September 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

September 10, 2007 Issue 2

Cases of Particular Interest in This Issue

Firm that represented creditor in acquisition of debtor was not disinterested and could not represent debtor or real estate and transactional matters.
In re Running Horse, LLC (Bankr. E.D. Cal. July 10, 2007) **0907-039**

Notices of sale of tax liens containing legend required by Fair Debt Collection Practices Act did not violate stay.
In re James (Bankr. N.D.N.Y. July 9, 2007) **0907-042**

Failure to file all required payment advices did not warrant dismissal due to reflection of constant pattern of compensation and "year-to-date" figures encompassing 60-day period.
In Wojda (Bankr. W.D.N.Y. July 13, 2007) **0907-046**

Above-median debtor required to propose five-year plan unless unsecured creditors were paid in full.
In re Nance (Bankr. S.D. Ill. July 10, 2007) **0907-057**

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

§ 362 Incarceration for civil contempt was within scope of automatic stay.
In re Birchall (*Bankr. D. Mass. July 3, 2007*)..... 0907-041

2d Circuit

§ 362(a)(5) Notices of sale of tax liens containing legend required by Fair Debt Collection Practices Act did not violate stay.
In re James (*Bankr. N.D.N.Y. July 9, 2007*)..... 0907-042

§ 521(i) Failure to file all required payment advices did not warrant dismissal due to reflection of constant pattern of compensation and "year-to-date" figures encompassing 60-day period.
In Wojda (*Bankr. W.D.N.Y. July 13, 2007*)..... 0907-046

3d Circuit

§ 303(b)(1) Involuntary petition filed by single creditor dismissal as debtor had more than eleven qualified creditor's and filing creditor's claim was subject to bona fide dispute.
In re Mylotte, David & Fitzpatrick (*Bankr. E.D. Pa. July 12, 2007*)..... 0907-038

§ 362(b)(22) Ministerial postpetition acts to enforce prepetition eviction judgment did not violate stay.
In re Williams (*Bankr. E.D. Pa. July 5, 2007*)..... 0907-043

§ 1306(b) Adequate protection payments to undersecured vehicle creditor had priority over debtor's attorneys' fees.
In Dispirito (*Bankr. D.N.J. July 17, 2007*)..... 0907-054

§ 1307(e) Debtor's fifth chapter 13 case in three and a half years dismissed with 180-day filing bar.
In re Forte (*Bankr. E.D. Pa. July 6, 2007*)..... 0907-055

4th Circuit

§ 109(h)(1) Case dismissed where debtors received credit counseling prior to dismissed chapter 13 case and after chapter 7 petition date but not within 180 days prior to the chapter 7 petition.
In re Ellis (*Bankr. D.S.C. May 17, 2007*) 0907-036

§ 109(h)(1) Credit counseling received 198 days prior to filing did not satisfy requirement.
In re Coard (*Bankr. D.S.C. May 16, 2007*) 0907-037

§ 362(d)(3) Motion for relief from stay denied as filed prior to expiration of 90-day "breathing space."
In re Hope Plantation Group, LLC (*Bankr. D.S.C. June 14, 2007*)..... 0907-044

§ 524(c)(3) Reaffirmation agreement approved upon debtor's certification that there was no undue hardship.
In re Isom (*Bankr. E.D. Va. July 17, 2007*)..... 0907-048

6th Circuit

§ 523(a) Debtor's misrepresentations, diversion of funds and conversion in construction process rendered debt nondischargeable.
Gibbs v. Nevels (In re Nevels) (*Bankr. E.D. Tenn. July 9, 2007*)..... 0907-047

§ 707(b)(1) Chapter 7 case ordered dismissed or converted due to excessive expense claims.
In re Zuccarell (*Bankr. N.D. Ohio July 9, 2007*)..... 0907-049

§ 727 Case dismissed due to debtor's failure to comply with turnover order.
Davis v. Stevens (In re Stevens) (*Bankr. N.D. Ohio July 17, 2007*)..... 0907-053

7th Circuit

§ 707(b)(2)(A) Above-median debtor could claim ownership expense for motorcycle owned free and clear.
In re Barrett (*Bankr. S.D. Ill. July 10, 2007*)..... 0907-051

§ 1325(b) Above-median debtor required to propose five-year plan unless unsecured creditors were paid in full.
In re Nance (*Bankr. S.D. Ill. July 10, 2007*)..... 0907-057

§ 1327 Plan rate of interest, not *Till* rate, applied where creditor's priority claims would be paid in full and creditor did not timely object.
In re Averhart (*Bankr. E.D. Wis. July 12, 2007*)..... 0907-058

9th Circuit

§ 327(e) Firm that represented creditor in acquisition of debtor was not disinterested and could not represent debtor or real estate and transactional matters.
In re Running Horse, LLC (*Bankr. E.D. Cal. July 10, 2007*)..... 0907-039

§ 327(e) Employment of divorce counsel for each debtor spouse approved as in best interests of debtors' estates.
In re Goldstein (*Bankr. C.D. Cal. July 2, 2007*)..... 0907-040

§ 362(k) Failure of creditor to return vehicles repossessed postpetition immediately upon receiving notice of bankruptcy violated stay.
In re White (*Bankr. D. Ariz. July 9, 2007*)..... 0907-045

§ 707(b)(3) Deadline for trustee's motion for dismissal for substantial abuse equitably tolled by debtor's false statements.
In re Bertel (*Bankr. N.D. Cal. July 6, 2007*)..... 0907-052

10th Circuit

§ 707(b)(2)(A) Mortgage payment on rental property which debtor planned to surrender could not be included in calculation of projected disposable income.
In re Edmondson (*Bankr. D.N.M. July 11, 2007*)..... 0907-050

§ 1325(a) Debtor's third chapter 13 case dismissed due to failure to demonstrate feasibility or filing of state tax returns.
In re Cordova (*Bankr. D.N.M. July 16, 2007*)..... 0907-056

PRE-2005 ACT CASES IN THIS ISSUE

2d Circuit

§ 727(a) Debtor who engaged in complex transactions among shell entities in hindrance of creditors denied discharge on grounds of fraud.
Doubet, LLC v. Palermo (In re Palermo) (*Bankr. S.D.N.Y. July 9, 2007*)..... 0907-067

§ 1127(b) Court ordered settlement and payment of claims against surviving reorganized debtor was not an impermissible post-confimation modification.
In re Reserve Capital Corp. (*Bankr. N.D.N.Y. July 6, 2007*)..... 0907-068

4th Circuit

§ 109(e) Finding of ineligibility under chapter 13 did not prevent voluntary conversion to chapter 7.
In re Bilter (*Bankr. E.D. Va. July 16, 2007*)..... 0907-059

§ 1307(c) Moratorium granted excusing debtor from three months of plan payments subject to dismissal if debtor missed any further payments.
In re Ivey (*Bankr. D.S.C. June 13, 2007*)..... 0907-069

6th Circuit

§ 328(a) Trustee's attorney's fees incurred in adversary proceeding were limited to rates approved in retention application.
Russell v. Jones (In re Pro Page Partners, LLC) (*Bankr. E.D. Tenn. July 11, 2007*)..... 0907-061

8th Circuit

§ 327(e) Law firm that represented debtor in chapter 11 case could represent trustee after conversion to chapter 7.
In re Tri-State Ethanol Co., LLC (*Bankr. D.S.D. July 10, 2007*) 0907-060

