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Collier Bankruptcy Case Update

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POST-2005 ACT CASES IN THIS ISSUE

PRE-2005 ACT CASES IN THIS ISSUE

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

§ 109(h)(3)(A) Who May Be a Debtor; Mandatory Credit Counseling; Exemption.

1107-071 (**Consumer**) **Deferment of credit counseling requirement where debtor did not claim exigent circumstances for filing or inability to obtain counseling within five days of petition date.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: A debtor filed for relief under chapter 7. The debtor filed a request for deferment of the credit counseling requirement set forth in 11 U.S.C. § 109(h).

OVERVIEW: The debtor filed a certification with his petition claiming exigent circumstances. The debtor had not had a job for over eight months and had been living in a homeless shelter for a week before filing the petition. The court found that the debtor had not established exigent circumstances as contemplated under 11 U.S.C. § 109 because there was no showing that the bankruptcy petition would be ineffective if the filing of the petition was delayed so that the debtor could obtain credit counseling first. Additionally, the debtor's certification did not say that the debtor attempted to obtain credit counseling but was unable to obtain it within five days of the request. Although the facts set forth by the debtor demonstrated a potential need for bankruptcy relief, there was no showing that the petition had to be filed by a certain date in order to provide effective relief. Because the certification did not comply with the first two requirements of 11 U.S.C. § 109(h)(3)(A), the court did not have authority to grant a deferment.

In re Hailemichael*, 2007 Bankr. LEXIS 3562 (Bankr. E.D. Va. October 12, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.09[3]**

§ 305 Abstention.

1107-072 (**Commercial**) **State court action with judge as "quasi-receiver" for debtor did not present grounds for dismissal of involuntary case which could better serve as single forum to resolve issues.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Major creditors of the debtor partnership filed involuntary petitions. The debtor filed an answer, pursuant to argues that this involuntary petition should be dismissed pursuant to Fed. R. Bankr. P. 1011, and moved for abstention pursuant to 11 U.S.C. § 305, arguing it was already a party to a "quasi-receivership" proceeding in state court. The creditors opposed the motion for abstention.

OVERVIEW: Once multiple creditors filed involuntary petitions, the requirement that there be three petitioning creditors under 11 U.S.C. § 303(b)(1) was met. The debtor was not paying its undisputed debts as they became due. It nonetheless contended that no order for bankruptcy relief should be entered because it was a party to a proceeding in state court where the judge was acting as a "quasi-receiver," and the partnership has no unencumbered assets with which to fund a chapter 7 liquidation. However, while the state court had the power to appoint an actual receiver for the debtor, the debtor had opposed such relief when requested by one of the petitioning creditors. The court noted that different creditors had diverse claims against the debtor, and consolidation of the various claims under Pa. R. Civ. P. 213.1, in a state forum was likely impractical. The bankruptcy court, as a single forum, would have jurisdiction over all of the debtor's assets, under 28 U.S.C. § 1334(e), and would have the ability to determine the priority of liens and creditor claims, and had notice procedures already in place. The best interests of creditors would be served by proceeding in the bankruptcy case.

In re Mylotte, David & Fitzpatrick*, 2007 Bankr. LEXIS 3572 (Bankr. E.D. Pa. October 11, 2007) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:305.01**

§ 328(b) Limitation on Compensation of Professional Persons; Trustee Serving as Attorney or Accountant.

1107-073 (**Consumer**) **Chapter 7 trustee's request for compensation for period prior to conversion to chapter 13 granted.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: At the behest of the court, a chapter 7 trustee filed a supplemental memorandum in support of his application for allowance of compensation and reimbursement of expenses for work performed in the brief period before the conversion of the debtors' case to chapter 13.

OVERVIEW: The court directed the trustee to add the explicit consent of the debtors' counsel and to address whether the request for compensation potentially ran afoul of 11 U.S.C. § 328(b), which allowed compensation for a trustee's services in his role as an attorney only to the extent of actual legal services performed as an attorney and not for the trustee's general duties. It appeared to the court that the trustee might have impermissibly combined the calculations for compensation as a trustee under 11 U.S.C. § 326(a) as a commission based on a percentage of the distribution to creditors and as an attorney for legal services under 11 U.S.C. § 328(a). According to the court, the better approach would have been to calculate the maximum commission that the chapter 7 trustee would have earned for his pre-conversion efforts and then to have voluntarily discounted that commission. The court believed that the trustee's intent was to follow this approach because he consciously and voluntarily reduced his compensation request from the maximum commission possible under 11 U.S.C. § 326(a). The debtors consented to the requested compensation, and the court approved the award.

