instruments that were themselves regularly the subject of trade in a financial market, and did not include the agreement between the purchaser and the debtor which was merely an agreement by a single end-user to purchase a commodity.

Hutson v. Smithfield Packing Co. (In re Nat'l Gas Distribs., LLC)*, 2007 Bankr. LEXIS 1783 (Bankr. E.D.N.C. May 24, 2007) (Small, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.53B**

§ 327(a) Employment of Professional Persons; Who May Be Employed.

0707-002 **Attorney who was trustee of spendthrift trust of which debtor was beneficiary was not disqualified from representing debtor.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 11. An attorney they hired to represent them filed a motion to approve his employment and the employment of his law firm, and the trustee in bankruptcy filed an objection to the motion, suggesting that the attorney and his law firm had a conflict of interest and did not satisfy the requirements of 11 U.S.C. § 327(a).

OVERVIEW: The trustee suggested that the attorney was disqualified from serving as the debtors' counsel because he was the trustee of a spendthrift trust, one of the debtors was the beneficiary of that trust, and the attorney had approved two transactions that resulted in the debtor being paid $22,500 by the trust which he paid the attorney so the attorney would represent him in his bankruptcy action. The court found that the concerns raised by the trustee did not preclude the attorney or his law firm from representing the debtors. The attorney was the trustee on seven trusts that were established by one of the debtors' parents for the benefit of their children, he was an experienced and accomplished bankruptcy attorney who was likely to lead the bankruptcy proceedings to a successful conclusion, and there was nothing in the record which showed that he was likely to encounter a conflict of interest between his duties to the debtors if he acted as counsel in their bankruptcy action and duties he had as trustee. If issues concerning the attorney's performance arose at a later time, nothing precluded creditors or other interested parties from bringing them to the court's attention.

In re Marble*, 2007 Bankr. LEXIS 1743 (Bankr. N.D. Tex. May 25, 2007) (Jones, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.02**

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

0707-003 **Attorneys' fees substantially reduced due to extensive pre-conversion services not likely to benefit estate.** (*Bankr. D. Mont.*)

PROCEDURAL POSTURE: The debtor filed for relief under chapter 11 and the matter was converted to a proceeding under chapter 7. The debtor's attorney filed two applications for professional fees for services, pursuant to 11 U.S.C. § 330(a), rendered to the debtor. The U.S. Trustee filed a written opposition to the first interim application.

OVERVIEW: In March, 2007, before the matter was converted to a chapter 7 proceeding, the attorney sought an award of fees and costs in the sum of $100,956. After the matter was converted, the attorney filed a final application for fees and reimbursement of costs in an additional amount of $14,236. The court found that it was appropriate to award the attorney $18,040 in attorney's fees and $4,610 in costs. The court expressed concern over the attorney's characterization of many of the proceedings in the bankruptcy case, particularly to obtain continued use of the cash collateral, as "emergency" motions. The court found that the time spent on the motions by the court was enormous, and then the attorney subsequently admitted after several months that the case was inevitably going to be converted to a chapter 7 proceeding. It was clear to the court that the services rendered by the attorney, other than preparation of the debtor's petition and schedules, and efforts to sell the debtor's assets, were not likely to benefit the bankruptcy estate. The court reduced the fees and costs to reflect only those fees and costs that actually benefitted the estate.

In re Incredible Auto Sales LLC, *2007 Bankr. LEXIS 1765 (Bankr. D. Mont. May 18, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

§ 362(a) Automatic Stay; Scope.

0707-004 **Refusal of university to release debtor's daughter's diploma and academic records did not violate stay.** (*Bankr. D. Md.*)

PROCEDURAL POSTURE: The debtors filed a motion to compel against creditor, a university. Because the student accounts of the debtors' daughters were unpaid, the university enforced its policy regarding payment and refused to release the daughters' academic records and diploma. At issue was whether the university's refusal to release the documents was a violation of 11 U.S.C. § 362(a).

OVERVIEW: In the reported decisions finding a violation of the automatic stay, the debtor was the student whose transcript and/or diploma were being withheld by a university. In the instant case, it was the daughters of the debtors who were the students holding rights (perhaps conditioned upon payment) to the transcripts and diploma in question. It was therefore clear that there was no invocation of an automatic stay by the operation of 11 U.S.C. § 362(a)(3). The debtors and the bankruptcy estate had no interest in the transcripts as property, and therefore the university's withholding of the transcripts and diploma could not have been a violative act to control property of the estate. Nor did the court find that the refusal by the university to release the documents was a violative act to collect or recover a claim against the debtors. It appeared a matter of dispute as to whether the debtors were co-liable to the university. Assuming that the debtors were co-liable and that therefore the university had a potential claim against the debtors, the automatic stay did not protect the debtors against all emotional distress created by a continuing effort of a creditor.

In re Carter, *2007 Bankr. LEXIS 1797 (Bankr. D. Md. May 24, 2007) (Keir, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

§ 523(a)(15) Exceptions to Discharge; Types of Debt Excepted; Debts in Connection with Divorce or Separation.

0707-005 **Debtor's hold harmless agreement with former spouse was incurred in connection with divorce or separation and nondischargeable.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff, a chapter 7 debtor's ex-husband, filed an adversary proceeding against debtor and sought summary judgment that her obligation under a separation agreement to hold him harmless on joint mortgage indebtedness was nondischargeable per 11 U.S.C. § 523(a)(15) and that a hold harmless obligation with respect to the parties' credit cards also included in that agreement was nondischargeable under both 11 U.S.C. § 523(a)(2)(A) and (a)(15).

OVERVIEW: In divorcing, each party agreed not to use the other's credit and to hold each other harmless from violations thereof. Debtor also agreed to refinance two mortgages to remove plaintiff as an obligor. After failing to refinance and making charges on plaintiff's credit card, debtor filed a chapter 7. Plaintiff then filed an adversary complaint claiming that debtor's obligations under the decree were nondischargeable per 11 U.S.C. § 523(a)(2)(A) and (a)(15). Ruling that debtor's hold harmless obligations were within the scope of section 523(a)(15), the court awarded judgment to plaintiff. First, after noting that the hold harmless agreement met the first two requirements of section 523(a)(15), the court ruled that the hold harmless provisions created a new debt that had been incurred "in connection with" a separation agreement and was within the scope of section 523(a)(15), which conclusion that was not affected by the fact that the charges were made by debtor after the divorce was final. Second, debtor's liability to plaintiff due to her failure to refinance was not affected by Ohio Rev. Code Ann. § 2329.08 (2005), which only concerned a mortgagor's liability to a mortgagee, not to a co-mortgagor.