9th Circuit

§ 523(a)(8) Debtor spouse with childrearing responsibilities and severe psychological difficulties granted undue hardship discharge of student loan debt.
DeCecco v. United States (In re DeCecco) (*Bankr. N.D. Cal. July 3, 2007*)..... 0907-064

10th Circuit

§ 348(f) Postpetition tax refunds that were property of the estate at time of conversion could not be administered by chapter 7 trustee absent bad faith.
In re Reed (*Bankr. D. Kan. July 9, 2007*)..... 0907-062

11th Circuit

§ 506(b) Unsecured creditor not entitled to recover postpetition attorneys' fees.
In re Electric Machine Enters. (*Bankr. M.D. Fla. July 6, 2007*) 0907-063

§ 542 Insurer's law firm that represented debtor in wrongful death action ordered to turn over allegedly privaleged documents relevant to estate's bad faith action.
In re Courtney (*Bankr. M.D. Fla. July 13, 2007*)..... 0907-065

§ 726(a)(4) FICA tax penalty claim subordinated to claims of unsecured creditors,
In re Morande Enters. (*Bankr. M.D. Fla. June 29, 2007*)..... 0907-066

§ 1329 Disposable income test applies to plan modifications.
In re Demske (*Bankr. M.D. Fla. July 6, 2007*) 0907-070

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

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

0907-036 **Case dismissed where debtors received credit counseling prior to dismissed chapter 13 case and after chapter 7 petition date but not within 180 days prior to the chapter 7 petition.** (*Bankr. D.S.C.)*

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. §§ 109(h)(1), 521(b) and 707(a) for the debtors' failure to obtain credit counseling within 180 days prior to the petition filing date, and the debtors' failure to file the proper credit counseling certificates.

OVERVIEW: The debtors filed the chapter 7 case on March 8, 2007. The debtors had filed a chapter 13 case in April, 2006, but the case was dismissed some seven months later because of the debtors' failure to make payments under their confirmed plan. In the chapter 13 case, the debtors had filed certificates showing compliance with the credit counseling requirements, under 11 U.S.C. §§ 521(b)(1) and 109(h). When the debtors filed their current chapter 7 case, they had not obtained any additional credit counseling and had thus not complied with the requirement of 11 U.S.C. § 109 that they receive credit counseling within 180 days of the filing. After the trustee filed the motion to dismiss, the debtors obtained credit counseling. The debtors did not provide certification of any exigent circumstances that would warrant a waiver under 11 U.S.C. § 109(h)(3)(A). The court declined to use its equitable authority and rule that a mere oversight of the credit counseling requirement could by cured by a postpetition filing, in view of the unambiguous requirements set forth in 11 U.S.C. § 109.

***In re Ellis**, 2007 Bankr. LEXIS 2383 (Bankr. D.S.C. May 17, 2007) (Duncan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

0907-037 **Credit counseling received 198 days prior to filing did not satisfy requirement.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: The debtor filed for bankruptcy relief under chapter 7. The United States Trustee filed a motion, pursuant to 11 U.S.C. §§ 109(h)(1), 521(b) and 707(a) to dismiss the case due to the debtor's failure to obtain credit counseling within 180 days prior to the petition filing date.

OVERVIEW: When the debtor filed for bankruptcy relief on February 23, 2007, the debtor filed a certificate of credit counseling. The certificate stated that the debtor had received credit counseling on August 9, 2006, 198 days before the bankruptcy case was filed. The debtor also filed a statement of compliance with credit counseling, which incorrectly stated that a briefing from an approved credit counseling agency had been received within 180 days of the filing. The court found that the debtor had not submitted a certification that was satisfactory to the court to demonstrate exigent circumstances that merited a waiver of the requirement of credit counseling. The debtor had not submitted any evidence of incapacity, disability, or active military duty that would merit exemption from the credit counseling requirement. The court declined to afford the debtor relief under its equitable authority under 11 U.S.C. § 105 because such relief was not allowed or contemplated by the law. Equity could not be exercised contrary to the unambiguous language of 11 U.S.C. § 109. The debtor was not eligible to file for chapter 7 relief and there was cause to dismiss the case under 11 U.S.C. § 707(a).

***In re Coard**, 2007 Bankr. LEXIS 2376 (Bankr. D.S.C. May 16, 2007) (Burris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[1]**

§ 303(b)(1) Involuntary Cases; Commencement; By Three or More Entities.

0907-038 **Involuntary petition filed by single creditor dismissal as debtor had more than eleven qualified creditor's and filing creditor's claim was subject to bona fide dispute.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: A petitioning creditor, an attorney who alleged he held claims for missed draw payments and unpaid monthly car allowance, filed an involuntary chapter 7 petition against the putative debtor, a law firm partnership. The putative debtor filed an answer in opposition to the petition, pursuant to Fed. R. Bankr. P. 1003(b), 1011, seeking its dismissal. Four other creditors filed requests to join in the petition pursuant to 11 U.S.C. § 303(c).

OVERVIEW: The putative debtor asserted that the petition should be dismissed because it had more than eleven qualified creditors at the time the involuntary case commenced, and so the involuntary petition was defective under 11 U.S.C. § 303(b)(1) in that three petitioning creditors – rather than the petitioning creditor alone – were required to initiate the action. Alternatively, it alleged that if a sole petitioning creditor could properly file an involuntary petition under 11 U.S.C. § 303(b)(2), the petitioning creditor was not so qualified. The putative debtor asserted that the creditor held a claim subject to a bona fide dispute. The court determined that the evidence demonstrated that the partnership had at least twelve qualified creditors. Thus, the petitioning creditor's claim, by itself, was insufficient to support an involuntary petition. The court also found that, as of March, 2007, the petitioning creditor knew or should have known that the partnership had twelve or more creditors whose claims were not subject to bona fide dispute when he filed the involuntary petition. The petition did not comply with 11 U.S.C. § 303(b)(1). Debtor acted in bad faith in filing alone.

In re Mylotte, David & Fitzpatrick*, 2007 Bankr. LEXIS 2375 (Bankr. E.D. Pa. July 12, 2007) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.04**

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

0907-039 **Firm that represented creditor in acquisition of debtor was not disinterested and could not represent debtor or real estate and transactional matters.** (*Bankr. E.D. Cal.)*

PROCEDURAL POSTURE: Chapter 11 debtor filed an application to employ a law firm as special counsel pursuant to 11 U.S.C. § 327(e). The United States Trustee objected.

OVERVIEW: Ownership of the debtor was acquired by a creditor. The firm represented the creditor in connection with the acquisition. The debtor sought to retain the firm as special counsel to represent the debtors on real estate and business transaction matters. The firm was not disinterested. In denying the application, the court held that it was not persuaded that the debtor sought to employ the firm for a specified special purpose, which was sufficiently disconnected from the debtor's general duty of conducting the case. The court held that the scope of the firm's proposed employment appeared to be far too expansive an assignment to be appropriate for an appointment under section 327(e). The court held that the firm's employment more properly fell under the ambit of section 327(a); however, the firm could not qualify under section 327(a) because it was not disinterested.

