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Collier Bankruptcy Case Update

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September 24, 2007 Issue 4

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§ 105 Power of Court.

0907-106 **Relief granted, in the form of reopened 341 meeting, to otherwise compliant debtor who failed to request adequate time to file tax returns.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Before the court was the United States' Motion to Dismiss pursuant to 11 U.S.C. §§ 1307(e) and 1308. The IRS sought dismissal for debtor's failure to file prepetition tax returns. Debtor responded that all prepetition tax returns had now been filed and moved the court either to ratify the filing of the untimely tax returns or, in the alternative, reopen the 11 U.S.C. § 341 meeting of creditors.

OVERVIEW: The IRS's motion was based on two provisions found in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. 11 U.S.C. § 1308 required debtors to complete all tax returns for the four years preceding the petition date. Returns were due the day before a debtor's 11 U.S.C. § 341 meeting unless the trustee held open the meeting to allow the debtor more time to comply. Failure to comply could result in dismissal or conversion pursuant to 11 U.S.C. § 1307(e), a non-discretionary provision. Given the premise that 11 U.S.C. § 1307(e) logically should not come into play until after a debtor had been given an 11 U.S.C. § 1308 extension and still failed to file returns, the issue was what happened to a compliant debtor who suffered the misfortune of failing to request additional time or, as in this case, adequate time under 11 U.S.C. § 1308(b)(1). Balancing all the factors in the case: debtor's immediate compliance, the harm to debtor and estate if the case was dismissed or converted, the lack of harm to the IRS, and no identified benefit to the other creditors, the court held that 11 U.S.C. § 105 relief was proper under these specific and limited circumstances.

***In re Novello**, 2007 Bankr. LEXIS 2589 (Bankr. D. Kan. July 25, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:105.01**

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

0907-107 **Relief from credit counseling requirement denied absent exigent circumstances or inability to obtain counseling within five days of filing.** (*Bankr. N.D. Fla.)*

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion to set aside the requirements of 11 U.S.C. § 109(h) to obtain budget and credit counseling.

OVERVIEW: The debtor did not receive the required credit counseling during the 180-day period preceding the date of the filing of the petition. The debtor asserted that the he was not required to receive credit counseling under 11 U.S.C. § 109(h)(4) because of incapacity, disability, or active military duty in a military combat zone. In denying the debtor's motion, the court held that the motion neither described exigent circumstances that merited a waiver of the credit counseling requirement nor stated that the debtor requested but was unable to obtain credit counseling for five days prior to the filing of the petition. The court held that the debtor was ineligible to be a debtor under Title 11 of the United States Code.

***In re Welsh**, 2007 Bankr. LEXIS 2698 (Bankr. N.D. Fla. June 27, 2007) (Killian, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09**

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

0907-108 **Creditor's postpetition repossession of truck violated stay.** (*10th Cir.)*

PROCEDURAL POSTURE: Defendant creditor sought review of the merits portion of a decision of the Bankruptcy Appellate Panel ("BAP"), which affirmed a bankruptcy court's determination that it willfully violated the automatic stay of 11 U.S.C. § 362 by repossessing a pickup truck after plaintiff debtors filed a chapter 13 bankruptcy petition.

OVERVIEW: As the BAP remanded only for a redetermination of attorney's fees, appellate jurisdiction was proper per 28 U.S.C. § 158(d). Affirming, the court of appeals held that willful violations of an automatic stay had to be proven by a preponderance of the evidence, and that, to demonstrate a violation of 11 U.S.C. § 362(k), the debtors bore the burden of showing that the creditor knew of the automatic stay and intended actions constituting the violation; no specific intent was required. Further, the court could

not say that the bankruptcy court was clearly erroneous in finding that the creditor possessed adequate knowledge of the debtors' bankruptcy such that its refusal to return the truck constituted a willful violation of the stay. The debtors' attorney telephoned the creditor's vice president and demanded the truck's immediate return. The vice president's belief about the debtors' ineligibility to refile for bankruptcy, coupled with the creditor's suspicion that the call was a ruse, gave rise to a responsibility to investigate further. Its beliefs had no bearing on willingness. Also, the court of appeals declined to construe the sales contract as executory per 11 U.S.C. § 365.

Johnson v. Smith (In re Johnson)*, 2007 U.S. App. LEXIS 20688 (10th Cir. August 28, 2007) (McKay, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.11[3]**

§ 366(c)(2) Utility Service; Adequate Assurance of Payment; Alteration, Discontinuation or Refusal of Service in Chapter 11 Case.

0907-109 **Security deposit for two weeks service approved as adequate assurance for utility companies.** (*Bankr. D.P.R.)*

PROCEDURAL POSTURE: Chapter 11 debtor filed a motion that included a request that an order be entered pursuant to 11 U.S.C. § 366(c)(2) establishing that a security deposit equal to the current average cost of two weeks service be deemed as adequate assurance for the utility companies that failed to reply or object to the motion.

OVERVIEW: The debtor in the instant motion provided all of its utility companies with a security deposit equal to the current average cost of two weeks service. The debtor also requested that an order be entered establishing that the two weeks deposit offered be deemed as adequate assurance for the utility companies that failed to reply or object to the motion. The court held that the injunction created by section 366(c)(2) could be continued by the motion against the utility companies that failed to reply or object to the debtor's proffer. The court held that the failure to reply, object, or counter-demand by the rest of the utility companies was considered a tacit acceptance of the debtor's proposed cash deposit as adequate assurance of payment satisfactory to the utility according to section 366(c)(2). The court noted that any utility company subject to its opinion and order still had the ability to request modification of the amount of assurance of payment at any time upon a request after notice and a hearing, pursuant to section 366(c)(3)(A).

In re Syroco Inc.*, 2007 Bankr. LEXIS 2813 (Bankr. D.P.R. August 22, 2007) (Tester, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:366.04**

§ 502(b)(6) Allowance of Claims or Interests; Disallowance; Lessor's Claim for Damages.

0907-110 **Claim based on debtor's guaranty of a lease was subject to rent claims limitation.** (*Bankr. W.D. Pa.)*

PROCEDURAL POSTURE: Chapter 11 debtors filed a motion for summary judgment with respect to their objection to the proof of claim filed by a claimant. The debtor alleged that the claim was subject to a limitation for rent claims imposed by 11 U.S.C. § 502(b)(6).