In re Robinson-Wolf*, 2007 Bankr. LEXIS 3543 (Bankr. D. Md. October 10, 2007) (Gordon, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:328.04**

§ 502(a) Allowance of Claims or Interests; Objections.

1107-074 **Financial records of debtor and creditor sufficient to establish proof of claim.** (*Bankr. M.D. Ga.)* (**Commercial**)

PROCEDURAL POSTURE: The chapter 11 Liquidating Agent filed objection to the claim of creditor.

OVERVIEW: The creditor presented conflicting testimony as to the basis for its claim. Initially, its position was that the $39,328 was owned by the creditor and was not property of the debtor's estate. However, the financial records of the debtor and the creditor showed that both parties treated the money as a trade debt. The court found the financial records of the debtor and the creditor to be more credible and persuasive than the creditor's response to the objection. Thus, the creditor had a general unsecured claim. However, the Liquidating Agent argued there was no proof of any underlying transaction giving rise to the debt and, therefore, the claim should be disallowed. While additional evidence, such as an invoice, might have provided further proof of the claim, the court determined that the financial records alone were sufficient to prove the claim. The Liquidating Agent could raise a defense to the claim, such as fraud, lack of consideration, or unconscionability. Even assuming the applicable statutes of limitations did not prevent a defense from being raised at this time, the Liquidating Agent did not articulate any specific defense or offered any evidence to support a defense.

In re FirstLine Corp.*, 2007 Bankr. LEXIS 3564 (Bankr. M.D. Ga. August 27, 2007) (Walker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.02**

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

1107-075 **Sixty-day period for filing payment advices does not include day of filing.** (*Bankr. D. Utah)* (**Consumer**)

PROCEDURAL POSTURE: The chapter 13 trustee filed an objection to confirmation of the debtors' chapter 13 plan on the ground that the husband debtor (debtor) failed to timely file all pay advices required by 11 U.S.C. § 521(a)(1)(B)(iv). The issue was whether the day of filing was included in calculating the 60 days worth of payment advices that the debtor was required to file under 11 U.S.C. § 521(a)(1)(B)(iv).

OVERVIEW: The debtor argued that the 60-day period should be counted backward beginning on the date of filing. The court did not agree with this interpretation of 11 U.S.C. § 521(a)(1)(B)(iv). The relevant language in section 521(a)(1)(B)(iv) was not ambiguous. It included a time period and an event from which to measure the time period. The relevant time period was "60 days before" while the critical event was the "date of the filing of the petition." The clear language directed the court to compute the relevant period to encompass 60 days before the date of filing. The debtor's interpretation also deviated from other bankruptcy courts' treatment of the 60-day period of section 521(a)(1)(B)(iv). Thus, the debtor was required to file copies of all pay advices received on and between January 18 and March 18, 2007. The debtor's failure to file a copy of the January 18 pay advice resulted in failure to comply with the requirements of section 521(a)(1)(B)(iv). The court did not have discretion as to whether to dismiss the

case if a debtor failed to file copies of all required pay advices. That the debtor filed copies of every other pay advice he received was of no consequence.

In re Neil, *2007 Bankr. LEXIS 3479 (Bankr. D. Utah August 9, 2007) (Boulden, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:521.09**

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

1107-076 (**Consumer**) **Divorced and remarried debtor's misrepresentation of authority to use former spouse's credit card resulted in nondischargeable debt.** (*Bankr. W.D. Ky.)*

PROCEDURAL POSTURE: Defendant debtor filed for relief under chapter 7. Plaintiff former husband filed a complaint objecting to the discharge of an indebtedness. The court held a hearing and issued findings of fact and conclusions of law.

OVERVIEW: The debtor and the former husband were divorced in February 2003. As part of the divorce, the parties entered into a settlement agreement, which provided, in part, that the former husband would pay the balance on the credit card account at issue. The husband paid the account in full by April 2003 and made no further charges to the account. Thereafter, the debtor began accruing charges on the credit card, and made several payments on it. The debtor did not inform the credit card company that she had divorced and remarried. The debtor defaulted on the credit card account and in October 2006, filed her petition for bankruptcy relief. The court found that the former husband had met his burden of proof on all of the elements of a claim under 11 U.S.C. § 523(a)(2). The debtor obtained the funds by misrepresenting that she was authorized to use the credit card and the debtor deceived the issuing bank and her former husband. The bank relied on the debtor's representation that she was authorized to use the account and the resulting debt arose from that reliance. The former husband also relied to his detriment that the debtor would comply with the terms of the settlement agreement.