In re Running Horse, LLC*, 2007 Bankr. LEXIS 2322 (Bankr. E.D. Cal. July 10, 2007) (Lee, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.04[9]**

0907-040 **Employment of divorce counsel for each debtor spouse approved as in best interests of debtors' estates.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: Chapter 11 debtors filed a joint motion to employ, pursuant to 11 U.S.C. § 327(e), their respective divorce counsel to perform legal services in relation to their marital dissolution proceeding pending in state court.

OVERVIEW: The joint debtors were in the process of seeking a dissolution of their marriage. Each party retained divorce counsel before the filing of the bankruptcy petition, and counsel for both parties had performed legal services in relation to the divorce proceeding prior to the filing of the bankruptcy petition. The court held that the estates should be treated as separate for each spouse, which facilitated the finding required under section 327(e) that the employment of legal counsel by each spouse separately to proceed with the divorce was in the best interests of their respective estates. The court held that employing special divorce counsel would assist the debtors in resolving their differences in their marital dissolution and in disentangling their domestic lives during the bankruptcy proceeding. The court also held that to continue to retain the attorneys as divorce counsel would avoid any unnecessary expenses and duplicated efforts from newly retained counsel.

In re Goldstein*, 2007 Bankr. LEXIS 2325 (Bankr. C.D. Cal. July 2, 2007) (Bufford, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.04[9]**

§ 362 Automatic Stay.

0907-041 **Incarceration for civil contempt was within scope of automatic stay.** (*Bankr. D. Mass.)*

PROCEDURAL POSTURE: A judgment creditor of a chapter 7 debtor filed a motion for a determination that the automatic stay of 11 U.S.C. § 362 did not apply to the debtor's incarceration for civil contempt. The debtor filed a motion to order the creditor to take all steps necessary to secure the immediate release of the debtor from incarceration.

OVERVIEW: The creditor obtained a default judgment against the debtor, the creditor's former attorney, for converting funds of the creditor and for breaching his duty toward the creditor. The creditor brought a supplementary process proceeding against the debtor in state court. The state court judge ordered the creditor to pay the judgment and, after the debtor failed to comply with orders of the state court and pay the judgment, the judge found the debtor in civil contempt and ordered him to be committed to the county jail. The debtor then filed a skeletal chapter 7 petition. In granting the debtor's motion, the court held that a civil contempt order was within the scope of the automatic stay because it was obtained as a tool to enforce the creditor's judgment. The court also held that the creditor was not entitled to relief from stay for cause because her claim was an unsecured claim, not the subject of a lien, and the court had not ruled that it was nondischargeable. The court also held that a dismissal of the debtor's chapter 7 case for cause was premature because the meeting of creditors had not yet been conducted by the trustee.

***In re Birchall**, 2007 Bankr. LEXIS 2309 (Bankr. D. Mass. July 3, 2007) (Feeney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(a)(5) Automatic Stay; Scope; Acts to Create, Perfect or Enforce Liens Securing Claims.

0907-042 **Notices of sale of tax liens containing legend required by Fair Debt Collection Practices Act did not violate stay.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: In separate cases, bankruptcy debtors moved for a finding that communications to the debtors from the former servicer of municipal tax liens against the debtors constituted attempts to collect prepetition debts from the debtors in violation of the automatic bankruptcy stay under 11 U.S.C. § 362(a)(5).

OVERVIEW: The servicer contended that the letters to the debtors merely advised the debtors that the tax liens against their properties were sold by the municipality, and that another entity was servicing the liens and was the proper party to contact concerning the liens. The debtors argued that the letters nonetheless contained a legend at the bottom stating that the servicer was attempting to collect municipal tax debt, and thus the letters violated the stay. The bankruptcy court held that the legend in the form letters was only intended to avoid any violation of debt collection statutes requiring disclosures in communications with the debtors, and no violation of the stay occurred as a result of the otherwise innocuous letters. Regardless of the language of the legend, the substance of the letters was informational and helpful and did not constitute attempts to collect debts.

***In re James**, 2007 Bankr. LEXIS 2321 (Bankr. N.D.N.Y. July 9, 2007) (Cangilos-Ruiz, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03[7]**

§ 362(b)(22) Automatic Stay; Exceptions; Enforcement of Judgment of Possession of Residential Rental Property.

0907-043 **Ministerial postpetition acts to enforce prepetition eviction judgment did not violate stay.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Before bankruptcy debtors filed their bankruptcy petition, the debtors' landlord obtained a judgment against the debtors for past-due rent and possession of the premises leased by the debtors. The landlord obtained a postpetition order of possession and, upon objection by the debtors' counsel, moved for relief from the automatic bankruptcy stay to the extent necessary to evict the debtors.

OVERVIEW: The landlord contended that 11 U.S.C. § 362(b)(22) permitted the landlord to proceed with the eviction, despite the stay, because the debtors failed to deposit rent with their certification that they intended to cure the arrearage. The debtors argued that, while cited exception to the stay permitted acts against the debtors' leasehold interest under section 362(a)(3), the exception did not apply to permit the continuation of the eviction proceeding as prohibited by section 362(a)(1) or to permit enforcement of the prepetition judgment as prohibited by section 362(a)(2). The bankruptcy court held that, while section 362(b)(22) did not expressly preclude the operation of section 362(a)(1) and (2), the landlord was entitled to proceed with the eviction under the express stay exception of section 362(b)(22), since allowing the operation of section 362(a)(1) and (2) to bar the eviction would render the exception meaningless. Further, the judgment ended the case and the ministerial acts involved in enforcing the eviction did not constitute the continuation of a proceeding within the meaning of section 362(a)(1). Also, the landlord was not attempting to collect property from the debtors personally within the contemplation of section 362(a)(2).

***In re Williams**, 2007 Bankr. LEXIS 2339 (Bankr. E.D. Pa. July 5, 2007) (Sigmund, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.05[25]**

§ 362(d)(3) Automatic Stay; Relief from Stay; Acts Against Single Asset Real Estate by Secured Creditor.

0907-044 **Motion for relief from stay denied as filed prior to expiration of 90-day "breathing space."** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: The debtor filed for protection under chapter 11. The movant filed a motion for relief from the automatic stay, pursuant to 11 U.S.C. § 362 so that the movant could proceed on an obligation owed by the debtor in the original amount of $12.5 million.

OVERVIEW: The debtor owed an obligation to the creditor, in the original amount of $12.5 million. Under the terms of the promissory note, the debtor was supposed to pay the note within 75 days and granted the creditor a first lien on the property. The creditor presented evidence that it was the intent for the parties for the debtor to obtain alternative financing and to satisfy the note in a timely fashion. The debtor never made any payment on the promissory note. The creditor commenced a foreclosure action in state court before the bankruptcy petition was filed and a consent order of foreclosure and sale was entered. The court noted that the creditor filed its motion for relief 73 days after the case was filed. The court found that the motion was premature because it was filed before the 90-day "breathing-space" period set forth in 11 U.S.C. § 362(d)(3) had expired. The court rejected the creditor's assertion that the motion was timely because the hearing was held on the 93rd day after the petition was filed, because there was no basis for the motion pursuant to 11 U.S.C. § 362(d)(3) when it was filed.

***In re Hope Plantation Group, LLC**, 2007 Bankr. LEXIS 2381 (Bankr. D.S.C. June 14, 2007) (Burris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[5]**

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

0907-045 **Failure of creditor to return vehicles repossessed postpetition immediately upon receiving notice of bankruptcy violated stay.** (*Bankr. D. Ariz.)*

PROCEDURAL POSTURE: Chapter 13 debtor filed a motion for sanctions against a creditor for a violation of the automatic stay pursuant to 11 U.S.C. § 362(k).