OVERVIEW: The claimant alleged that it held a claim based on the debtors' personal guaranty of a lease and a related judgment obtained in state court. The debtors contended that the guaranty claim arose out of termination of the leasehold and was therefore subject to the damages cap imposed by section 502(b)(6). The claimant argued that section 502(b)(6) did not apply to guarantors of a lessee's obligations under a lease and also that section 502(b)(6) did not apply to limit damages because the claimant neither accepted a surrender of the premises nor terminated the leasehold. In granting the debtors' motion for summary judgment, the court held that section 502(b)(6) applied not only to limit landlord claims against tenants in bankruptcy, but also in instances where guarantors of such leases sought bankruptcy protection. The court also held that the word "termination" in section 502(b)(6) included not only a technical state law termination of the lessor-lessee relationship, but also included circumstances where there was an uncured breach of a lease coupled with an intentional abandonment of the premises to the landlord, similar to rejection under 11 U.S.C. § 365 when the tenant itself was in bankruptcy.

Flanigan v. Samalex Trust (In re Flanigan)*, 2007 Bankr. LEXIS 2815 (Bankr. W.D. Pa. August 27, 2007) (Deller, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[7]**

§ 521(a)(1)(B) Debtor's Duties; Required Acts; Filing; Schedules, Statements and Copies.

0907-111 **Debtor's case dismissed for failure to timely file payment advice despite good faith effort to comply.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: Movant, the chapter 7 trustee, asked the court to dismiss a chapter 7 petition filed by debtors, a married couple. The motion was based on debtors' alleged failure to comply with the requirement in 11 U.S.C. § 521(a)(1)(B)(iv) that they file copies of all evidence of payments received from any employer during the 60 days prior to the filing of their bankruptcy petition.

OVERVIEW: The trustee sought dismissal on a claim that debtors failed to comply with provisions requiring the filing of records reflecting payments received in the prior 60 days. The court denied the motion as to the wife but granted it as to the husband. Noting the trustee's stipulation that the wife had not received income from an "employer" within the meaning of section 521(a)(1)(B)(iv) during the relevant period, the court concluded that the wife did not have any obligation to submit records thereof. As for the husband, however, the court held that the husband's failure to file a pay stub for the last check that he received prior to the date on which the chapter 7 was filed or within 45 days thereafter constituted a violation of the positive statutory mandate and required dismissal under section 521(i). In so ruling, the court held that even though it appeared that debtors had worked in good faith to satisfy the demands of 11 U.S.C. § 521(a), dismissal thereof was mandatory under the language of the statute once a finding was made that a debtor had in fact not fully complied therewith. Nor was reinstatement available because the same would contravene express provisions mandating dismissal.

In re Bonner*, 2007 Bankr. LEXIS 2817 (Bankr. W.D.N.Y. August 17, 2007) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.09B**

§ 521(a)(4) Debtor's Duties; Required Acts; Surrender of Property and Recorded Information to Trustee.

0907-112 **Money judgment issued in favor of trustee in amount of tax refund spent by debtor prior to turnover order.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Before the court was the motion of the chapter 7 trustee for turnover of $3,670 in state and federal income tax refunds received by debtor.

OVERVIEW: A debtor was required to surrender all property of the estate to the trustee, 11 U.S.C. § 521(a)(4). Debtor did not dispute that she had a legal duty to turn over the estate's share of the refund but raised essentially two arguments in opposition to the trustee's motion. The first was that the refunds had already been spent, and she simply did not have the financial ability to pay them over to the trustee. The second was that no purpose would be served by turnover, since the tax refunds were used in large measure to pay the same claims that would be paid by the trustee. Regarding the latter argument, the court stated that because the unsecured creditors had received nothing, they had been prejudiced. Next, the court was satisfied that debtor did not have sufficient funds in her possession to simply write the trustee a check for the $3,348 that it determined was property of the estate. It was far from persuaded, however, that debtor would never be in a position to pay that amount. It concluded, therefore, that the appropriate relief was a money judgment in favor of the trustee for the amount in question.

In re Cook*, 2007 Bankr. LEXIS 2613 (Bankr. E.D. Va. July 31, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.12**

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

0907-113 **Utility shutoff notice, issued on day notice of discharge was received, but then corrected, did not violate discharge injunction.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: After a city issued a utility shutoff notice to debtors requesting payment on the same day that it received a notice of the debtors' chapter 7 discharge, the debtors sought a finding of contempt and an award of damages and attorneys' fees under 11 U.S.C. § 105(a), alleging that the city violated the discharge injunction under 11 U.S.C. § 524(a).

OVERVIEW: After the debtors voluntarily converted their chapter 13 bankruptcy case to a chapter 7 case, a notice of discharge was served on all creditors. The shutoff notice issued by the city on the day it received the discharge notice requested payment of the accrued postpetition, pre-conversion arrearage on

the debtors' account. When the city realized its error, it corrected it with no further action required by the debtors. Utility service was never interrupted, and not further attempts at collection were made. The court denied the motion to hold the city in contempt and for an award of damages and attorneys' fees. The debtors failed to establish that the conduct of the city was anything but an inadvertent action, which it quickly corrected once it understood that not could it not collect on any pre-chapter 13 debt, but it could also not seek to collect on the postpetition, pre-conversion debt. An award of attorneys' was inappropriate be there was no evidence of bad faith by the city. The city believed that it was entitled to recover and immediately ceased its collection activities when it was corrected, making the violation technical and unintended.

In re Thompson, *2007 Bankr. LEXIS 2830 (Bankr. N.D.N.Y. August 21, 2007) (Gerling, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

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

0907-114 **Internal Revenue Manual not valid for interpreting means test in bankruptcy cases.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: Debtors filed a voluntary petition for relief under chapter 7, claiming an ownership expense for an unencumbered vehicle and an expense for a 401(k) loan repayment. The U.S. Trustee filed a motion to dismiss pursuant to 11 U.S.C. § 707(b)(1) and (b)(2).

OVERVIEW: The debtors asserted that they should be allowed the local standards vehicle ownership expense under 11 U.S.C. § 707(b)(2)(A)(ii)(I) based on the plain language of the statute, while the Trustee contended that pursuant to the Internal Revenue Manual ("IRM"), the debtors were entitled to this expense only if they actually had a loan or lease payment on the vehicle. The court found no authority in the Bankruptcy Code for the use of the IRM when interpreting this section, and the statute's legislative history supported the conclusion that the IRM did not apply to bankruptcy cases. Thus, the court determined that the debtors were entitled to deduct the ownership test under the means test. However, since the IRM was not applicable to interpret 11 U.S.C. § 707(b), the debtors were not allowed to claim an additional $200 operating expense for the vehicle. The debtors' 401(k) loan repayments were essentially secured loans and therefore could be deducted under the means test of 11 U.S.C. § 707(b).