Higdon v. Blair (In re Blair), *2007 Bankr. LEXIS 3715 (Bankr. W.D. Ky. November 7, 2007) (Lloyd, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08**

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

1107-077 (**Consumer**) **Hold harmless obligation contained in divorce decree was nondischargeable due to BAPCA elimination of "balancing test."** (*Bankr. N.D. Okla.)*

PROCEDURAL POSTURE: Plaintiff creditor, the former wife of defendant debtor, brought an adversary proceeding to determine whether a hold harmless provision in the parties' decree of divorce, whereby the debtor agreed to hold the former wife harmless as to various credit card debts, constituted a nondischargable obligation of the debtor within the meaning of 11 U.S.C. § 523(a)(15).

OVERVIEW: Despite his obligation to hold the former wife harmless for the credit card debt, the debtor failed to make all payments timely, and the former wife paid portions of the debt to protect her credit rating and avoid collection activities. The court found that the hold harmless provision created a new debt from the debtor to the former wife. The debt at issue resulted from the division of property and was not in the nature of support. The debtor admitted that he alone incurred the entire balance of the credit card debt before the marriage. Because the hold harmless obligation was made directly in connection with the divorce decree, it fell squarely within the exception to discharge set forth in section 523(a)(15). The amendment of the section by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 had eliminated the need for a balancing test and essentially made all obligations to a former spouse found in a separation agreement or divorce decree nondischargeble.

Davis v. Hoserman (In re Hosterman), *2007 Bankr. LEXIS 3491 (Bankr. N.D. Okla. October 9, 2007) (Michael, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

§ 547(b) Preferences; Avoidable Transfers.

1107-078 (**Commercial**) **Store inventory purchased from lessor was property of the estate.** (*Bankr. N.D. Okla.)*

PROCEDURAL POSTURE: Plaintiff trustee sought summary judgment that defendant vendor's repossession of inventory in the possession of debtors was an avoidable preference under 11 U.S.C. § 547(b). Defendant cross-moved for summary judgment on a claim that the inventory, which debtors bought from defendant in connection with their lease of his convenience store, was not debtors' "property" under section 547 and that its value was less than the minimum required therein.

OVERVIEW: Debtors agreed to pay $300 a month to buy the existing store inventory. When they closed the store prior to filing bankruptcy, defendant entered, took possession, and began running the store and selling its inventory. The trustee filed an adversary complaint to avoid the repossession and then sought summary judgment on all issues. Defendant cross-moved. The court rejected claims that the inventory was not debtors' "property" under section 547 based on defendant's claim that he continued to own the inventory because that view was inconsistent with governing state law. Specifically, per Okla. Stat. tit. 12, § 2-401(1) and (3), title to the inventory had passed to debtors when the underlying agreement was signed. Second, a claim that the absence of a bill of sale rebutted the claim that title passed to debtors was meritless because a bill of sale was not a "document of title" per section 2-401(3). Thus, the inventory was debtors' property for purposes of 11 U.S.C. § 547, and defendant's motion for summary judgment on the contrary proposition was properly denied. Finally, it held that disputes as to the inventory's value prevented a defense summary judgment on the affirmative defense of value.

In re Callahan*, 2007 Bankr. LEXIS 3548 (Bankr. N.D. Okla. October 11, 2007) (Rasure, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

1107-079 (**Commercial**) **Security interest not perfected unitl more than 30 days after debtor took possession of truck was avoidable.** (*Bankr. D. Idaho)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee filed an adversary proceeding against defendant debtor's sister, seeking a judgment avoiding a security interest the sister held in the debtor's truck, as a preference under 11 U.S.C. § 547(b). The sister claimed that the security interest was not avoidable, and the parties' claims were tried to the court.

OVERVIEW: Before he declared bankruptcy in July 2006, the debtor entered into an agreement with his sister to purchase her pickup truck. The debtor signed a purchase agreement on December 11, 2005, but he left the truck in his sister's garage until January 4, 2006, and did not receive the title the Idaho Department of Motor Vehicles ("DMV") issued to his sister until January 27, 2006. The debtor presented the title to the county assessor's office, and on January 31, 2006, the DMV issued a new certificate of title which showed the debtor as the owner and noted that his sister had a lien on the truck. The bankruptcy court found that the sister's retention of a security interest in the truck was a preference under 11 U.S.C. § 547(b), and the sister was not insulated from avoidance of the preference by section 547(c)(3) because her security interest was not recorded until the DMV issued new title, an event that occurred more than 30 days after the debtor took possession of the truck on December 11, 2005. The fact that the debtor's sister allowed the debtor to store the truck in her garage after he signed the purchase agreement did not mean that he did not have possession of the truck.