OVERVIEW: The debtor owed the creditor money, repayment of which was secured by two vehicles. The creditor repossessed the vehicles after the debtor had filed a chapter 13 petition. Although the creditor was listed on the debtor's bankruptcy schedules, it was not on the master mailing list. As a result, the creditor did not receive notice of the filing of the debtor's bankruptcy case until after it had repossessed the debtor's vehicles. Nonetheless, the creditor did not return the vehicles for six days, doubting the authenticity of the bankruptcy filing during that time period. The court held that the creditor had the affirmative duty to return the vehicles to the debtor immediately after receiving notice of the bankruptcy filing and the failure to do so constituted a willful violation of the stay. The court held that the debtor was entitled to the attorneys' fees and costs that she incurred to file her motion for sanctions and for her counsel to attend the hearing on the motion. The court also held that the debtor was entitled to recover damages for the emotional distress caused by the ongoing violation of the stay by the creditor.

In re White, *2007 Bankr. LEXIS 2354 (Bankr. D. Ariz. July 9, 2007) (Curley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.11[3]**

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

0907-046 **Failure to file all required payment advices did not warrant dismissal due to reflection of constant pattern of compensation and "year-to-date" figures encompassing 60-day period.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: Debtor filed a voluntary petition for relief under chapter 13 and the court approved confirmation of his plan. Pending was a creditor's motion to dismiss the bankruptcy case. The dispute involved the substantive grounds for the dismissal of a bankruptcy case under 11 U.S.C. § 521(i), as well as the procedural requirements for consideration of a request for an order confirming this outcome.

OVERVIEW: The creditor argued that debtor failed to file copies of all of payment advices received within 60 days of its bankruptcy filing, that more than 45 days had passed since commencement of the bankruptcy, that the case was automatically dismissed by section 521(i)(1), and that pursuant to section 521(i)(2), any party in interest could now request an order dismissing the case. Debtor responded that the confirmation order barred application of section 521(i), and that in any event, he provided adequate information to satisfy section 521(a). The court stated that the facts of the case were special, in that debtor filed a majority of the payment advices from the 60 day period, and those advices reflected a constant pattern of compensation. The submitted advices contained no indication of wages for overtime. Because debtor filed his petition during October, the "year to date" numbers encompassed all 60 days prior to filing. A different result might have followed if the filed statements did not so clearly demonstrate the precise and consistent amount of compensation. Here, debtor's peculiar circumstances allowed the filed payment advices to satisfy section 521(a) and to avoid grounds for dismissal under section 521(i).

In Wojda, *2007 Bankr. LEXIS 2393 (Bankr. W.D.N.Y. July 13, 2007) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.24**

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

0907-047 **Debtor's misrepresentations, diversion of funds and conversion in construction process rendered debt nondischargeable.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Plaintiff judgment creditors brought an adversary proceeding against defendant bankruptcy debtor, alleging that the judgment debt was not dischargeable under 11 U.S.C. § 523(a)(2)(A), (4) and (6) based on the debtor's fraud, misappropriation, and willful and malicious injury. The creditors moved for summary judgment based on collateral estoppel.

OVERVIEW: A default judgment in a prior state case, which the debtor unsuccessfully attempted to vacate, established that the debtor accepted funds from the creditors for construction of a home but used the funds for payment of outstanding invoices of the debtor's business and did not construct the home. The bankruptcy court held that collateral estoppel precluded relitigation of the issues raised in the state case and established the nondischargeability of the judgment debt to the creditors. The state court specifically found that the debtor's misrepresentations and concealment of progress on the home sufficiently evidenced the debtor's intent to defraud the creditors. Further, the debtor's diversion of funds from the construction trust account constituted fiduciary fraud, and the conversion of the creditors' funds constituted willful and malicious injury. Also, the fact that the judgment was by default did not preclude application of collateral estoppel, and the prior judgment expressly found that the debtor was properly served by publication based on the debtor's willful concealment of her whereabouts to avoid service of process by the creditors.

Gibbs v. Nevels (In re Nevels), *2007 Bankr. LEXIS 2403 (Bankr. E.D. Tenn. July 9, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

§ 524(c)(3) Effect of Discharge; Reaffirmation Agreements; Filing and Affidavit of Debtor's Attorney.

0907-048 **Reaffirmation agreement approved upon debtor's certification that there was no undue hardship.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: A debtor filed a petition under chapter 7 and filed a motion which asked the court to approve a reaffirmation agreement. The court held a hearing on the debtor's request.

OVERVIEW: The debtor properly executed the certification in Part D of Form 240A in support of the agreement, stating that she believed the agreement was in her financial interest and that she could afford to make payments on the reaffirmed debt. Although the debtor was represented by counsel, her counsel did not execute the certification in Part C of the agreement, as required by 11 U.S.C. § 524(c)(3), which required her to state that the agreement would not impose an undue hardship on the debtor. Counsel represented at the hearing that it was not her practice to make that certification, and that any such determination was best left up to the court. The court found that the rebuttable presumption of undue hardship under 11 U.S.C. § 524(m) did not apply because the creditor was a credit union. However, the court found that it could not approve the agreement unless the debtor's counsel executed the certification in Part C. At the conclusion of the hearing, the debtor's counsel asked the court for time to respond to the court's ruling, and counsel subsequently filed an Amended Attorney Certification.

In re Isom*, 2007 Bankr. LEXIS 2437 (Bankr. E.D. Va. July 17, 2007) (Huennekens, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.04**

§ 707(b)(1) Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13; Substantial Abuse; Test.

0907-049 **Chapter 7 case ordered dismissed or converted due to excessive expense claims.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: A debtor filed a petition under chapter 7, and a United States trustee was appointed to manage the bankruptcy estate. The trustee filed a motion to dismiss the case pursuant to 11 U.S.C. § 707(b)(1).

OVERVIEW: The debtor claimed that he had unsecured debts totaling between $6,000 and $16,000, and he asked the court to discharge those debts. The trustee questioned budgetary figures submitted by the debtor which showed that he had a net monthly income of $2,702, and monthly expenses in the amount of $2,742. The trustee noted that the debtor had surrendered his house and moved into an apartment, but claimed a monthly payment of $852 for the mortgage on his house and a monthly expense of $150 for home maintenance. The trustee also claimed that the debtor's claim of $250 per month for recreation was excessive. The court found that the debtor had surrendered his house and moved into an apartment, and it allowed him to claim $550 a month for rent he was paying but disallowed his claims for mortgage payments and home maintenance. The court also found that the debtor's claim of $250 for recreation was unreasonable. After the figures were adjusted, the debtor's income exceeded his monthly expenses, and a presumption arose under 11 U.S.C. § 707 that he was not entitled to chapter 7 relief.

In re Zuccarell*, 2007 Bankr. LEXIS 2311 (Bankr. N.D. Ohio July 9, 2007) (Speer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

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

0907-050 **Mortgage payment on rental property which debtor planned to surrender could not be included in calculation of projected disposable income.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: The debtors moved for confirmation of their chapter 13 plan. Creditor filed an objection.