In re Brand, *2007 Bankr. LEXIS 2640 (Bankr. S.D. Ill. March 15, 2007) (Meyers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

0907-115 **Voluntary job changes due to economic factors beyond debtor's control were special circumstances negating presumption of abuse.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: A United States Trustee asserted that chapter 7 bankruptcy debtors' financial situation raised a presumption of bankruptcy abuse because the debtors could fund a plan under a different chapter. The trustee moved to dismiss the debtors' case for presumed abuse under 11 U.S.C. § 707(b), and the debtors maintained that a decrease in their income constituted special circumstances which rebutted the presumption.

OVERVIEW: The debtors contended that their income decreased since the six-month period prior to their bankruptcy filing because one debtor changed jobs several times in an effort to increase his income and alleviate the debtors' financial problems. The trustee argued that the debtor's voluntary job changes did not constitute special circumstances, and that the debtors did not adequately document their decreased income. The bankruptcy court held that the debtors demonstrated special circumstances from the job changes and thus rebutted the presumption of bankruptcy abuse. While the job changes were voluntary, they were not intended to affect the debtors' circumstances in bankruptcy and were unsuccessful due to reasons out of the debtor's control, such as economic factors in the lending and real estate markets and the debtor's lack of expertise in other fields. Further, while the debtors did not provide any corroborating documentation to show the decrease in income, the job-changing debtor provided credible testimony about his job situation and the debtors' historical and current income, matters which were certainly within his personal knowledge.

In re Tamez, *2007 Bankr. LEXIS 2763 (Bankr. W.D. Tex. August 13, 2007) (McGuire, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

§ 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.

0907-116 **Dismissal for abuse could not be based on Schedules I and J alone.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: A debtor filed a petition under chapter 7, and a United States Trustee ("UST") filed a motion, pursuant to 11 U.S.C. § 707(b), for an order dismissing or converting the case.

OVERVIEW: The debtor reported that he had above-median income, but that he had a negative monthly disposable income of $88.48. He also reported that he had $108,947 in secured debt, $3,304 in priority debt, and $46,358 in unsecured debt. The UST claimed that the totality of the circumstances demonstrated abuse under 11 U.S.C. § 707(b)(3), and she noted the fact that the Schedule I and the amended Schedule J the debtor filed showed that the debtor and his non-filing spouse had net monthly income of $505.65. The court found that the UST had not met her burden of showing abuse. The fact that the debtor had been employed for a year did not show he had a stable income, and although the debtor did not file for bankruptcy because he suffered a calamity or illness, there was no evidence showing that he made pre-petition purchases that were far in excess of his ability to pay or that his expenses were excessive. The debtor's Schedules I and J were not necessarily an accurate predictor of the debtor's income and expenses, and reliance on those schedules for a true projection of the debtor's future cash flow was illusory at best and had to be accompanied by more facts to prove abuse.

In re Doherty*, 2007 Bankr. LEXIS 2848 (Bankr. D. Kan. August 28, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

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

0907-117 **Case ordered converted or dismissed where debtors would have disposable income after surrender of property on which payments were claimed in means test.** (*Bankr. S.D. Cal.)*

PROCEDURAL POSTURE: The United States Trustee moved to dismiss or convert the debtors' chapter 7 petition pursuant to 11 U.S.C. § 707(b)(2) and as presumptively abusive for failing the means test calculation of their listed expenses, or alternatively under the totality of the circumstances under 11 U.S.C. § 707(b)(3)(B).

OVERVIEW: At issue under the means test was whether debtors could include in their calculation payments they would otherwise owe on property they intended to surrender rather than retain. The trustee argued that the debtors should not be able to claim such sums as expenses, and if they could not, then a presumption of abuse under section 707(b)(2) arose. Alternatively, the trustee urged the case should be dismissed under the totality of circumstances under section 707(b)(3), because once debtors surrendered the property they would have income that could be used to pay creditors in a chapter 13 plan. Allowing them to proceed in chapter 7 would then result in an abuse. The court denied relief under section 707(b)(2), because the means test clearly required the analysis to be based on debtor's obligations at the time of filing the petition, before any property had been surrendered. The motion to dismiss under section 707(b)(3)(B), however, was granted. Debtors could not still rely on the "contractually due" payments on surrendered property in assessing their financial situation for purposes of section 707(b)(3)(B) where at least $733.72 of monthly of disposable income was available.

In re Maya*, 2007 Bankr. LEXIS 2800 (Bankr. S.D. Cal. August 14, 2007) (Gropper, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

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

0907-118 **Case filed by debtor's spouse after debtor defaulted on settlement agreement in original chapter 13 case dismissed for bad faith.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Debtor husband filed a petition under chapter 13, and a bank filed a motion to dismiss the husband's petition, arguing that it was filed in bad faith.

OVERVIEW: The debtor's wife filed a petition under chapter 13 in July 2005, and a plan to repay her creditors. A bank that held a mortgage on the wife's residence filed a claim against the bankruptcy estate, and in August 2005, the wife and her husband filed an adversary proceeding in the wife's bankruptcy

action, claiming a right to rescind the mortgage. The bank filed a motion for relief from the automatic stay, but entered a settlement agreement with the wife which allowed her to cure her default. When the wife failed to cure the default, the bank filed a second motion for relief from the automatic stay, and the court granted that motion. After the court granted the bank's second motion, the wife's husband filed a petition for relief under chapter 13. The court found that the husband filed his action in bad faith. The husband's debts were identical to his wife's debts, and allowing the husband to proceed with his case would prevent the bank from foreclosing on the mortgage after it agreed to a stipulation which gave the wife additional time to cure the default. However, the court denied the bank's request for an award of $1,210 to defray costs it incurred to filed its motion to dismiss.

In re Glauser, *2007 Bankr. LEXIS 2641 (Bankr. E.D. Pa. August 1, 2007) (Sigmund, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

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

0907-119 **Proposed plan modification for surrender of vehicle in full satisfaction of debt pursuant to hanging paragraph did not violate Fifth Amendment.** (*Bankr. M.D. Pa.)*

PROCEDURAL POSTURE: Objectant, a secured creditor, opposed debtor's motion to modify a confirmed chapter 13 plan to permit him to surrender a vehicle securing the claim as an alternative to obtaining the creditor's approval of the modification or to paying the claim through the plan. At issue was whether such a modification deprived the creditor of a property right without just compensation in violation of the Fifth Amendment of the United States Constitution.