Hopkins v. Lang (In re Carpenter)*, 2007 Bankr. LEXIS 3477 (Bankr. D. Idaho October 9, 2007) (Pappas, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:547.03**

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

1107-080 (**Consumer**) **Loan payments and contributions to thrift savings plan were not proper expenses and once excluded resulted in dismissal for presumption of abuse.** (*Bankr. E.D. Mo.)*

PROCEDURAL POSTURE: The United States Trustee filed a motion to dismiss chapter 7 debtor's case, arguing that granting the debtor relief would constitute an abuse of the provisions of chapter 7 as provided in 11 U.S.C. § 707(b)(1).

OVERVIEW: The debtor included in her current monthly expenses the repayment of loans that the debtor had taken from her thrift savings plan ("TSP") account with her employer and a voluntary contribution to her TSP account. When excluding the two items from the debtor's monthly expenses, a presumption of abuse arose under section 707(b)(2)(A)(i). The debtor contended that the loan repayment was a mandatory employment expense under section 707(b)(2)(A)(ii). The court disagreed, holding that the loan repayment was not a condition of the debtor's continued employment. The debtor also argued that the loan repayment was a secured debt under section 707(b)(2)(A)(iii). The court held that a debtor's obligation to remit payment on a loan taken from a qualified retirement account was not a claim or debt under the Bankruptcy Code. The court also held that the fact that the debtor could exclude from her disposable income the two items in a hypothetical chapter 13 plan, but could not exclude that same payments as expenses under the chapter 7 means test, was not inconsistent with the stated Congressional policy objectives, protecting retirement contributions and ensuring debtors repay creditors the maximum they can afford.

***In re Mordis**, 2007 Bankr. LEXIS 3527 (Bankr. E.D. Mo. October 9, 2007) (McDonald, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

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

1107-081 (**Consumer**) **Above-median debtors could claim vehicle ownership expense for two cars even though one car was unencumbered.** (*Bankr. D. Kan.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 7. The United States Trustee sought dismissal of the case for abuse under 11 U.S.C. § 707(b)(2), contending that the debtors could not deduct monthly car ownership allowances for two cars that they owned when one of the cars was unencumbered.

OVERVIEW: When the debtors filed their chapter 7 petition, they owned one car that was not encumbered and one car that was encumbered. The debtors had an above-median income. The debtors deducted monthly allowance of $471.00 and $156.90 for the two cars, based on vehicle ownership allowances set forth by the IRS for two cars reduced by the debtors' monthly payment obligation for the one car. With the car deductions, the presumption of abuse would not arise; however, if the deductions were reduced as requested by the Trustee, the filing would be presumptively abusive. The court concluded that the debtors were entitled to claim vehicle ownership expenses for the two cars even though the debtors did not have a lien encumbering one of the cars. As a result, the debtors' case was not presumptively abusive.

***In re Camacho**, 2007 Bankr. LEXIS 3555 (Bankr. D. Kan. October 4, 2007) (Berger, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

1107-082 (**Consumer**) **Debtor who owned vehicle free and clear was not entitled to transportation ownership deduction.** (*Bankr. C.D. Cal.)*

PROCEDURAL POSTURE: The U.S. Trustee filed a motion to dismiss a chapter 7 debtor's case pursuant to 11 U.S.C. § 707(b)(1).

OVERVIEW: The trustee contended that debtor's petition should be dismissed pursuant to 11 U.S.C. § 707(b)(2) for presumed abuse because the debtor failed the means test under section 707(b)(2). Specifically, the trustee argued that the debtor was not eligible for a deduction for transportation ownership expense on Line 23 of Form B22A because she owned her car free and clear of any loan or lease payments. If the debtor was not eligible for a transportation ownership deduction, then the debtor would fail the means test. In granting the trustee's motion, the court held that, under section 707(b)(2)(A)(ii)(I), a chapter 7 debtor who owned her vehicle free and clear of any loan or lease payments was not entitled to the transportation ownership deduction.

***In re Canales**, 2007 Bankr. LEXIS 3714 (Bankr. C.D. Cal. October 31, 2007) (Robles, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 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.

1107-083 (**Consumer**) **Correction of debtors' overstatement of tax liability resulted in dismissal pursuant to presumption of abuse.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Debtors, a husband and wife, filed a joint petition for relief under chapter 7, listing primarily consumer debts. The United States Trustee ("UST") filed a motion to dismiss the debtors' action, pursuant to 11 U.S.C. § 707(b)(2) and (3), claiming that the debtors were ineligible for relief under chapter 7.