OVERVIEW: The creditor argued that the debtors' mortgage payment was, by definition, "unreasonable" because it exceeds the IRS Standard deduction for housing expenses. The court found that the debtors' mortgage payment on their primary residence was not restricted to the IRS Standard; the expense clearly fell within 11 U.S.C. § 707(b)(2)(A)(iii). In addition, there was no evidence before the court

that the amount of the debtors' mortgage payment was otherwise extraordinary. In sum, 11 U.S.C. § 707(b)(2)(A)(iii) allowed for the deduction of a debtor's average monthly payments on secured debts, and because the mortgage payment was for the debtors' primary residence, such expense also appeared to fit within 11 U.S.C. § 707(b)(2)(A)(iii)(II) as an additional payment to a secured creditor necessary for the debtors to maintain possession of their debtor's primary residence. However, the mortgage payment associated with the rental property which the debtors planned to surrender, and from which the debtors no longer received income, could not be included in the expenses deducted in computing their projected disposable income.

In re Edmondson, *2007 Bankr. LEXIS 2344 (Bankr. D.N.M. July 11, 2007) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

0907-051 **Above-median debtor could claim ownership expense for motorcycle owned free and clear.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: The trustee in bankruptcy objected to the confirmation of the proposed plan of a single, above-median income, chapter 13 debtor, who claimed an ownership expense for two motor vehicles on form B22C, arguing the debtor had not applied all of her "projected disposable income" to make payments to unsecured creditors under her plan as required by 11 U.S.C. § 1325(b).

OVERVIEW: Only one of debtor's vehicles was encumbered by a lien. Her motorcycle was unencumbered. Nevertheless, the debtor, who was single and childless, claimed a monthly ownership expense for the motorcycle of $332, as allowed by the IRS local standards, and as applied in the means test under 11 U.S.C. § 707(b)(2)(A)(ii)(I). Under the IRS standards, whether the debtor had a spouse or any dependents was irrelevant. While there was much ambiguity under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 arising from the interpretation of the phrase "projected disposable income," the court did not find such ambiguity in the narrow application of the ownership expense deduction. The trustee had not raised any argument that would allow the court to weigh whether the debtor had acted in bad faith. The court held that her claim of a deduction for both vehicles did not foreclose a determination that she was applying all of her projected disposable income to make payments to unsecured creditors under the plan, as required by 11 U.S.C. § 1325(b)(1)(B).

In re Barrett, *2007 Bankr. LEXIS 2369 (Bankr. S.D. Ill. July 10, 2007) (Meyers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 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.

0907-052 **Deadline for trustee's motion for dismissal for substantial abuse equitably tolled by debtor's false statements.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: The Office of the U.S. Trustee ("UST") moved to dismiss debtor's chapter 7 case under 11 U.S.C. § 707(a) and (b)(3). Debtor opposed, contending the section 707(b)(3) motion was untimely.

OVERVIEW: Debtor made false statements in his filings that were not discovered by the UST until the deadline had passed for filing a motion based on the true facts. The UST acknowledged that, with exceptions not relevant here, Fed. R. Bankr. P. 1017(e)(1) provided that a motion to dismiss a case for abuse under 11 U.S.C. § 707(b) had to be filed within 60 days after the first date set for the meeting of creditors. Although the original motion was filed before the deadline, the supplemental motion, which changed the basis for the motion, was not. The court was not persuaded that the supplemental motion related back to the original motion. The supplemental motion did not meet the test that it arose out of the conduct, transaction, or occurrence set forth in the original pleading. The court was persuaded by the UST's second argument, *i.e.*, that the deadline should be deemed to be equitably tolled. Equitable tolling was appropriate when the claimant had acted diligently but had been induced by the adverse party through trickery or other misconduct to file a defective pleading or not to file at all during the statutory period. The application of equitable tolling was appropriate.

In re Bertel, *2007 Bankr. LEXIS 2318 (Bankr. N.D. Cal. July 6, 2007) (Tchaikovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[3]**

§ 727 Discharge.

0907-053 **Case dismissed due to debtor's failure to comply with turnover order.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff, the chapter 7 trustee, moved for summary judgment on his complaint objecting to defendant debtor's discharge pursuant to 11 U.S.C. § 727(a)(6) and (d)(3). At issue, *inter alia*, was whether debtor's failure to fully comply with a turnover order was a sufficient basis on which to deny discharge.

OVERVIEW: After debtor filed a chapter 7 case, the court ordered debtor to turn over to the trustee a sum exceeding $2300. When, after several months, debtor had only turned over $500, the trustee filed an adversary proceeding seeking a judgment depriving debtor of a discharge, either by revocation of discharge under section 727(d)(3) or by denial of discharge under section 727(a)(6)(A). Several months later, the trustee moved for summary judgment. When debtor failed to oppose the motion, the court nonetheless considered whether the trustee had met his burden to prove by a preponderance of the evidence that there was no genuine issue as to a material fact and that the trustee was entitled to judgment as a matter of law. The court so ruled. Specifically, it noted that because the trustee had established debtor's failure to comply with the turnover order and because debtor had failed to respond to the summary judgment motion or otherwise to refute the trustee's affidavit that had established her failure to comply with the turnover order, there was no genuine issue of material fact in dispute and the trustee was entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c). It so ruled.

Davis v. Stevens (In re Stevens)*, 2007 Bankr. LEXIS 2434 (Bankr. N.D. Ohio July 17, 2007) (Baxter, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 1306(b) Property of the Estate; Possession by Debtor.

0907-054 **Adequate protection payments to undersecured vehicle creditor had priority over debtor's attorneys' fees.** (*Bankr. D.N.J.)*

PROCEDURAL POSTURE: Chapter 13 debtor and the creditor holding the security interest on her motor vehicle disputed whether the adequate protection payments debtor was making to the creditor was senior or junior in priority to the claim to attorneys fees by debtor's counsel.

OVERVIEW: It was undisputed that the creditor was an undersecured creditor with respect to the subject vehicle, and that the debtor needed to retain the vehicle to maintain her employment and succeed under the plan. The debtor argued that the creditor's claim to the adequate protection payments was not entitled to administrative status because the debtor had purchased her vehicle for personal, rather than commercial, use. The court rejected that argument. If the attorney's fees were paid ahead of the adequate protection payments, then the adequate protection would be undercut, as the funds that provide the adequate protection would be paid to someone besides the protected lender. The lender's claim thus was entitled to priority.

In Dispirito*, 2007 Bankr. LEXIS 2439 (Bankr. D.N.J. July 17, 2007) (Kaplan, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1306.03**

§ 1307(e) Conversion or Dismissal; Failure to File Prepetition Tax Return.

0907-055 **Debtor's fifth chapter 13 case in three and a half years dismissed with 180-day filing bar.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Chapter 13 trustee filed a motion to dismiss the debtor's case pursuant to 11 U.S.C. § 1307(e) and to bar the debtor from filing future bankruptcy cases.