OVERVIEW: After the creditor repossessed the vehicle, sold it, and asserted, by an amended proof of claim, a right to recover a deficiency therein, debtor proposed to modify the plan to treat surrender of the vehicle as having fully satisfied the creditor's claim. The creditor objected, arguing that the resulting destruction of its deficiency claim violated its Fifth Amendment rights. The court held that no such infringement of Fifth Amendment rights resulted and that debtor was properly permitted to modify the plan as requested. Noting a prior ruling that such surrenders barred the filing of deficiency claims, the court held that it was well-settled that amendments to bankruptcy laws enacted after a contract was fully performed applied because contracts were subject to Congress's constitutional power to legislate on the subject thereof. Moreover, while the same rule might not apply where a creditor's property rights were completely destroyed, the result of the rule in the instant case was to protect the creditor's lien to the extent of the value of the collateral, in exchange for which a creditor lost the right to assert an unsecured claim. Thus, no Fifth Amendment interest was implicated.

Americredit Fin. Servs. v. Lanier (In re Lanier), *2007 Bankr. LEXIS 2675 (Bankr. M.D. Pa. June 29, 2007) (France, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0907-120 **Secured claim in vehicle purchased for business purposes could be bifurcated pursuant to hanging paragraph even if no longer used for such purposes.** (*Bankr. D. Alaska)*

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion to value a creditor's security interest in the debtor's vehicle and bifurcate the creditor's secured claim into secured and unsecured components pursuant to 11 U.S.C. § 506(a).

OVERVIEW: The debtor financed the purchase of a vehicle through the creditor. She purchased the vehicle to use with her job delivering newspapers, as well as U.S. mail. After two years, she stopped using the vehicle for deliveries when she began working as a bus driver. The debtor's chapter 13 plan proposed to bifurcate the creditor's secured claim on the debtor's vehicle into secured and unsecured components. The creditor argued that bifurcation was barred by 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5) because the vehicle was acquired for the debtor's personal use. The court held that the vehicle was purchased for business use because, when the debtor purchased the vehicle, she intended to use it for her newspaper and mail delivery business and, in fact, used the vehicle for that purpose for more than two years. The court also noted that the debtor deducted expenses related to the vehicle on her tax returns for two tax years.

In re Garrison, *2007 Bankr. LEXIS 2749 (Bankr. D. Alaska June 1, 2007) (MacDonald, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0907-121 **Creditor was entitled to full amount of 910 claim, including interest.** (*B.A.P. 10th)*

PROCEDURAL POSTURE: Appellant creditor challenged an order of the Bankruptcy Court for the District of Kansas confirming the chapter 13 plan filed appellee debtor. The trustee was also an appellee in the matter.

OVERVIEW: Central to the appeal was whether the "hanging paragraph" at the end of 11 U.S.C. § 1325(a)(9) relieved debtor of the obligation to pay postpetition interest to the secured creditor who recently financed his acquisition of a car. The creditor objected to confirmation, arguing that the hanging paragraph prohibited bifurcation of its 910-claim and that therefore, 11 U.S.C. § 1325(a)(5)(B)(ii) required payment of interest on the full amount of its claim. The court determined the effect of the hanging paragraph's language on debtor's obligation to pay postpetition interest. It noted that the bankruptcy court adopted the minority view of the hanging paragraph. However, the instant court followed the majority view that limited the effects of the hanging paragraph to prohibiting bifurcation, and the resulting cram-down of 910-claims. Accordingly, the objection to the chapter 13 plan should have been sustained. The creditor's 910-claim should have been treated as a secured claim for the full amount of its loan balance on the petition date and section 1325(a)(5)(B)(ii) required debtor to pay interest at the *Till* rate on the allowed secured claim over the life of the plan.

DaimlerChrysler Fin. Servs. N. Am. LLC v. Griffin (In re Wilson)*, 2007 Bankr. LEXIS 2784 (B.A.P. 10th August 24, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

0907-122 **Credit union bound by confirmation of plan calling for surrender of recreational vehicle in full satisfaction of refinanced debt.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: A debtor filed a petition under chapter 13, and a plan for repaying his creditors. The court confirmed the plan without objection on December 5, 2006. A credit union filed a proof of claim for $43,287.44 on April 16, 2007, and the debtor filed an objection to that claim. On May 31, 2007, the credit union filed a motion to amend the debtor's plan to provide for full payment of its claim.

OVERVIEW: The debtor refinanced debt he owed on a motorcycle and a recreational vehicle ("RV"), and subsequently declared bankruptcy. The bankruptcy court approved a repayment plan which indicated that the RV would be surrendered in full satisfaction of a debt the debtor owed to a credit union, and the credit union repossessed the RV and sold it for $70,000, leaving a deficiency of $43,287.44 on the amount the debtor owed. The credit union filed a claim for that deficiency and a motion to amend the debtor's plan to provide for full payment of its claim. Although the bankruptcy court found that the RV was not a "910 vehicle" under 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5) because the debtor refinanced his purchase of the RV, the debtor's repayment plan provided that the RV would be surrendered in full satisfaction of his debt, and the credit union was bound by the terms of the plan because it had not filed an objection to the plan or appealed the court's order approving it. The court also found that the plan was not subject to modification under 11 U.S.C. § 1329(a) because there had been no substantial, unanticipated change in the debtor's financial circumstances.

In re Huddle*, 2007 Bankr. LEXIS 2770 (Bankr. E.D. Va. August 13, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(b)(4) Confirmation of Plan; Objections; "Applicable Commitment Period".

0907-123 **Plans could not provide for early payment absent filing of motion for modification.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Multiple debtors filed individual petitions under chapter 13, and plans for repaying their creditors. A trustee who was appointed to manage each case filed objections to confirmation of the debtors' plans.

OVERVIEW: The trustee claimed that repayment plans chapter 13 debtors proposed could not be confirmed because the plans contained language which allowed the debtors to pay off the plan sooner than the commitment period required by 11 U.S.C. § 1325(b)(4). The court reviewed each plan and found language in some plans which allowed the debtor to pay off the plan sooner than the commitment period without filing a motion under 11 U.S.C. § 1329 to modify the plan, and it held that those plans could not be confirmed. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), 11

U.S.C. §§ 101-1532, put an end to a form of bankruptcy planning debtors used before the BAPCPA was enacted, where debtors used equity they had in exempt assets to pay their creditors after their plan was confirmed. As amended, 11 U.S.C. § 1325(b)(1)(B) allowed a repayment plan to be less than three or five years only if the plan provided for payment in full of all allowed unsecured claims over a shorter period. However, that change did not affect a debtor's ability to file a good faith motion under 11 U.S.C. § 1329, after the plan was confirmed, seeking an order modifying the plan.