Schweitzer v. Schweitzer (In re Schweitzer)*, 2007 Bankr. LEXIS 1855 (Bankr. S.D. Ohio June 4, 2007) (Hoffman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

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

0707-006 **Debtor not entitled to Form B22A deductions for unborn child or transportation costs for unencumbered vehicle.** (*Bankr. M.D. La.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss a chapter 7 above-median income debtor's petition pursuant to 11 U.S.C. § 707(b).

OVERVIEW: In subtracting her monthly expenses from her current monthly income, the debtor claimed her unborn child as an additional household member on the means test form, Form B22A, and deducted a transportation ownership cost for her unencumbered vehicle. The court held that the debtor could not count her unborn child as a member of her household for purposes of the means test because, as of the date the Trustee moved to dismiss her case, her child had not been born. The court also held that the debtor was not entitled to claim the transportation ownership cost for a vehicle on which she was not making loan or lease payments. The court further held that the debtor had not rebutted the presumption of abuse because the debtor pointed to only one increased expense constituting a special circumstance resulting from her pregnancy, specifically, additional travel expenses for consultation with out-of-town physicians, and did not itemize the additional expenses, nor provide sufficient documentation of the expenses.

In re Pampas*, 2007 Bankr. LEXIS 1741 (Bankr. M.D. La. May 21, 2007) (Dodd, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

0707-007 **Chapter 7 case ordered dismissed unless converted as above-median debtors has ability to fund chapter 13 plan.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 7. The United States Trustee sought to dismiss the case, pursuant to 11 U.S.C. § 707(b)(2) and (3).

OVERVIEW: At the time of the petition, the debtors were married and had two dependents. The debtors had an annualized current monthly income of $81,837, which fell above the average median income for a family of four in Missouri. The debtors' obligations were primarily consumer debts, and their non-priority, unsecured debt totalled $55,947. The court found that based upon the submissions, the debtors'

ability to repay a significant portion of their unsecured debt after the debtors paid their 401(k) loan supported a finding of abuse under 11 U.S.C. § 707(b)(3). The court found that a finding of abuse was warranted based upon the significant amount of money and the percentage of unsecured debt that the debtors would have the ability to pay in a chapter 13 case. Upon consideration of the totality of the circumstances of the debtors' financial situation, the case needed to be dismissed because it constituted an abuse of the provisions of chapter 7. The debtors were given time to convert their case to chapter 13 and to propose a plan.

***In re Freis**, 2007 Bankr. LEXIS 1803 (Bankr. W.D. Mo. May 18, 2007) (Venters, 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.

0707-008 **In joint case filed by separated couple expenses from both households properly considered in ruling on presumption of abuse.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Movant, the U.S. Trustee, sought an order dismissing a chapter 7 case filed by debtors, a married couple who were separated and maintained separate households, on the ground of abuse under 11 U.S.C. § 707(b)(2). Based on stipulations, the parties submitted, for decision, the issue of whether, under these circumstances, expenses for both households may be considered in determining whether there is a presumption of abuse under section 707(b)(2).

OVERVIEW: Debtors, though married, were legally separated and lived separately. As per 11 U.S.C. § 302, they filed a joint petition and filed the required forms, including forms reflecting their "means test" calculation. The trustee sought dismissal on the basis, *inter alia*, that the calculation did not comply with 11 U.S.C. § 707(b)(2)(A) and that if properly calculated, a presumption of abuse existed. In submitting the issue, debtors argued that expenses of two households was a special circumstance per section 707(b)(2)(B) that rebutted the statutory presumption. The court agreed, and denied that prong of the motion. Noting that the statute did not erect a per se rule but required a fact-specific inquiry, the court ruled that "special circumstances," as contemplated therein, were those that were out of the ordinary for an average family and that left a debtor with no reasonable alternatives but to incur the expense. It rejected the Trustee's claim that debtors' separation was not such a "special circumstance" because it was not unanticipated and because debtors had alternatives, ruling instead that the expenses were justified and were expenses for which there was no reasonable alternative.

***In re Armstrong**, 2007 Bankr. LEXIS 1812 (Bankr. N.D. Ohio May 24, 2007) (Whipple, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 1112(b) Conversion or Dismissal; Involuntary Conversion or Dismissal.

0707-009 **Potential loss of lease that would have eliminated chances for reorganization provided grounds for bona fide chapter 11 petition.** (*1st Cir.)*

PROCEDURAL POSTURE: Appellant, the corporate owner of commercial premises upon which appellee debtor sought to reorganize under chapter 11 and reopen as a food market, challenged, on appeal of the District Court for the District of Massachusetts' intermediate affirmance, the judgment of the bankruptcy court which denied the owner's motion to dismiss the chapter 11 petition on the ground that it was not filed in good faith.

OVERVIEW: The debtor filed a voluntary chapter 11 reorganization to avert forfeiture of its lucrative leasehold. The debtor continued to make timely rent payments to the owner. Within two weeks of its chapter 11 filing, the debtor obtained the operating and health permits, and reopened the food market. The owner promptly submitted a motion to dismiss the chapter 11 petition, 11 U.S.C. § 1112(b) or for relief from the automatic stay under 11 U.S.C. § 362(d)(1), and alleged that the debtor's petition had been filed in bad faith and for an improper purpose. The court found that where the debtor's non-monetary default under the lease threatened to extinguish its lucrative leasehold, and the loss of that leasehold would have doomed its bona fide reorganization efforts, it had a present need for chapter 11 protection to avoid business disruption and economic dismemberment. As the owner made no prima facie showing that the debtor submitted its chapter 11 petition in bad faith, the bankruptcy court did not abuse its

discretion when it denied the owner's motion to dismiss the chapter 11 petition or relief from the automatic stay.

Fields Station LLC v. Capitol Food Corp. (In re Capitol Food Corp.), *2007 U.S. App. LEXIS 13028 (1st Cir. June 6, 2007) (Cyr, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1112.04**

§ 1129(b) Conformation of Plan; Cramdown.

0707-010 **Fair and equitable plan confirmed over objections of general unsecured creditors who would receive 95% on claims over three years.** (*Bankr. D. Neb.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 11. The debtors filed a first amended chapter 11 plan and the U.S. Trustee filed an objection to the plan. The court issued findings of fact and conclusions of law.