OVERVIEW: The debtor's instant bankruptcy case was his fifth chapter 13 petition in three and a half years. All four prior cases had been dismissed, without the debtor successfully reorganizing. At the time of the filing of the instant bankruptcy case, the debtor had not filed either federal or state tax returns for several years. The debtor failed to attend a meeting of creditors pursuant to 11 U.S.C. § 341(a). The trustee sought dismissal due to the debtor's failure to file his tax returns for the prior four years by the first meeting of creditors, as required under 11 U.S.C. § 1308. The court held that, pursuant to 11 U.S.C. § 1307(e), the failure to comply with 11 U.S.C. § 1308 mandated dismissal of the debtor's case. In barring the debtor from filing any future bankruptcy cases for a period of 180 days, the court held that, despite knowing for years that taxing authorities had been asserting claims against him, he failed to fulfill his

statutory obligations to have prepared and filed all delinquent tax returns. The court held that the debtor's creditors, including the taxing authorities and his mortgagee, had been delayed for years in collecting their outstanding obligations.

***In re Forte**, 2007 Bankr. LEXIS 2373 (Bankr. E.D. Pa. July 6, 2007) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04[12]**

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

0907-056 **Debtor's third chapter 13 case dismissed due to failure to demonstrate feasibility or filing of state tax returns.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: A debtor filed a voluntary petition under chapter 13, and a trustee was appointed to the case. The trustee filed a motion to dismiss the debtor's action, based on the debtor's failure to comply with requirements of the Bankruptcy Code, and several creditors supported the trustee's request.

OVERVIEW: The debtor filed a petition under chapter 13 in August, 2005, and his plan for repaying creditors was confirmed. However, the court dismissed the case after the debtor failed to make payments that were due under his plan. Four days after his first case was dismissed, the debtor filed a second petition. However, that case was dismissed because the debtor failed to comply with 11 U.S.C. § 521. The debtor filed a third petition under chapter 13 on April 20, 2007, and the trustee filed a motion to dismiss. The court dismissed the debtor's petition because the debtor did meet his burden under 11 U.S.C. § 1325(a)(6) of showing that his plan for repaying creditors was feasible, and did not meet his burden under 11 U.S.C. § 1325(a)(9) of showing that he filed state tax returns. Although the debtor proposed to pay his creditors over a 60-month period, the maximum period allowed under 11 U.S.C. § 1322(d), he had not started making payments. In addition, he did not show that he had a reliable source of income which could be used to make payments. Given the debtor's prior history of failed bankruptcy actions, dismissal was appropriate.

***In re Cordova**, 2007 Bankr. LEXIS 2428 (Bankr. D.N.M. July 16, 2007) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.02**

§ 1325(b) Confirmation of Plan; Objections.

0907-057 **Above-median debtor required to propose five-year plan unless unsecured creditors were paid in full.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: In each of the debtors' cases, the chapter 13 trustee objected to confirmation on the grounds that the proposed plan failed to use the proper methodology to calculate "projected disposable income" and/or failed to provide for payment of all of debtors' disposable income for a period of five years.

OVERVIEW: The court's opinion examined 11 U.S.C. § 1325(b) and addressed: (1) how "projected disposable income" ("PDI") was to be calculated for purposes of section 1325(b)(1)(B), and (2) whether, for purposes of confirmation, an above-median income debtor could propose a plan for a duration of less than five years without paying unsecured creditors in full. Regarding the first issue, the court needed to determine whether a debtor's PDI was calculated using the current monthly income figure on line 20 of Official Form B22C, which looked back at the six months preceding the filing, or whether the court should give forward meaning to the word "projected" and use a debtor's income as reflected on Schedule I to calculate PDI. It was the court's opinion that, when determining whether or not an above-median debtor had committed all of his or her PDI under section 1325(b)(1)(B), it would look to a debtor's Form B22C alone. On the second issue, the court found that the plain language of section 1325(b) mandated that, in order to be confirmed, an above-median income chapter 13 debtor had to propose a five year plan, unless the plan pays unsecured creditors in full over a shorter period of time.

***In re Nance**, 2007 Bankr. LEXIS 2370 (Bankr. S.D. Ill. July 10, 2007) (Meyers, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

§ 1327 Effect of Confirmation.

0907-058 **Plan rate of interest, not *Till* rate, applied where creditor's priority claims would be paid in full and creditor did not timely object.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 13. The creditor, which held a security interest in the debtor's car, filed a proof of claim, and the debtor filed an objection to the creditor's proof of claim. The debtor claimed that pursuant to 11 U.S.C. § 1327, the creditor's claim was limited to the amount confirmed in the plan.

OVERVIEW: The debtor asserted that the creditor's claim should be allowed in the amount of $24,521, which included interest computed at 4.89%, in accordance with the debtor's confirmed chapter 13 plan. The creditor asserted that its claim should be allowed in the amount of $27,644, which included interest computed at 9.5%, in accordance with the creditor's proof of claim. The court held that the creditor was required to abide by the terms of the confirmed plan and was not eligible to recover its claim with the higher interest rate. The creditor's case was not governed by *Till* because it did not involve a situation where the debtor had confirmed a plan that did not pay the creditor's priority claims in full. 11 U.S.C. § 1325(a) was not a mandatory provision to confirmation, when the creditor did not timely object to the proposed interest that would be paid. Bankr. E.D. Wis. R. 3001.1, as it was in effect at the time of the proceedings, did not support the argument that the creditor's proof of claim was controlling over the claim confirmed in the plan.

In re Averhart, *2007 Bankr. LEXIS 2407 (Bankr. E.D. Wis. July 12, 2007) (Shapiro, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.01**

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

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

0907-059 **Finding of ineligibility under chapter 13 did not prevent voluntary conversion to chapter 7.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: The debtor originally filed for relief under chapter 13 and then sought to voluntary convert the matter to a proceeding under chapter 7. One of the creditors objected to the debtor's notice of voluntary conversion.

OVERVIEW: The debtor filed a petition under chapter 13 in September, 2005. A chapter 13 plan had not been confirmed, but the debtor had made plan payments to the trustee in the amount of $10,850. One of the creditors objected to confirmation under chapter 13, and at a hearing on the objection the court was apprised of a liquidated unsecured claim against the debtor in the amount of $328,511. Under the provisions of 11 U.S.C. § 109 in effect at the time of filing, the limit for debt under chapter 13 liability was $307,675 and the court orally ruled that the chapter 13 case needed to be dismissed. Because of the court's ruling, and before a written order was entered by the court, the debtor filed the notice for a voluntary conversion. The court determined initially that it was not bound by its prior oral bench ruling dismissing the chapter 13 case. The court determined that it had jurisdiction to address the debtor's motion to convert even after the debtor had been found to be ineligible under 11 U.S.C. § 109(e) to proceed as a debtor under chapter 13. The debtor was not precluded from converting his case to chapter 7 even though he exceeded the eligibility limits for a chapter 13 case.

In re Bilter, *2007 Bankr. LEXIS 2436 (Bankr. E.D. Va. July 16, 2007) (Tice, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.06**

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

0907-060 **Law firm that represented debtor in chapter 11 case could represent trustee after conversion to chapter 7.** (*Bankr. D.S.D.)*

PROCEDURAL POSTURE: The debtor initially filed for relief under chapter 11, and the matter had been converted to a proceeding under chapter 7. The company sought to disqualify the law firm retained by the chapter 7 trustee to represent the trustee, because the law firm had previously represented the debtor.

OVERVIEW: Pursuant to 11 U.S.C. § 327(e), the trustee employed the law firm that had represented the debtor both pre-petition and during the debtor's chapter 11 case, before the matter was converted to a chapter 7 proceeding. The court determined that the company had failed to establish any legal authority for its argument that the law firm needed to be removed as counsel for the trustee because of its earlier representation of the debtor. The court rejected the company's argument that the law firm had violated some continuing fiduciary or professional duty to the debtor. The conversion of the matter to chapter 7 created control of the debtor with the chapter 7 trustee, and the debtor's former board of managers was completely ousted. The trustee also controlled any attorney-client privilege that was held by the debtor.