***In re Kidd**, 2007 Bankr. LEXIS 2812 (Bankr. D. Kan. August 27, 2007) (Karlin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[5]**

§ 1327 Effect of Confirmation.

0907-124 **Proceeds of postconfirmation cause of action were disposable income warranting modification of plan.** (*Bankr. M.D. Ala.)*

PROCEDURAL POSTURE: The movant, the chapter 13 trustee, sought to modify the confirmed plan in debtor's case. The trustee requested that the non-exempt, net proceeds due the debtors from their settlement of a lawsuit be paid under the plan for the benefit of unsecured creditors. The debtors objected to the motion.

OVERVIEW: The plan as originally confirmed provided that certain secured creditors be paid the value of the collateral securing their claims, but that unsecured creditors be paid nothing. The debtors commenced an adversary proceeding against certain creditors, alleging violations of the automatic stay imposed by 11 U.S.C. § 362 and the Fair Debt Collections Practices Act, 15 U.S.C. §§ 1692 et seq. The issue was whether the proceeds from that post-confirmation cause of action were property of the chapter 13 debtor's bankruptcy estate. The court resolved that issue in the negative. However, those same proceeds, if not property of the estate, constituted disposable income warranting the modification of the debtors' plan.

***In re Baxter**, 2007 Bankr. LEXIS 2857 (Bankr. M.D. Ala. August 20, 2007) (Williams, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.01**

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

§ 329 Debtor's Transactions with Attorneys.

0907-125 **Attorney held in contempt for charging fees not approved by court.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: A trustee in bankruptcy filed motions for relief under 11 U.S.C. §§ 329 and 330 and Fed. R. Bankr. P. 2017, 9020, and 9024, seeking examination of fees received by an attorney who represented two chapter 13 debtors, an order requiring the attorney to return the fees, an order finding the attorney in contempt of court for receiving unauthorized fees, an award of costs and attorney's fees, and an order imposing fines.

OVERVIEW: The court found that an attorney who represented chapter 13 debtors charged the debtors $2,700 for legal services she rendered to help them file bankruptcy, but then suggested that the debtors refinance their mortgages and charged one debtor $3,500 and the other debtor $5,262 for those services, and did not report the additional fees she received to the court. The court found that the attorney kept her receipt of the additional fees hidden from the trustee and the court, that her actions violated the court's order allowing her to collect $2,700 for all legal services she rendered to the debtors, and that her actions violated 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b). The court also found that the additional fees the attorney charged were excessive. Finally, the court found that these were not isolated incidents or oversights, but were part of an ongoing pattern and fraudulent scheme to obtain additional unauthorized fees. The court held the attorney in civil contempt, ordered her to disgorge the fees she charged the debtors for helping them refinance their mortgages, and referred the case to appropriate authorities for disciplinary action.

***In Andreas**, 2007 Bankr. LEXIS 2792 (Bankr. N.D. Ill. August 23, 2007) (Squires, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:329.01**

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

0907-126 **Bankruptcy court properly declined to apply doctrine of marshalling to tax refund used to pay debtor's attorney.** (*B.A.P. 10th)*

PROCEDURAL POSTURE: Appellant trustee challenged an order from the Bankruptcy Court for the District of Kansas, which declined to apply the doctrine of marshaling to the tax refund of appellee debtor. Prepetition, the debtor had assigned that tax refund to her attorney for his flat-fee retainer.

OVERVIEW: Prepetition, the attorney agreed to represent the debtor for a flat fee, and the debtor executed an assignment of her anticipated tax refund in favor of the attorney. When the refund was received, the attorney deducted his fee from the pro rata prepetition portion of the refund. The trustee contended that the bankruptcy court should have applied the doctrine of marshaling and required that the fee be paid from the debtor's postpetition portion, but the bankruptcy court disagreed. On appeal, the court affirmed, holding first that the fee was an exception to the general prohibition against using estate funds to compensate attorneys not employed under 11 U.S.C. § 327. 11 U.S.C. § 330(a)(1) did not prohibit a flat-fee retainer to compensate the attorney who had been engaged and paid in advance to ensure that the bankruptcy filing was in order. The bankruptcy court did not abuse its discretion in declining to apply the equitable doctrine of marshaling because prorating or splitting the refund did not create two funds for purposes of marshaling. Thus, the trustee failed to meet his burden of showing two funds belonging to the debtor as required for marshaling.

Redmond v. Carson (In re Carson)*, 2007 Bankr. LEXIS 2785 (B.A.P. 10th August 24, 2007) (Bohanon, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.04**

§ 363 Use, Sale, or Lease of Property.

0907-127 **Sale of debtor's legal malpractice claim was proper.** (*6th Cir.)*

PROCEDURAL POSTURE: Defendant debtor sought review of a judgment from the District Court for the Eastern District of Kentucky affirming the bankruptcy court's order in an adversary proceeding filed by plaintiff attorney, the debtor's former counsel, which permanently enjoined the debtor from prosecuting a state legal malpractice claim against the attorney.

OVERVIEW: The adversary proceeding arose because the debtor continued to pursue his state malpractice claim after the bankruptcy trustee sold the cause of action to the attorney's malpractice insurer at public auction and the bankruptcy court approved the sale pursuant to 11 U.S.C. § 363(b). The debtor failed to appeal the order of sale and did not obtain a stay, and the malpractice insurer consummated the sale by paying the full purchase price to the bankruptcy estate. The court held that section 363(m) rendered the debtor's attacks on the Order of Sale moot because he failed to obtain a stay of the sale. Although the debtor asserted that the malpractice suit did not constitute property of the estate, the court held that § 363(m) mooted the challenge to the unstayed order notwithstanding the debtor's claims that the property sold did not constitute property of the estate and that the bankruptcy court thus lacked authority. The court found that the suit was colorably property of the estate under 11 U.S.C. § 541. The court also held that the injunction fell within the "expressly authorized" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, by virtue of 11 U.S.C. §§ 105, 363 and 541.

Parker v. Goodman (In re Parker)*, 2007 U.S. App. LEXIS 20551 (6th Cir. August 28, 2007) (Clay, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.01**

§ 502 Allowance of Claims or Interests.