OVERVIEW: The debtors owned and operated two businesses and most of their debt was business debt. In their proposed amended plan, the debtors proposed eight classes of creditors. The first three creditor classes were unimpaired secured creditor classes, and there were five classes of impaired creditors. All classes of creditors approved the plan except for the general unsecured creditor class (Class 7). The amended plan provided for payment to the general unsecured creditors on a *pro rata* basis, without interest, in quarterly installments, over a period of three years. The court held that the debtors could retain their property under 11 U.S.C. § 1115, and the absolute priority rule of 11 U.S.C. § 1129(b)(2)(B)(ii) no longer needed to be followed if the proposed plan was fair and equitable. The court noted that the proposed plan would provide over 95% of the amounts owed to the unsecured creditors over a period of years, and the court found the proposed plan to be fair and equitable, even though the debtors proposed keeping all of their estate property and postpetition property.

In re Tegeder, *2007 Bankr. LEXIS 1756 (Bankr. D. Neb. May 23, 2007) (Saladino, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1129.04**

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

0707-011 **Debtor's third case dismissed for bad faith with prohibition on further filings without leave of court.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Chapter 13 trustee filed motions to dismiss two related chapter 13 cases pursuant to 11 U.S.C. § 1307(c). A judgment creditor filed motions for relief from the automatic stay in the cases.

OVERVIEW: The creditor and another person obtained judgments against one of the debtors. Subsequently, the debtor transferred real property for $1 to himself and his son's mother as trustees for their seven year old son. He then filed three chapter 13 cases, all but the last of which were dismissed for failure to file the required documents. Contemporaneously with the filing of the third case, the debtor filed a chapter 13 petition on behalf of his minor son. Both plans were significantly underfunded. The schedules omitted certain information and misrepresented other information. The debtor's testimony was evasive, argumentative, and lacking in credibility. The court held that dismissal was warranted because the cases had been filed in bad faith. The court held that the bankruptcies served no legitimate reorganizational purpose, and failed to address the judgments. The court also held that the creditor was entitled to an order pursuant to 11 U.S.C. § 362(c)(4) that any bankruptcy petition filed within 180 days would not serve as a stay of state law proceedings with respect to the transferred property because the filing of the petitions was part of a scheme to delay and hinder creditors.

In re Joobeen, *2007 Bankr. LEXIS 1842 (Bankr. E.D. Pa. May 23, 2007) (Sigmund, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

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

0707-012 **Secured claim in mobile home protected by anti-modification provision.** (*Bankr. S.D. Ohio)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13 and filed an amended chapter 13 plan. The creditor, who had a perfected mortgage in the debtors' real property and a perfected security interest in the debtors' mobile home, filed an objection to confirmation of the amended plan.

OVERVIEW: The creditor had a perfected mortgage on the debtors' real property and a perfected security interest in the debtors' mobile home located on the real property. The title to the mobile home had not been surrendered to the county auditor under Ohio Rev. Code Ann. § 4505.11(H)(1). The creditor contended that under the new definition set forth in 11 U.S.C. § 101(13A), the debtor was prohibited from modifying the creditor's secured claim. The court noted that the anti-modification provision of 11 U.S.C. § 1322(b)(2), both before and after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) remained the same. However, the BAPCPA modified the definition of a principal residence, in 11 U.S.C. § 101(13A) to include a mobile home. Thus the debtor's mobile home was under the protective ambit of 11 U.S.C. § 1322(b)(2) whether or not the certificate of title had been turned over to the county officer as set forth in Ohio Rev. Code Ann. § 4505.11(H)(1). The court concluded that the creditor's liens on the property and the mobile home amounted to a claim secured only in real property that was protected under 11 U.S.C. § 1322(b)(2).

***In re Davis**, 2007 Bankr. LEXIS 1824 (Bankr. S.D. Ohio May 24, 2007) (Aug, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

§ 1325 Confirmation of Plan.

0707-013 **Secured creditor entitled to interest payments at *Till* rate.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13 and submitted a proposed plan. The creditor objected to the plan, as amended, because the debtor proposed that the creditor receive the interest rate of 7.2% as provided for in the contract between one of the debtors and the creditor. The creditor sought interest at the prime rate of 8.25% plus a 1% adjustment.

OVERVIEW: The creditor filed a claim in the amount of $10,677 and the claim was secured by a vehicle valued at $12,000 in the plan. The creditor sought interest to be calculated on the claim at the prime rate of 8.25% plus a 1% upward risk adjustment. The court held that the United States Supreme Court plurality decision in *Till* applied in the case for purposes of assessing interest in the calculation of present value. The debtor's proposed treatment of the obligation to the creditor could be characterized as "cramdown" treatment under 11 U.S.C. § 1325 because the creditor had not agreed to accept the treatment proposed under the plan. Under *Till*, the creditor was entitled to receive at least the prime rate of interest on the secured claim, which the creditor had established was 8.25%. The court concluded that no debtor-specific risk adjustment above the prime rate needed to be made. The creditor had stipulated that the risk of non-payment was low, and the value of the vehicle exceeded the amount owed on the debt.

***In re Yelverton**, 2007 Bankr. LEXIS 1804 (Bankr. M.D. Ala. May 21, 2007) (Williams, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0707-014 **Secured creditor was not entitled to deficiency upon debtor's surrender of vehicle under hanging paragraph.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 13. The debtor sought confirmation of a second amended plan and the creditor filed an objection to the plan. In the plan, the debtor sought to surrender a car encumbered by a lien held by the creditor in full satisfaction of the debt.

OVERVIEW: The creditor objected to the debtor's proposed plan and claimed that the creditor was entitled to file an unsecured deficiency claim for the difference between the amount of the debt owed and the value of the surrendered vehicle. The debtor had purchased the vehicle within 910 days of his bankruptcy petition. At the time of the hearing, the debtor still owed approximately $8,000 for the car and the car was valued at approximately $6,200. The court rejected the creditor's assertion that it could file an unsecured claim for the deficiency amount. The court determined that the creditor was not entitled to be paid the deficiency when the debtor elected to surrender the car, pursuant to the recently revised provisions of 11 U.S.C. § 1325(a)(9). The "hanging paragraph" of 11 U.S.C. § 1325 allowed the debtor to surrender the vehicle in full satisfaction to the debtor.

***In re Wiliams**, 2007 Bankr. LEXIS 1754 (Bankr. M.D. Fla. May 21, 2007) (Jennemann, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

0707-015 **Modification of confirmed plan denied due to debtor's inability to provide for payment of full value of collateral.** (*Bankr. S.D. Tex.*)

PROCEDURAL POSTURE: Debtor moved for an order modifying her chapter 13 plan to change both the classification and the treatment of a creditor's claim therein, which claim was secured by debtor's residence, a manufactured home. By separate motion, the creditor sought an order lifting the automatic stay.