In re Tri-State Ethanol Co., LLC*, 2007 Bankr. LEXIS 2387 (Bankr. D.S.D. July 10, 2007) (Hoyt, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.04[9]**

§ 328(a) Limitation on Compensation of Professional Persons; Professionals Employed by Trustee or Committee.

0907-061 **Trustee's attorney's fees incurred in adversary proceeding were limited to rates approved in retention application.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Defendant objected to the request for attorney's fees by plaintiff chapter 7 trustee.

OVERVIEW: The trustee obtained court approval to retain special counsel to prosecute on the trustee's behalf certain adversary proceedings, including one against defendant. Counsel agreed to charge certain hourly fees for its services. The court granted the trustee summary judgment against defendant on an indemnity claim and concluded that she was entitled to recover reasonable attorney's fees and expenses based on a provision in the parties' indemnification agreement that permitted such recovery. The trustee calculated the attorney's fees according to an hourly rate that was higher than the amount that counsel had agreed to charge. The court held that, absent some basis for setting that agreement aside, it was inequitable for the trustee to be able to obtain a higher rate from defendant, merely because the indemnification agreement permitted recovery of a reasonable fee and counsel could have charged a higher rate. The court held that, under 11 U.S.C. § 328(a), the rates approved in the application had to remain in effect unless unanticipated developments made them improvident, and there were no unforeseen developments that made the approved rates improvident.

Russell v. Jones (In re Pro Page Partners, LLC)*, 2007 Bankr. LEXIS 2401 (Bankr. E.D. Tenn. July 11, 2007) (Parsons, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:328.02**

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

0907-062 **Postpetition tax refunds that were property of the estate at time of conversion could not be administered by chapter 7 trustee absent bad faith.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: Chapter 7 debtors in two cases filed motions to determine that their income tax refunds were not property of the chapter 7 estate. In a third chapter 7 case, the trustee filed a motion for turnover. In a fourth chapter 7 case, the chapter 7 debtors, who had converted their case from chapter 13, filed a motion to strike language in their chapter 13 confirmation order.

OVERVIEW: In all four cases, the debtors originally filed under chapter 13 and later converted to chapter 7 after their plans were confirmed. The confirmation orders all contained language providing that, if the case were converted to chapter 7, postpetition tax refunds, which were part of the bankruptcy estate at the time of conversion pursuant to 11 U.S.C. § 1306(a)(1), could be administered by the chapter 7 trustee upon conversion of the case. The court held that the language had to be stricken from all future orders because it conflicted with 11 U.S.C. § 348(f), which provided for such administration by the chapter 7 trustee only if the case had been converted in bad faith. The court held that, despite the conflict, the debtors in the first two cases could not exclude their tax refunds from the chapter 7 estate because the debtors failed to timely appeal the confirmation orders and were bound by the terms of those orders, and the orders could not be altered by a collateral attack. In the fourth case, the language was stricken from the confirmation order pursuant to Fed. R. Civ. P. 59(e) because the debtors sought relief within 10 days of the entry of the confirmation order.

In re Reed*, 2007 Bankr. LEXIS 2337 (Bankr. D. Kan. July 9, 2007) (Karlin, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 3:348.07**

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

0907-063 **Unsecured creditor not entitled to recover postpetition attorneys' fees.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Chapter 11 debtor objected to a request by an unsecured creditor to recover attorneys' fees and costs incurred postpetition as part of its unsecured claim against the debtor.

OVERVIEW: The creditor was a surety that issued a subcontractor performance bond on behalf of a contractor on a construction project. The debtor executed an indemnity agreement in favor of the creditor agreeing to indemnify the creditor from any losses incurred with respect to the bond. The contractor defaulted in its obligation to pay a subcontractor obligee, who thereafter sued and obtained a money judgment against the contractor and the creditor. The creditor filed an unsecured proof of claim for the amount of the judgment, together with attorneys' fees incurred both before and after the filing of the debtor's bankruptcy petition for fees in connection with collection of the judgment. The court held that the creditor was not entitled to attorneys' fees, costs, and other charges that were incurred postpetition, even though there was an attorney fee provision contained in the indemnity agreement, because, if Congress had intended for unsecured creditors to receive postpetition attorneys' fees, then it would have done so explicitly by authorizing unsecured creditors to collect fees under 11 U.S.C. § 506(b).

In re Electric Machine Enters., *2007 Bankr. LEXIS 2356 (Bankr. M.D. Fla. July 6, 2007) (Wiliamson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:506.04**

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

0907-064 **Debtor spouse with childrearing responsibilities and severe psychological difficulties granted undue hardship discharge of student loan debt.** (*Bankr. N.D. Cal.)*

PROCEDURAL POSTURE: Plaintiff bankruptcy debtors, husband and wife, brought an adversary proceeding against defendant United States, seeking a determination that the debtors' student loan debts were dischargeable based on undue hardship under 11 U.S.C. § 523(a)(8).

OVERVIEW: Although the wife was well educated and worked with emotionally disturbed children, she had a history of severe psychological difficulties, and the husband was also well educated but worked at two jobs for hourly wages. The debtors contended that they cashed in retirement funds to make ends meet in supporting their child, and that they had another child on the way. The bankruptcy court noted that the debtors lived modestly, had no assets, had expenses equal to their income, and had no current ability to make payments on their student loans. The court then held that most of the wife's student loan debt was discharged but none of the husband's debt was discharged. The wife's employment and family responsibilities took a constant toll on her ability to overcome her severe psychological problems, and the wife was heavily dependent on therapy and medication to keep functioning. However, the husband was underemployed but had excellent prospects for increasing income in the future, and his present inability to make payments due to the needs of his family was not likely to persist for a significant portion of the repayment period.

DeCecco v. United States (In re DeCecco), *2007 Bankr. LEXIS 2320 (Bankr. N.D. Cal. July 3, 2007) (Jaroslavsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 542 Turnover of Property to the Estate.

0907-065 **Insurer's law firm that represented debtor in wrongful death action ordered to turn over allegedly privaleged documents relevant to estate's bad faith action.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 7. The chapter 7 trustee filed a motion, pursuant to 11 U.S.C. § 542, for turnover of property and files that the law firm had in its possession or control in its capacity as representatives for the debtor in a wrongful death action filed against the debtor.

OVERVIEW: The debtor was sued in a wrongful death action resulting from a car accident. The debtor's insurer retained the law firm to represent the debtor in the action. As a direct result of the wrongful death action, the debtor filed a voluntary petition for relief under chapter 7. The debtor was obligated to pay personally $1.04 million of the wrongful death judgment. The debtor obtained a discharge in bankruptcy,

and the trustee was actively pursuing an insurance bad faith claim on behalf of the estate. The trustee claimed that the bad faith action was part of the estate, pursuant to 11 U.S.C. § 541, and that the law firm was obligated to turn over the documents that would otherwise be protected under the attorney-client privilege, pursuant to 11 U.S.C. § 542. The court found that the benefits to the debtor's estate of potential recovery under a bad-faith law suit outweighed any conceivable harm that could come to the debtor from disclosure of the privileged material. Any statements that could potentially expose the debtor to additional criminal liability could be redacted with the approval of the court.