0907-128 **Bankruptcy court erred in disallowing claim for prepayment penalties based on standards for priority rather than allowability.** (*1st Cir.)*

PROCEDURAL POSTURE: At issue was a commercial lender's right to receive a bargained-for prepayment penalty from a solvent debtor. Defendant creditor sought review of a decision of the District Court for the District of Rhode Island, which held that 11 U.S.C. § 506(b) governed and that it could recover prepayment penalties only if they were reasonable; it further affirmed a bankruptcy court's determination that they were not.

OVERVIEW: The creditor entered into commercial loan agreements with the debtor that were secured by real property interests and other assets. Each allowed the debtor to repay at any time, subject to prepayment penalties. Thereafter, the debtor filed for bankruptcy. An auction was had of its operating assets, resulting in it securing sufficient funds to pay all creditors in full. The creditor asserted claims for prepayment penalties, which the federal district court denied. The federal court of appeals reversed and remanded. As a matter of bankruptcy law, the lower courts should not have disallowed the claims for penalties in toto based solely upon a finding that they were not entitled to priority under section 506(b). 11 U.S.C. § 502, not 11 U.S.C. § 506, afforded the ultimate test for allowability, and any claim satisfying that test was, at the very worst, collectible as an unsecured claim. While it was arguable whether the creditor presented a statutory interpretation argument below, the court of appeals exercised its discretion to relieve it of forfeiture. The question of whether the prepayment penalties were enforceable under 11 U.S.C. § 502 was to be addressed by the bankruptcy court.

UPS Cap. Bus. Credit v. Gencarelli (In re Gencarelli)*, 2007 U.S. App. LEXIS 20751 (1st Cir. August 30, 2007) (Selya, C.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:502.01**

§ 523 Exceptions to Discharge.

0907-129 **Contractual penalty for debtor's violation of non-compete covenant was nondischargeable.** (*Bankr. N.D. Okla.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendant debtor seeking a determination that its debt was nondischargeable pursuant to 11 U.S.C. § 523. The district court remanded the matter and instructed the bankruptcy court to reassess the damages attributable to loss of goodwill by the creditor as a result of the debtor's willful and malicious conduct.

OVERVIEW: The debtor and creditor entered into an asset purchase agreement whereby the creditor purchased the debtor's business assets. In the agreement, the parties gave values to certain assets such as intangibles and a covenant not to compete. The court previously determined that the debtor had breached the covenant not to compete and awarded $5,000 in damages based on the parties' valuation of the covenant. The court remained convinced that this award was appropriate. The $5,000 figure in the agreement was analogous to a liquidated damages clause. The creditor sought an additional award of damages in the amount of $55,000 based upon the price it paid for the general intangibles of the business. Those assets included the business name and all of its customer records. Nothing established that the creditor did not receive these assets, or that the debtor took any action to intentionally damage these assets. Further, the debtor's breach was only with respect to residential customers, but there was little if any repreat business from such customers, hence, very little good will. The debtor did not damage the creditor's relationships with its commercial customers.

Custom Heating & Air, Inc. v. Andress (In re Andress)*, 2007 Bankr. LEXIS 2844 (Bankr. N.D. Okla. August 17, 2007) (Michael, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

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

0907-130 **Claim for unauthorized charges placed by debtors on creditor's credit card was nondischargeable.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: Plaintiff creditor sought a judgment that her claim against defendant debtors for unauthorized charges they placed on her credit cards was not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(2) or (a)(4). The creditor also sought an award of prejudgment interest and attorney's fees.

OVERVIEW: The creditor added the name of the debtors to her credit card to secure needed van rentals for their business but instructed the debtors not to actually use the card. In spite of the promise, the debtors made charges on the card and forged the creditor's signature on convenience checks. The creditor's lawsuit against the debtors resulted in a settlement agreement, but the debtors defaulted. The court concluded that the obligation for repayment of the unauthorized charge on credit card was non-dischargeable under 11 U.S.C. § 523(a)(2)(A). The debtor made a false representation that they would not use the card for the purpose of deceiving the creditor, who justifiably relied on the representations. The obligation was also non-dischargeable under 11 U.S.C. § 523(a)(4) because the actions of the debtors were

unauthorized and the debtors had not intention of repaying the creditor, which constituted embezzlement. The creditor had no right to attorney fees under 11 U.S.C. § 523(d) when she failed to show any contractual right valid under state law to recover the fees. She was entitled to prejudgment interest at the rates fixed by 28 U.S.C. § 1961.

Holmes v. Jones (In re Holmes), *2007 Bankr. LEXIS 2863 (Bankr. E.D. Tex. August 23, 2007) (Rhoades, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

0907-131 **Debt owed to creditor subrogee, based on injury inflicted by debtor on subrogee's insured in response to threat of bodily harm, was dischargeable.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff creditor filed a complaint against defendant chapter 7 debtor, alleging that any debt owed it should be excepted from discharge under 11 U.S.C. § 523(a)(6) and/or (a)(9).

OVERVIEW: The creditor was an insurance company. One of its insureds was involved in a fight with the debtor that resulted in the insured being injured when struck by a car driven by the debtor. The creditor compensated the insured for her injuries and became a subrogee of the insured's rights against the debtor. The debtor, after a plea of no contest, was convicted of attempt to commit felonious assault. The court held that the facts did not support a finding that the injury was malicious under 11 U.S.C. § 523(a)(6). The court held that the debtor reacted to a real threat of bodily harm by the insured when the insured was jumping around four to five feet in front of her car with a brick and yelling, "I'm going to f--k you up." The court also held that the evidence of the debtor's criminal conviction did not determine the element of maliciousness, as a matter of preclusion or otherwise. The court further held that there was no evidence that the debtor had consumed alcohol, and there was no testimony regarding the amount of marijuana that the debtor smoked or other evidence from which the court could have concluded that the debtor drove her vehicle under the influence of marijuana.

State Farm Fire & Cas. Co. v. Chapman (In re Chapman), *2007 Bankr. LEXIS 2864 (Bankr. N.D. Ohio August 22, 2007) (Whipple, 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.

0907-132 **Debt owed based on deposit of and draws against counterfeit check received by debtor in email lottery scam was dischargeable absent intent to defraud.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff bank filed an action against defendant debtor alleging that an obligation that the debtor owed to the bank was nondischargeable under 11 U.S.C. § 523(a)(2)(A). The obligation arose after the debtor deposited a counterfeit check into an account that the debtor had with the bank, and later the debtor defaulted on a promissory note that the debtor gave to the bank to cover the overdraft.