OVERVIEW: Debtor's chapter 13 filing valued her residence at about $19,000 while the secured creditor asserted two claims, one for $44,856 and one for a $4,940 arrearage. Debtor's plan classified both claims in paragraph 4 thereof, which applied only to claims secured by a residence. Thereafter, however, debtor sought to modify the plan by moving those claims to and reclassifying them under paragraph 8, which covered other secured claims. Before that request was heard, the creditor's motion for relief from stay alleging that debtor had not made required postpetition payments was denied pending approval of the modified plan. After reviewing 11 U.S.C. § 1322(b)(2) and (b)(5), however, the court denied the motion to modify and granted the motion for relief from stay. Rejecting an argument that the claims should have been listed in paragraph 8 from the start, the court held that the motion to modify was properly denied as it did not satisfy 11 U.S.C. § 1325(a)(5) by providing for payment of the value of the collateral, which exceeded debtor's scheduled value. Finally, modification was improper where, as here, the court concluded that debtor was not able to make the required payments.

In re Rodriguez, *2007 Bankr. LEXIS 1819 (Bankr. S.D. Tex. May 24, 2007) (Steen, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06**

§ 1326(a)(1)(C) Payments; Plan Payments; Commencement; Adequate Protection Payments.

0707-016 **Debtors required to make monthly adequate protection payments to secured creditor to cover depreciation in motor vehicle.** (*Bankr. N.D. Ill.*)

PROCEDURAL POSTURE: In a chapter 13 bankruptcy case, a creditor filed a motion to modify stay with respect to a debt secured by a lien on two vehicles. The creditor asserted that the debtors were not providing it with adequate protection for its collateral under 11 U.S.C. § 1326(a)(1)(C).

OVERVIEW: The debtors purchased two vehicles and obtained loans secured by the vehicles from the creditor. Their original proposed plan provided for monthly payments to the creditor, but the creditor asserted a lack of adequate protection. The court held that the debtors were required to make monthly adequate protection payments under section 1326(a)(1)(C) in the amount of each vehicle's depreciation and that depreciation was to be measured over the first month after the debtors filed their bankruptcy petition. Although the Bankruptcy Code did not define adequate protection, the court relied on 11 U.S.C. § 361 for its conclusion that the creditor was entitled to the decreased value in the vehicles represented by their depreciation. In calculating that depreciation, the court used the depreciation that occurred during the first month following the bankruptcy filing. The debtors were not required to provide costly expert testimony concerning depreciation, and the court used evidence from the N.A.D.A. Official Used Car Guide to determine the adequate protection payments.

In re Robson, *2007 Bankr. LEXIS 1822 (Bankr. N.D. Ill. May 23, 2007) (Schmetterer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1326.02[1][c]**

§ 1327(a) Effect of Confirmation; Parties Bound by Confirmed Plan.

0707-017 **Creditor that failed to object to bifurcation of claim prior to confirmation was bound by plan.** (*Bankr. E.D. Wis.*)

PROCEDURAL POSTURE: After plan confirmation, the chapter 13 debtor objected to a secured creditor's proof of claim.

OVERVIEW: A creditor filed a claim in the amount of $18,006, secured by a car owned by the debtor. The debtor's plan bifurcated the claim, listing the amount of the secured claim at $11,225. After confirmation of the plan, the debtor argued that the claim was subject to bifurcation under 11 U.S.C. § 506 because the collateral securing the claim was not purchased for the debtor's personal use. Rather, he argued, the car

was purchased for his fiance's sole and exclusive use. He argued that the secured portion of the bifurcated claim should be $11,225 plus 8.5 percent interest, with the balance of the claim being treated as a general, unsecured claim. The creditor argued that the claim controlled because it was not objected to prior to confirmation. In sustaining the debtor's objection, the court held that the confirmed plan controlled because a creditor who had adequate pre-confirmation notice of how the debtor intended to treat its claim, but did not object to that treatment pre-confirmation, was bound by the terms of the confirmed plan under 11 U.S.C. § 1327(a).

***In re Smith**, 2007 Bankr. LEXIS 1857 (Bankr. E.D. Wis. May 29, 2007) (Pepper, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.02**

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

§ 101(10) Definitions; ``Creditor''.

0707-018 **Debtor's failure to make payments to former spouse under dissolution order did not give rise to claim by spouse's parent.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: The former spouse of a bankruptcy debtor, and a parent of the spouse, filed proofs of claim in the debtor's bankruptcy, asserting that the debtor's failure to make payments required by a state court order in dissolution proceedings caused the spouse and the parent to incur expenses for which the debtor was liable. The trustee objected to the claims.

OVERVIEW: The parent contended that, due to the debtor's failure to make the required payments and the sale of the residence of the debtor and the spouse in the debtor's bankruptcy, the parent was required to provide support for the spouse. The spouse asserted that the debtor was liable to the spouse for the debtor's failure to make mortgage payments, car payments, car insurance payments, and utility payments. The bankruptcy court first held that the parent had no claim against the debtor since the debtor owed obligations to the spouse rather than the parent, the parent's provision of a vehicle and a townhouse for the spouse occurred after the debtor's bankruptcy petition was filed, and the parent did not make any payments which the debtor was obligated to make. Similarly, the spouse had no claim based on subrogation since the spouse did not pay any of the expenses which were obligations of the debtor, and the spouse suffered no damage based on the sale of the residence.

***In re Karp**, 2007 Bankr. LEXIS 1821 (Bankr. N.D. Ill. May 22, 2007) (Schmetterer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.10**

§ 101(31)(A) Definitions; ``Insider''; Individual.

0707-019 **Bank of which debtor was a non-controlling "director emeritus" was not an insider.** (*10th Cir.)*

PROCEDURAL POSTURE: Plaintiff debtor filed a bankruptcy proceeding wherein plaintiff trustee maintained that prepetition transfers from the debtor to defendant bank were preferential under 11 U.S.C. § 547(b) as the bank was both a per se insider under 11 U.S.C. § 101(31)(A) and an extra-statutory insider. Plaintiffs challenged a decision of the Bankruptcy Appellate Panel for the Tenth Circuit, which reversed a grant of partial summary judgment to the trustee.