In re Courtney, *2007 Bankr. LEXIS 2409 (Bankr. M.D. Fla. July 13, 2007) (Funk, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:542.01**

§ 726(a)(4) Distribution of Property of the Estate; Order of Distribution; Fines, Penalties, Forfeitures, or Damages.

0907-066 **FICA tax penalty claim subordinated to claims of unsecured creditors,** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: A corporate debtor filed a petition under chapter 11, and creditor IRS filed a claim in the amount of $55,005.16, based on penalties relating to the debtor's nonpayment of FICA tax obligations to the U.S. The debtor filed a motion to subordinate the IRS' claim.

OVERVIEW: The IRS opposed the debtor's motion to subordinate its claim for tax penalties, arguing that the language of 11 U.S.C. § 510(c) did not permit subordination. Although it sought subordination under section 510(c), the debtor conceded that subordination under section 510(c) would not be warranted unless there was proof the Government was involved in inequitable conduct. The court then considered the issue of whether it could consider 11 U.S.C. § 726(a)(4) in the context of a Chapter 11 case. The court found that subordination of the IRS' claim was warranted. First, this was a total liquidation Chapter 11 case. Second, the tax penalty claim was clearly a nonpecuniary claim. Third, the IRS would receive full payment plus interest on tax claims it asserted. Fourth, after the payment of administrative claims and priority claims, money available for distribution to general unsecured creditors would yield only a partial dividend, and it would be unfair to further dilute amounts general unsecured creditors received by requiring the debtor to pay the IRS' tax penalty claim.

In re Morande Enters., *2007 Bankr. LEXIS 2296 (Bankr. M.D. Fla. June 29, 2007) (Paskay, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:726.02[4]**

§ 727(a) Discharge; Grounds for Denial.

0907-067 **Debtor who engaged in complex transactions among shell entities in hindrance of creditors denied discharge on grounds of fraud.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff judgment creditor brought an adversary proceeding against defendant bankruptcy debtor, seeking a determination that the debtor was not entitled to a discharge based on the debtor's fraud, inadequate records, and failure to explain the loss of assets under 11 U.S.C. § 727(a)(2), (3) and (5). The bankruptcy court conducted a trial.

OVERVIEW: The debtor was a self-employed real estate consultant with uneven reported income, and the debtor engaged in financial transactions through numerous shell entities controlled by the debtor. The bankruptcy court held that denial of the debtor's discharge was warranted in view of the debtor's fraudulent transactions, his failure to maintain adequate records, and his failure to explain the disposition of substantial funds. By orchestrating complex arrangements between his various shell entities, the debtor acted with the requisite intent to hinder creditors by taking cash advances on future earnings, assigning payments to those lenders in repayment, transferring property between accounts, and squandering the balances. Further, the debtor did not maintain records of his financial transactions, and his accountings were fraught with inaccuracies and inconsistencies, despite the debtor's experience and sophistication. Also, the debtor's spending was grossly irresponsible in maintaining a high standard of living with minimal assets, and the debtor obtained substantial amounts of money without providing any meaningful explanation concerning the disposition of the funds.

Doubet, LLC v. Palermo (In re Palermo), *2007 Bankr. LEXIS 2307 (Bankr. S.D.N.Y. July 9, 2007) (Hardin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 1127(b) Modification of Plan; After Confirmation and Before Substantial Consummation.

0907-068 **Court ordered settlement and payment of claims against surviving reorganized debtor was not an impermissible post-confimation modification.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: On remand from the district court, certain debtors raised the issue that the proposed relief previously ordered by the bankruptcy court was an impermissible post-confirmation modification of the previously confirmed plan of the one reorganized surviving chapter 11 debtor. The bankruptcy court had ordered the compromise and payment of claims against the surviving reorganized debtor.

OVERVIEW: The district court decision generally ruled that the bankruptcy court did not abuse its discretion in finding that the proposed compromises raised by the trustee in a Fed. R. Bankr. P. 9019 motion were fair, reasonable and in the best interest of the estates. The district court did remand on the issue of whether that bankruptcy court order constituted an improper post-confirmation modification of the confirmed reorganized debtor's plan. The trustee argued, and the bankruptcy court found, that the compromise contained in the Rule 9019 motion merely instituted the relief exactly as the plan called for: it discounted the share of the payments in accordance with present value. In doing so, the court did not modify the plan, but simply carried through the plan's express terms, discounting of the estates' interest in an annual $100,000 consulting fee to $250,000 net present value, and liquidating a 2 percent equity interest in the reorganized debtor, reasonably valued at $60,000.

In re Reserve Capital Corp., *2007 Bankr. LEXIS 2305 (Bankr. N.D.N.Y. July 6, 2007) (Gerling, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1127.04**

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

0907-069 **Moratorium granted excusing debtor from three months of plan payments subject to dismissal if debtor missed any further payments.** (*Bankr. D.S.C.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 13, and a plan was confirmed. The chapter 13 trustee sought dismissal of the proceedings for non-payment, and the debtor objected. The court held a hearing and issued findings of fact and conclusions of law.

OVERVIEW: The confirmed plan required the debtor to make monthly payments to the trustee for a period of 57 months. When the trustee sought dismissal, the debtor was more than two months behind on her payments and in default under the plan. The debtor filed a motion for moratorium asking that she be excused from three months of missed payments, and that she be allowed to resume payments in May, adding the missed payments to the end of the plan term. No objections were filed to the motion for moratorium, and it was undisputed that the debtor would again be current with plan payments if the moratorium was granted. The court found that the debtor committed a material default under 11 U.S.C. § 1307(c)(1) and (6) when she failed to make payments under the confirmed plan for two or more months, and did not take any action to make the missed payments before the trustee petitioned for dismissal. The default resulted in prejudice to the creditors. Because of debtor's conduct, the court determined that imposition of a future dismissal provision was appropriate.

In re Ivey, *2007 Bankr. LEXIS 2367 (Bankr. D.S.C. June 13, 2007) (Burris, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.04**

§ 1329 Modification of Plan After Confirmation.

0907-070 **Disposable income test applies to plan modifications.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: The debtors filed a motion to modify their confirmed chapter 13 plan. The chapter 13 trustee filed an objection.

OVERVIEW: The debtors argued that the disposable income test of 11 U.S.C. § 1325(b) did not apply to modifications simply because that statute had not been incorporated in 11 U.S.C. § 1329, by virtue of the plain language of the statute. The court disagreed. The court found that section 1325(b) was incorporated into section 1329 for the parallel rationale that it was not incorporated – the two sections were related, but one section could not supersede the other. Section 1329 set additional standards for modifications of the original confirmed plan. Further, a debtor could not supply a plan to the court which incorporated all

of debtor's disposable income, and then turn around post-confirmation and remove his or her disposable income under the guise of modification, while simultaneously claiming that the creditors could only object using those provisions listed by section 1329. In the instant case, the debtors proposed to refinance their home. However, they did not inform the court as to how the refinancing would have affected their disposable income. It was unclear whether there had been a reduction in the debtors' disposable income to have justified the voluntary modification they sought.

In re Demske, *2007 Bankr. LEXIS 2298 (Bankr. M.D. Fla. July 6, 2007) (Funk, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1329.01**