OVERVIEW: The debtor spent over a year and wired payments of over $167,000 to various individuals to pay the fees and taxes so that the debtor could collect a prize in a lottery scam. When the debtor eventually received a check for $48,100, the debtor deposited the check in his account with the bank. After a week, the bank notified the debtor that the check had cleared, and he wired money to other accounts based on the deposit. Thereafter, the bank discovered that the check was counterfeit, and the debtor was required to sign a $48,000 promissory note to cover the overdraft in his account. The bank filed an adversary proceeding for a ruling that the loan obligation was nondischargeable under 11 U.S.C. § 523(a)(2). The court held that the presentation of the bad check alone did not constitute false representation, false pretenses, or fraud on the part of the debtor under 11 U.S.C. § 523(a)(2)(A). The bank failed to provide any evidence that the debtor made an express representation that the check was good. The bank also failed to prove that the debtor had an intent to defraud the bank. The court denied the debtor's request for attorney's fees under 11 U.S.C. § 523(d).

Hickory Point Bank & Trust v. Kucera (in re Kucera), *2007 Bankr. LEXIS 2765 (Bankr. C.D. Ill. August 22, 2007) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

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

0907-133 **Detbor who was sole, unpaid, round-the-clock caretaker for chronically ill mother entitled to undue hardship discharge of student loan debt.** (*Bankr. D. Vt.)*

PROCEDURAL POSTURE: Plaintiff debtor filed an adversary proceeding against defendant creditor for a discharge of the student loan obligation that the debtor owed to the creditor, pursuant to 11 U.S.C. § 523(a)(8). The debtor filed a motion for summary judgment.

OVERVIEW: The creditor had guaranteed three student loans made to the debtor. As of April 2006, the balance owed on the loans was $16,207 plus interest. The debtor provided evidence that since 2000, she had been the sole and full-time caretaker for her mother and that the two of them lived solely on the mother's pension and social security income. The income for the debtor and her mother totalled $3,139 per month and their monthly expenses totaled $3,505. The debtor claimed that she did not earn any income. The court found that the expenses listed were reasonable and that payment on the student loans would not allow the debtor to maintain a minimal standard of living. The court thus found that the debtor had satisfied the first prong of Brunner. The court found that the second prong of Brunner was met because the debtor had documented that the mother required round-the-clock care for a long-term, chronic illness, and the debtor had been the sole provider of that care since 2000. The debtor met the good faith requirement of the Brunner test because the debtor made efforts to repay the loans when she had an income. Further the debtor had sold many personal items to pay for expenses.

Santamassino v. New Jersey Higher Educ. Student Assistance Auth. (In re Santamassino)*, 2007 Bankr. LEXIS 2822 (Bankr. D. Vt. August 23, 2007) (Brown, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

0907-134 **Debtor permanently brain damaged before completing medical school granted undue hardship discharge of student loan debt.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: Plaintiff debtor filed for relief under chapter 7. The debtor filed an adversary proceeding against defendant two creditors to determine dischargeability of the debtor's student loan obligations to the creditors. After a hearing, the court issued findings of fact and conclusions of law.

OVERVIEW: The debtor completed two years of medical school and incurred extensive student loan obligations to finance his education. Before the debtor could complete medical school, he was seriously injured in a motor vehicle accident that left the debtor with permanent brain damage. The debtor was not able to complete medical school or to perform complex tasks. The debtor owed just under $200,000 to the two creditors. At the time of the hearing, the debtor worked as an assistant in a medical office, performing clerical and menial tasks, and the debtor earned approximately $1,154 per month. The debtor's monthly expenses exceeded income by about $800 per month. The court found that the debtor had established, by a preponderance of the evidence, that repayment of the loan obligations to the two creditors would impose an undue hardship on the debtor. Under the totality of the circumstances, the debtor's injuries had severely limited his current and future ability to earn a significant income. The debtor's listed living expenses were reasonable, and under the circumstances of the case, favored discharge of the debtor's student loans, pursuant to 11 U.S.C. § 523(a)(8).

Sherman v. Mohela (In re Sherman)*, 2007 Bankr. LEXIS 2802 (Bankr. W.D. Mo. August 15, 2007) (Venters, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 547 Preferences.

0907-135 **Payments properly held to be preferential where debtor held a receivable in excess of nine million dollars.** (*B.A.P. 10th)*

PROCEDURAL POSTURE: Defendant, a member of a chapter 7 debtor, appealed a decision of the Bankruptcy Court for the District of Colorado, which held that the member had received preferential payments from the debtor under 11 U.S.C. § 547.

OVERVIEW: The debtor was a non-profit company made up of several members, who factored accounts receivable, which were then sold to the debtor at a discount. All transfers were with full recourse to the factoring member and members were required to maintain deposits with the debtor to partially secure their recourse obligation. During the preference period, the member received interest payments and

made two principal withdrawals. The bankruptcy court held that the debtor was insolvent during the preference period because at least $9 million of an account receivable was uncollectible, leaving the debtor with negative equity. In affirming the bankruptcy court's decision, the court held that the $9 million dollar figure was not clearly erroneous because, if anything, the evidence in the record supported a higher figure. The court also held that the bankruptcy court properly rejected the member's ordinary course defense because the member pointed to nothing in the record indicating that the bankruptcy court erred when it concluded that he knew about the precariousness of the debtor's financial situation and, therefore, that the circumstance under which the transfers were made were suspicious.

Jagow v. Grunwald (In re Allied Carriers' Exchange, Inc.), *2007 Bankr. LEXIS 2859 (B.A.P. 10th September 4, 2007) (McFeeley, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.01**

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

0907-136 **Contstructive trust imposed on house purchased by debtor's son with proceeds of sale of house preferentially transferred to him by debtor.** (*Bankr. E.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff, the chapter 7 trustee, sought to avoid the transfer of the debtor's former residence and the proceeds from the refinancing and sale thereof, pursuant to 11 U.S.C. § 544(b), and to impose liability upon the defendant transferee, the debtor's son, under 11 U.S.C. § 550. The son's defense was that he gave reasonably equivalent consideration in exchange for the transfer.

OVERVIEW: The son resided with the debtor for a long period of time. The father filed a chapter 13 petition in which he claimed the house as his exempt homestead and his only significant asset. The chapter 13 case was voluntarily dismissed in 2002. While insolvent, the father conveyed the house to his son, identifying the transfer as a gift. The son refinanced the house, and then sold it and bought a new house. The father filed his chapter 7 petition. The court found incredible the son's testimony that he made various undocumented cash payments to his father as consideration for the house. The transfer of the house was held avoidable, and the trustee was entitled to recover the property or the value of the property under section 550, including the appreciation in the value of the house. It was undisputed that all of the funds used by the son to purchase the second house came from the sale proceeds of the first house. The court imposed a constructive trust on the second house, and awarded a money judgment as to the proceeds realized by the son that were not reinvested in the second house.