OVERVIEW: The debtor was involved in the bank's organization and had been a member of its board of directors until he resigned from the board. Since then, the debtor held the title "director emeritus" but had not attended board meetings. The debtor had no decision-making power, no office, and no staff; he was not entitled to attend any meeting on the bank's business. Directors emeritus received a fixed monthly honorarium and were listed in the bank's annual reports. The principal issue was whether a "director emeritus" was a "director" within the meaning of 11 U.S.C. § 547(b). The federal court of appeals held that it was not, concluding that it was the legislative intent that a person with a relationship designated in 11 U.S.C. § 101(31)(A) be treated as an insider due to the high potential for control inherent in those relationships, and that other persons might be found to be insiders in particular cases, based on specific facts. It concluded that it was more consistent with that understanding of the function of the statutory definition of "insider," as well as of the actual language, to hold that the debtor, as a director emeritus, was not a director within the definition's meaning.

Rupp v. United Sec. Bank (In re Kunz), *2007 U.S. App. LEXIS 12943 (10th Cir. June 5, 2007) (Holloway, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:101.31**

§ 109(e) Who May Be a Debtor; Chapter 13.

0707-020 **Chapter 13 case properly dismissed where sum of debt secured by two properties exceeded limit.** (*6th Cir.)*

PROCEDURAL POSTURE: Appellant, a chapter 13 debtor, challenged the decision entered by the District Court for the Eastern District of Michigan that affirmed the bankruptcy court's decision that dismissed the debtor's chapter 13 petition after appellee chapter 13 trustee moved to dismiss the petition, claiming the debtor's secured debts exceeded the $922,975 cap for filing a chapter 13 petition.

OVERVIEW: The debtor filed a petition for relief under chapter 13. Among his assets, he listed two houses that he owned jointly with his wife. One house, worth $1.2 million, was subject to a $980,000 mortgage. The second house, worth $302,000, was subject to a mortgage of $133,000. The appellate court had to determine whether a security interest in a debtor's property was a noncontingent, liquidated, secured debt under 11 U.S.C. § 109(e), which at the time of the filing contained a $922,975 debt limit for filing a chapter 13 petition. The appellate court found that it was, and accordingly affirmed the dismissal of the bankruptcy petition. Because the sum of the debts on the two houses at the time the debtor filed this chapter 13 petition was $1,113,000 – or about $190,000 more than the limit of $922,975 found in section 109(e) – the bankruptcy court correctly dismissed the petition.

Glance v. Carroll (In re Glance), *2007 U.S. App. LEXIS 12622 (6th Cir. June 1, 2007) (Sutton, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.06**

§ 362(a) Automatic Stay; Scope.

0707-021 **Two year limitation on trustee's powers does not end the automatic stay.** (*E.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff judgment creditors obtained a jury verdict for damages against defendant judgment debtors. After a judgment was entered, the creditors moved to add as judgment debtors various individuals and entities. The debtors filed petitions to commence chapter 7 bankruptcy. The court stayed the action pursuant to 11 U.S.C. § 362(a). One of the creditors moved for an order to calendar a hearing date certain on the motion to add judgment debtors.

OVERVIEW: The creditor contended that a bankruptcy trustee had failed to vacate fraudulent transfers as part of the bankruptcy proceedings and that the time within which the trustee could have done so had passed. The creditor contended that because the trustee could no longer obtain the assets the debtors transferred to the individuals, the stay had automatically lifted. The court disagreed that the passing of the statute of limitations set forth in 11 U.S.C. § 546(a) operated to lift a bankruptcy stay. The passing of the two year statue of limitations found in 11 U.S.C. § 546(a) was not listed in 11 U.S.C. § 362(c) as one of the events that concluded an automatic stay. In addition, the creditor did not cite any case interpreting 11 U.S.C. § 362(c) to include the passing of 11 U.S.C. § 546(a)'s statute of limitations as an event which ended the automatic stay. Thus, the stay in the action remained in place. Absent an order by the bankruptcy judge or specific language in 11 U.S.C. § 362(c), stating that the passing of 11 U.S.C. § 546(a)'s limitation period ended the automatic stay, the automatic stay continued, and the action remained stayed.

Flores v. DDJ, Inc., *2007 U.S. Dist. LEXIS 40584 (E.D. Cal. May 22, 2007) (Ishii, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

0707-022 **Postpetition tax sale violated stay and was void.** (*Bankr. N.D. Miss.)*

PROCEDURAL POSTURE: Plaintiff creditor filed a Fed. R. Bankr. P. 7056 motion for summary judgment on an adversary proceeding to set aside defendant county assessor's sale of defendant debtor's home to defendant buyer for delinquent taxes as violative of the automatic stay, pursuant to 11 U.S.C. § 362(a).

OVERVIEW: The debtor pledged a manufactured home as collateral for his indebtedness to the creditor under a manufactured home retail installment contract and security agreement. The debtor filed for chapter 13. The creditor filed an adversary proceeding for a determination that the assessor's sale of the home for delinquent taxes was void because it was taken in violation of the automatic stay. The assessor answered that he was not notified of or aware of the bankruptcy at the time of the sale. The court granted

the creditor judgment as a matter of law because there were no genuine issues of material fact remaining in dispute. The court held that the tax sale, which was conducted after the debtor filed a bankruptcy petition and caused the debtor's property to be sold to the buyer, violated the stay but was not contemptuous; therefore, it was void and of no legal effect.

Green Tree Serv., LLC v. Ivy (In re Ivy), *2007 Bankr. LEXIS 1851 (Bankr. N.D. Miss. May 18, 2007) (Houston, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

§ 362(b)(9) Automatic Stay; Exceptions; Tax Related Activities.

0707-023 **State tax collection letter sent during pendency of chapter 13 plan properly found not to violate stay.** (*N.D. Cal.)*

PROCEDURAL POSTURE: Appellant bankruptcy debtor filed an adversary proceeding in bankruptcy court alleging that the California Franchise Tax Board ("FTB") violated the bankruptcy code automatic stay by sending the debtor a letter directing that she pay her tax debt. The bankruptcy court granted the FTB's cross-motion for summary judgment on the ground that the letter did not violate the automatic stay. The debtor appealed.

OVERVIEW: The debtor was unable to pay all of her California taxes as a result of cashing in a 401(k) fund to obtain money for a medical emergency. She subsequently entered into a tax amnesty program with the FTB in which she agreed to make installment payments. She nonetheless filed for chapter 7 bankruptcy. The bankruptcy filing terminated her installment agreement, but not the tax liability. When the chapter 7 proceeding terminated, she still had the FTB tax liability which she subsequently sought to pay through a Chapter 13 Plan. The Plan provided for payment of the tax debt to the FTB which filed its claim. The claim was not objected to and was being paid when the FTB sent the letter at issue. The letter requested payment and also warned that if the amount was not paid within 30 days, "we may file a state tax lien against your property." The court held that such language was not coercive and did not violate the automatic stay. However, the court also rejected the FTB's argument that the letter was exempt under 11 U.S.C. § 362(b)(9).

Diwa v. California Franchise Tax Board (In re Diwa), *2007 U.S. Dist. LEXIS 39552 (N.D. Cal. May 18, 2007) (Breyer, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05(9)**

§ 522(c)(1) Exemptions; Debts Collectible from Exempt Property; Debt Under §§ 523(a)(1) and 523(a)(5).

0707-024 **Trustee could pay off liens with proceeds of sale of homestead even if impairment of exemption resulted.** (*Bankr. E.D.N.Y.)*

PROCEDURAL POSTURE: After debtor filed a chapter 7 petition, plaintiff, who was his ex-wife, and intervenor, a former law guardian appointed in connection with debtor's state court matrimonial action, sought payment of judgments against debtor from $50,000 that constituted debtor's homestead exemption under state law and was expected as proceeds from the sale of his residence. The status of such claims under 11 U.S.C. § 522(c) was at issue.

OVERVIEW: After plaintiff and intervenor won nondischargeability rulings against debtor per 11 U.S.C. § 523(a)(5), the trustee sold debtor's residence. Both plaintiff and intervenor then sought orders preventing the trustee from granting a credit to the buyer equal to debtor's $50,000 homestead exemption on the basis that their judgments were properly paid therefrom. The court abstained from ruling on plaintiff's claim and denied intervenor's motion without prejudice. While noting that 11 U.S.C. § 522(c)(1) did not preempt state exemption laws, it ruled that that fact did not mean that section 522(c)(1) had no effect at all. Rather, assuming the liens were properly perfected, they could be paid from proceeds of a trustee's sale in the same priority as would have applied per state law regardless of whether impairment of debtor's homestead exemption resulted. That was because Congress could not have intended to enable debtors to use 11 U.S.C. § 522(f) to avoid liens that secured nondischargeable debts. Thus, if the liens were perfected, the trustee could properly pay them with sale proceeds if payment was proper per state law, which issue it abstained from deciding per 28 U.S.C. § 1334(c).

Rupp v. Elmasri (In re Elmasri), *2007 Bankr. LEXIS 1780 (Bankr. E.D.N.Y. May 24, 2007) (Rosenthal, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.02**

§ 522(d)(5) Exemptions; Types of Exempt Property; General Surplus.

0707-025 **Debtors could not claim exemption in proceeds from sale of homestead transferred to son prior to petition date.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: Two months before filing for chapter 7 relief, debtors transferred the bulk of the proceeds from the sale of their homestead to defendant son in payment of an antecedent debt. They claimed an exemption for the amount of the payment under 11 U.S.C. § 522(d)(5), but plaintiff trustee objected and commenced an adversary proceeding to recover the payment as a preference.

OVERVIEW: The parties agreed that the transfer to the son met the test for avoidance as a preference under 11 U.S.C. §§ 574(b) and 550. However, if the claim of exemption was valid, the son did not receive more in the transfer than he would have in the bankruptcy. The court first concluded that the proceeds were never exempt at the time of the transfer under Tex. Prop. Code Ann. § 41.001(c) because the debtors never intended to invest the proceeds into a new homestead. The court then found that the proceeds were not property of the estate subject to exemption under 11 U.S.C. § 522(d)(5). At the commencement of their case, the debtors had no right, title, or interest to the money transferred to the son; thus, the proceeds were not part of the estate under 11 U.S.C. § 541(a)(1). The court declined to read 11 U.S.C. § 541(a)(3) and 11 U.S.C. § 522(d)(5) to permit a debtor to exempt any property recovered by the trustee under 11 U.S.C. § 550 because that reading would obviate 11 U.S.C. § 522(g). The property, not subject to exemption, was recoverable as a preference by the trustee for the benefit of creditors.

Brown v. Kaba (In re Kaba)*, 2007 Bankr. LEXIS 1744 (Bankr. N.D. Tex. May 25, 2007) (Lynn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.09[5]**

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

0707-026 **Stripping assets of LLC by debtor and transfer to company controlled by debtor resulted in nondischarageable debt.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff creditor sought a determination that debt owed him by defendant chapter 7 debtor was not dischargeable under 11 U.S.C. § 523(a)(4) and (6).

OVERVIEW: The debtor and the creditor formed a limited liability company to invest in real estate. Each had a 50 percent interest in the company. The company purchased two properties. The debtor later stripped the company of its assets and transferred them to a company owned and controlled by him. The debtor claimed that he was just repaying himself for a cash loan he had extended to the creditor. The court held that the debt could not be excepted from discharge pursuant to section 523(a)(4) because, although the debtor owed fiduciary duties to the creditor, the duties were limited and there was no segregated and/or defined trust res nor any trust beneficiary identified pursuant to Fla. Stat. § 608.4225 or otherwise. The court did hold, however, that the debt was excepted from discharge pursuant to section 523(a)(6) because the debtor wrongly asserted dominion of the company's assets to the detriment of the creditor and in a manner inconsistent with the creditor's ownership interest in the substantial assets. The court held that the debtor failed to prove that he made a cash loan to the creditor and failed to provide any credible explanation why he was entitled to transfer all of the company's assets.

Bar-Am v. Grossman (In re Grossman)*, 2007 Bankr. LEXIS 1844 (Bankr. M.D. Fla. May 22, 2007) (Jennemann, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

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

0707-027 **Investment in debtor's business paid by creditor's domestic partner was a gift to creditor who held a nondischargeable claim against debtor due to misrepresentation.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendants, debtors, seeking a money judgmenta determination that its debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) or (a)(4).

OVERVIEW: The debtors had agreed to operate a restaurant with the creditor. The creditor's domestic partner had agreed to give the creditor $36,000 to invest in the business. The debtors eventually backed out of the arrangement. The creditor's claim stemmed from the $36,000 investment. The court first

rejected the debtors' contention that, because the $36,000 they received came directly from the creditor's domestic partner, the creditor suffered no injury in fact. The court found that the domestic partner had made a gift to the creditor when he delivered the $36,000 to one of the debtors for the creditor's benefit. Thus, the $36,000 payment was a gift to the creditor, thereby giving her standing to pursue this action. As to the claim under 11 U.S.C. § 523(a)(2)(A), the debtors both represented an intention to share ownership in the restaurant with the creditor, but they never intended actually to do so. The debtors made the representation with the intent to induce the creditor and her partner to provide them with financial assistance, knowledge, and experience. Their reliance was justifiable based upon the parties' family relationship and prior history.