Sanders v. Quan Ky Hang (In re Hoa Ky Hang), *2007 Bankr. LEXIS 2836 (Bankr. E.D. Cal. August 16, 2007) (Ford, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:550.02**

§ 727(a) Discharge; Grounds for Denial.

0907-137 **Discharge denied due to debtor's concealment of interests in real estate contract and joint bank account.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: Plaintiff, the U.S. Trustee, sought an order denying a discharge to debtor pursuant to 11 U.S.C. § 727(a)(2) and (a)(4)(A) on claims that debtor concealed property from the estate by omitting assets from his petition and knowingly made a false oath or account when he testified to the accuracy of his petition.

OVERVIEW: Though debtor, a real estate agent, and his wife, signed a contract to buy a residential lot and made payments in connection therewith, debtor failed to disclose that contract on schedules completed in tandem with his chapter 7 bankruptcy petition filed later that same year and also failed to disclose the existence of the joint checking account which was used to make payments on the contract. The trustee claimed that a discharge was properly denied per section 727 based on debtor's omission of both interests from his petition and his swearing of an oath, both in writing and at a creditor's meeting, that the matters disclosed in his petition were accurate. Though debtor denied any intention to hinder, delay, or defraud, the court held that debtor's conduct in fact violated section 727(a)(2) and (a)(4)(A), and granted relief on the complaint. Specifically, given the proximity in time of the various events and debtor's vocation as a real estate agent, his protestations that the items were omitted by mistake were

unconvincing and his failure to list those assets as well as his conduct in swearing that his disclosures were accurate when in fact they were not justified an order denying discharge.

Fokkena v. Smith (In re Smith), *2007 Bankr. LEXIS 2726 (Bankr. N.D. Iowa June 12, 2007) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

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

0907-138 **Denial of discharge reversed and remanded due to reasonable question of fact regarding debtor's intent.** (*4th Cir.)*

PROCEDURAL POSTURE: Appellant debtor appealed the final judgment of the District Court for the District of Maryland affirming the decision of the bankruptcy court. By its opinion, the bankruptcy court denied the debtor's discharge petition and awarded summary judgment to a creditor.

OVERVIEW: The bankruptcy court determined that the debtor's discharge petition should be denied as he knowingly made false oaths during his bankruptcy proceedings. The bankruptcy court also concluded the petition should be denied because the debtor failed to keep and preserve adequate records from which his financial condition could be ascertained. The debtor maintained that there were genuine issues of material fact concerning whether he knowingly made false oaths in his bankruptcy proceedings and whether he failed to keep and preserve adequate financial records. A reasonable factfinder could have concluded that the debtor lacked the requisite intent under 11 U.S.C. § 727(a)(4)(A) to make false oaths. This was particularly so in light of the expert medical evidence indicating that the debtor's inaccuracies were likely the result of a mental impairment, plus the debtor's own affidavit that he did not intend to mislead the court. A reasonable factfinder could have also found the records produced by the debtor were sufficient to permit an assessment of his financial condition and to the extent the debtor failed to produce certain records, such failure was justified in the circumstances.

Mercantile Peninsula Bank v. French (In re French), *2007 U.S. App. LEXIS 20462 (4th Cir. August 27, 2007) (King, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.04**

§ 1143 Distribution.

0907-139 **Creditors who did not receive or cash distribution checks could make claims against funds in registry.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 11. The liquidation trustee made final distributions, and a remaining amount of $22,176 in uncashed distribution checks was deposited into the registry of the court. Two claimants sought payment from the funds and the debtor alleged they had forfeited any claims to the money.

OVERVIEW: The liquidating trustee made two distributions pursuant to a liquidation plan. After the second distribution, four unclaimed checks totaling $22,176 were subsequently deposited with the court. Thereafter, the two claimants filed motions to claim $4,678 and $15,541 respectively. The two claimants had not received or cashed their checks mailed to them as part of the second distribution, and that was part of the money deposited with the court. It was not disputed that the two claimants were creditors in the case who were entitled to final distributions in the amounts stated. The debtor claimed that the claimants could not recover the funds because they did not cash their distribution checks within 90 days as required by the confirmed plan. The court found that the registry funds could not be considered unclaimed under the plain language of 11 U.S.C. § 1143. The claimants could make a claim on the registry funds within five years of confirmation and the two claims filed were timely. The court was not persuaded that claim forfeiture had occurred under the terms set forth in the confirmed plan.

In re Sterling Fin. Servs. of Florida - 1, Inc., *2007 Bankr. LEXIS 2814 (Bankr. M.D. Fla. August 24, 2007) (May, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1143.01**

§ 1328(a)(3) Discharge; Full-Compliance Discharge; Restitution or Criminal Fines Excepted.

0907-140 **Costs of federal criminal prosecution imposed as part of sentence were excepted from discharge.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: The debtor filed a chapter 13 petition listing only an obligation owed to the United States government, identified as the unpaid costs of prosecution imposed on the debtor as part of a federal criminal sentence. The debtor then filed an adversary complaint to determine whether that obligation would be dischargeable under 11 U.S.C. § 1328(a)(3).

OVERVIEW: Debtor was also required to pay a monetary fine as part of his punishment. A restitution requirement was waived. He had first filed a chapter 7 petition and obtained a discharge. The government filed an adversary proceeding in connection with the chapter 7 case, contending that the obligation debtor owed for the costs of prosecution was nondischargeable under 11 U.S.C. § 523(a)(7). The debt was the only one listed in the chapter 13 case. The court denied as premature the debtor's request for a ruling at the outset of the chapter 13. The chapter 13 trustee's final report and accounting indicated that $2,774.89 was paid on the government's claim, leaving a balance of $77,088.34 unpaid. The court concluded that the unpaid portion of the government's claim for costs of prosecution was excepted from discharge by 11 U.S.C. § 1328(a)(3). The costs of prosecution were tantamount to a "criminal fine." *Kelly v. Robinson* supported the inclusion of all penal monetary sanctions within the Code's discharge exceptions.

Ryan v. United States (In re Ryan)*, 2007 Bankr. LEXIS 2603 (Bankr. D. Idaho July 31, 2007) (Myers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.02[3]**