Messina v. Monaco (In re Monaco), *2007 Bankr. LEXIS 1784 (Bankr. N.D. Ohio May 22, 2007) (Harris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.06[1]**

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

0707-028 **Debtor's obligation to pay second mortgage for former spouse was in the nature of support and nondischargeable.** (*B.A.P. 10th Cir.)*

PROCEDURAL POSTURE: Appellant chapter 7 debtor challenged a decision of the Bankruptcy Court for the District of Utah, which denied the debtor's motion for relief from judgment under Fed. R. Bankr. P. 7052 and Fed. R. Bankr. P. 9024 after the bankruptcy court held that an obligation owed to appellee, the debtor's ex-wife, was nondischargeable and awarded attorney's fees to the ex-wife's attorney in connection with state and federal litigation.

OVERVIEW: The parties' divorce decree required the debtor to assume and pay and hold the ex-wife harmless from second mortgage payments on the parties' home. The debtor failed to make the second mortgage payments. The bankruptcy court determined that the mortgage obligation was in the nature of support and therefore nondischargeable. The bankruptcy court awarded the ex-wife attorney's fees and costs in connection with the ex-wife's participation in the bankruptcy litigation and in litigating the characterization of the second mortgage as support in state court. The court held that the bankruptcy court correctly determined that the debtor's obligation to pay the second mortgage was nondischargeable under 11 U.S.C. § 523(a)(5) because there was sufficient evidence that the obligation was in the nature of support to the extent that it allowed the debtor's child to remain in the home until age 18. The court also held that, although the award of attorney's fees that were incurred by the ex-wife in the bankruptcy litigation was correct, the bankruptcy court was without authority to award fees incurred in the state litigation because the fees incurred were not reduced to judgment in state court.

Busch v. Hancock (In re Busch), *2007 Bankr. LEXIS 1823 (B.A.P. 10th Cir. June 4, 2007) (Cornish, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.11**

§ 523(a)(15) Exceptions to Discharge; Types of Debt Excepted; Debts in Connection with Divorce or Separation.

0707-029 **Post-dissolution property settlement was nondischargeable as detriment to former spouse outweighed benefit to debtor.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: Plaintiff former wife filed an adversary proceeding seeking: (1) to except from discharge, pursuant to 11 U.S.C. § 523(a)(15), the debts due her in accordance with a state court judgment of marital dissolution, and (2) to recover the attorney's fees she incurred in bringing the action against defendant debtor.

OVERVIEW: The debtor's former wife sought to have his obligations under the dissolution judgment held nondischargeable as a property settlement, other than in the nature of support, arising from a divorce decree. The court concluded that the debtor's obligations under the judgment to transfer to the wife the timeshare, car, personal property, and cash payments were excepted from discharge, pursuant to section 523(a)(15). The court concluded that the debtor had the ability to pay his obligations and did not meet the safe harbor criteria for discharge under section 523(a)(15)(A) because the house was valued at $180,000, with an outstanding mortgage of $85,221, and the debtor had equity of $94,778 with which to satisfy the judgment. Pursuant to section 523(a)(15)(B), the detriment to the wife, who had $20,000 in income and no retirement, of discharging the debtor's obligation under the judgment outweighed the benefit to the debtor, who had $60,000 in income, sole ownership of the house, and pension plans. The

court declined to exercise its inherent powers to impose attorney's fees as sanctions against the debtor because the appropriate remedy for the debtor's sale of the car was in the state court.

DeFeo v. DeFeo (In re DeFeo), *2007 Bankr. LEXIS 1858 (Bankr. D. Conn. May 23, 2007) (Krechevsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

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

0707-030 **Car titled in name of debtor's mother to whom debtor made payments was not estate property absent further proof of ownership.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: Plaintiff trustee in bankruptcy filed an adversary proceeding against defendants, a debtor and the debtor's mother, claiming that the debtor possessed a vehicle that was property of the bankruptcy estate. The debtor and her mother denied the claim.

OVERVIEW: The debtor filed a voluntary petition under chapter 7 and did not list ownership of a vehicle or an auto loan. The trustee who was appointed to manage the bankruptcy estate learned that the debtor was driving a car that was titled in her mother's name and was making payments on that car, and he filed an adversary proceeding against the debtor and her mother to obtain an order requiring the debtor to surrender the car. The bankruptcy court found that the trustee did not meet his burden of proving that the debtor had an ownership interest in the car. There was no evidence showing that the mother purchased the car with the intent that it become the debtor's car and Idaho's motor vehicle titling law expressed a legislative policy that supported the mother's claim of ownership. The mother testified that although she allowed the debtor to drive the car, she retained all rights in the car, had the right to demand its return at any time, and the debtor had no right to sell the vehicle or use it as a trade-in on a different vehicle.

Rainsdon v. Long (In re Long), *2007 Bankr. LEXIS 1760 (Bankr. D. Idaho May 21, 2007) (Pappas, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:541.01**

§ 547(b) Preferences; Avoidable Transfers.

0707-031 **Funds deposited by debtor to cover overdrafts were preferential transfers.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed a complaint against defendant bank, alleging that certain transfers made by the debtor as deposits into the debtor's bank account at the bank were avoidable and recoverable as preference payments pursuant to 11 U.S.C. §§ 547 and 550.

OVERVIEW: The trustee alleged that the bank received preferential transfers from the debtor in the form of funds deposited with the bank to cover overdrafts resulting from withdrawals from or checks written on the debtor's accounts. The court had previously determined that the trustee's recovery would be limited to deposits curing the largest ledger balance overdraft during the preference period. The court held that the largest negative ledger balance resulted from the bank issuing a series of cashier's checks to the debtor in an amount in excess of the cash and deposits in the account and solely upon the debtor's promise to make deposits the following day. The court held that the overdraft was a debt because it was the extension of credit on future anticipated deposits. Because the debtor was insolvent and the bank received more than it would have received if the case were a case under chapter 7 when the debtor covered the overdraft the next day, the court held that the trustee had proved all of the elements of a preferential transfer under 11 U.S.C. § 547(b). The court also held that the issuance of the cashier's checks and the repayment by the debtor was not a contemporaneous exchange.

Feltman v. City Nat'l Bank (In re Sophisticated Communs., Inc.), *2007 Bankr. LEXIS 1846 (Bankr. S.D. Fla. May 25, 2007) (Mark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

§ 547(c)(1) Preferences; Exceptions to Avoidance; Contemporaneous Exchange for New Value.

0707-032 **Existing credit relationship does not bar contemporaneous exchange for new value defense to avoidance.** (*3d Cir.*)

PROCEDURAL POSTURE: Appellee chapter 11 debtor sued appellant creditor in bankruptcy court to recover alleged preferential transfers under 11 U.S.C. §§ 547 and 550. The bankruptcy court denied the creditor's spoliation motion and entered judgment in favor of the debtor. The District Court for the District of Delaware affirmed. The creditor appealed.

OVERVIEW: The debtor purchased lumber products from the creditor during a 15-year business relationship. Shortly before the beginning of the preference period that preceded the debtor's bankruptcy filing, the creditor tightened its credit terms, imposed a credit limit on the debtor, and required large lump-sum payments. The court of appeals found that the bankruptcy court erred in holding that the creditor could not establish the contemporaneous exchange defense under 11 U.S.C. § 547(c)(1) because the parties had a credit relationship; transfers made under credit terms were not, as a matter of law, categorically excluded from the scope of the section 547(c)(1) defense. Remand was necessary to determine whether the transfers were intended to be contemporaneous exchanges for new value. The creditor did not establish the "ordinary course of business" defense under section 547(c)(2) because of the alterations of the credit terms. The creditor's spoliation motion was properly denied, as there was no evidence that the debtor intentionally destroyed documents that it knew would have been useful to the creditor. Explanation was required of a denial of prejudgment interest under 11 U.S.C. § 550(a).

Hechinger Inv. Co. of Del., Inc. v. Universal Forest Prods. (In re Hechinger Inv. Co. of Del., Inc.), *2007 U.S. App. LEXIS 13155 (3d Cir. June 7, 2007) (Rendell, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04[1]**

§ 547(c)(2) Preferences; Exceptions to Avoidance; Payments in Ordinary Course of Business.

0707-033 **Preference period payments to vendor were consistent with prior practice and with industry standards and coverd by "ordinary course" defense.** (*Bankr. D.D.C.*)

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee initiated an adversary proceeding to avoid and recover two transfers made by debtor, as a result of cash infusions, to defendant vendor pursuant to 11 U.S.C. §§ 547 (amended 2005) and 550. Pending were cross-motions for summary judgment.

OVERVIEW: The vendor argued that there was no genuine dispute of material fact as to its "ordinary course of business" defense under 11 U.S.C. § 547(c)(2) (amended 2005). The dispute over the defense related to the second and third prongs of the standard. The court stated that the focus of section 547(c)(2)(B) was the consistency of the preference transfers with prior practice. As for the parties' prior practice, the timing and amount of payments, both during and before the preference period, was based on the timing of capital contributions to debtor, and the vendor brought no unusual collection efforts to bear in the preference period. Thus, the preference period payments were in the ordinary course of debtor's and the vendor's business affairs, and the vendor was entitled to partial summary judgment on the section 547(c)(2)(B) issue. To satisfy the final prong of the defense, the vendor had to demonstrate that debtor's preference period payments were made in accordance with the practices in which firms similar in some general way to the creditor in question engaged. A declaration by a vendor witness provided enough evidence of the relevant industry standards by itself to satisfy section 547(c)(2)(C).

Webster v. Fujitsu Consulting, Inc. (In re NETtel Corporation, Inc.), *2007 Bankr. LEXIS 1796 (Bankr. D.D.C. May 22, 2007) (Teel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.04[2]**

§ 727(a) Discharge; Grounds for Denial.

0707-034 **Bankruptcy court properly refused to deny discharge where debtor's omissions did not amount to failure to keep adequate records.** (*S.D. Tex.*)

PROCEDURAL POSTURE: In an adversary proceeding, appellant assignee creditor sought judicial review of a bankruptcy court's February 21, 2007 memorandum opinion and final order denying the creditor's challenge to appellee debtors' discharge.

OVERVIEW: The creditor argued that the debtors should be denied discharge pursuant to 11 U.S.C. § 727(a)(3) because they failed to provide sufficient information to enable it to determine their true financial condition. The creditor also argued that the debtors should be denied discharge pursuant to 11 U.S.C. § 727(a)(4) because they knowingly and fraudulently made a false oath. The bankruptcy court found that two deficiencies did not rise to the level of a failure to maintain adequate records such that the creditor could not determine the debtors' financial condition. The bankruptcy court's finding was supported by substantial evidence in the record. Regarding the second claim, the creditor and the debtors each presented evidence regarding the accuracy of debtors' statements during the bankruptcy proceeding and whether any inaccuracies were the result of fraudulent intent. The bankruptcy court credited a debtor's testimony and resolved the factual dispute in the debtors' favor. The bankruptcy court's decision was supported by substantial evidence in the record.

Cadle Co. v. Blakesley*, 2007 U.S. Dist. LEXIS 39391 (S.D. Tex. May 31, 2007) (Atlas, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

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

0707-035 **Discharge revoked due to sophisticated debtor's unauthorized postpetition transfer of property to father.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff trustee filed an adversary proceeding to revoke defendant debtor's discharge, pursuant to 11 U.S.C. § 727(d)(1) and (a)(2)(B).

OVERVIEW: The trustee sought a revocation of the discharge for fraud on the ground that the debtor did not advise him of the postpetition transfer of property to his father prior to the entry of discharge. The debtor alleged that he did not know, until a creditors meeting, about his parents' prepetition deed conveying their interest in the property to the debtor and reserving a life estate. The court revoked the discharge because the transfer was made with a clear intent to hinder, delay, or defraud the creditors and trustee. The actions of the debtor, a sophisticated businessman and elected public official, in transferring estate property that he believed had value without the consent of the trustee, without consideration, and with the intent to put it out of the reach of his trustee and creditors were not those of the honest debtor properly fulfilling his 11 U.S.C. § 521 duties to cooperate and surrender estate property in order to obtain a discharge. The court held that the debtor's intentions in executing the deed to his father must have included the intention to eliminate any interest his estate, trustee, or creditors had in the property as a result of the deed from his parents.

Scribner v. Bosket (In re Bosket)*, 2007 Bankr. LEXIS 1776 (Bankr. W.D.N.Y. May 25, 2007) (Ninfo, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[2]**