OVERVIEW: The debtors claimed that they had current monthly income in the amount of $6,818.39 and monthly deductions totaling $6,849.93, and that they were eligible for relief under chapter 7 because their expenses exceeded their income. The UST claimed that the debtors miscalculated their expenses because they claimed deductions for payroll and social security taxes that exceeded the amount of their tax liability, and he offered the testimony of a bankruptcy analyst who testified that the debtors had a total monthly tax liability that was below the deductions they claimed. The court credited the analyst's unrebutted testimony regarding the proper calculation of the debtors' tax liability, and found that the debtors overstated their tax liability by at least $321 per month. When that amount was subtracted from the amount of monthly expenses the debtors claimed, their income exceeded their expenses and 11 U.S.C. § 707(b)(2)(A)(i) created a presumption that granting the debtors a discharge under chapter 7 would be an abuse of chapter 7. The debtors had not demonstrated that special circumstances existed which rebutted that presumption.

In re Hale*, 2007 Bankr. LEXIS 3516 (Bankr. N.D. Ohio October 10, 2007) (Whipple, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05[2]**

§ 1322(b) Contents of Plan; Discretionary Provisions.

1107-084 (**Consumer**) **Bankruptcy court erred in holding debtors were required to cure default under real estate contract within 60 days of filing.** (*B.A.P. 9th Cir.)*

PROCEDURAL POSTURE: Appellant debtors filed a petition under chapter 13, and a plan for paying their creditors. Appellees, a trustee who was appointed to represent the bankruptcy estate and a creditor, filed objections to the debtors' amended plan for paying their creditors, and the Bankruptcy Court for the District of Montana sustained the objections and denied confirmation. The debtors appealed.

OVERVIEW: The debtors signed a contract for deed in 1995 to purchase their residence. A creditor notified the debtors that they were in default for failing to make payments under the contract, and when the debtors did not cure the default, the creditor informed them that she had decided to accelerate the entire balance due and would terminate the contract without further notice and reclaim title to the property if the debtors did not pay the balance due. Before the date for payment, the debtors declared bankruptcy. The bankruptcy court refused to confirm a plan the debtors proposed for paying their creditors, and the debtors appealed. The appellate panel found that the bankruptcy court erred when it found that the debtors' plan could not be confirmed because they proposed to cure their default by making payments under their plan. Contrary to the bankruptcy court's finding, 11 U.S.C. § 108(b) did not require the debtors to cure their default within 60 days from the date they declared bankruptcy. Instead, 11 U.S.C. § 1322(b) allowed the debtors to cure the default and continuing making payments on their debt as long as the default was cured within a reasonable period of time.

Frazer v. Drummond (In re Frazer)*, 2007 Bankr. LEXIS 3565 (B.A.P. 9th Cir. September 27, 2007) (Smith, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.05**

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

1107-085 (**Consumer**) **Loans secured by security interest in manufactured homes, but not real property on which they were situated, were not protected from bifurcation.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: A creditor objected to the confirmation of debtors' chapter 13 plans proposed in their respective cases. The creditor contended that its debts, which were secured only by perfected security interests in the debtors' manufactured homes but not by the real property upon which the homes were situated, was protected from modification under 11 U.S.C. § 1322(b)(2).

OVERVIEW: The parties agreed that, pursuant to Tex. Prop. Code Ann. § 2.001 (2004), their manufactured homes constituted personal property and not an interest in real property. The debtors proposed chapter 13 plans that would bifurcate the creditor's allowed claims into secured and unsecured portions under 11 U.S.C. § 506. The court overruled the objection, holding that the plain language of 11 U.S.C. § 1322(b)(2) applied the anti-modification protection only to claims secured by real property that was a debtor's principal residence. The fact that various types of residential structures could constitute a debtor's principal residence under the broad definition of 11 U.S.C. § 101(13A) did not change the unambiguous statutory requirement imposed by 11 U.S.C. § 1322(b)(2) that a claim must be secured by an interest in real property to qualify for anti-modification protection. That requirement was neither expressly nor impliedly abrogated by the enactment of 11 U.S.C. § 101(13A).

In re Oliveira*, 2007 Bankr. LEXIS 3545 (Bankr. E.D. Tex. October 11, 2007) (Parker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1322.06**

§ 1325 Confirmation of Plan.

1107-086 (**Consumer**) **Plan not confirmable due to debtor's failure to utilize disposable income calculation from Form 22C.** (*Bankr. W.D. Mo.)*

PROCEDURAL POSTURE: A debtor filed for relief under chapter 13 and submitted a proposed chapter 13 plan. A trustee filed a motion objecting to the plan, pursuant to 11 U.S.C. § 1325, because the amount that the debtor proposed to pay was less than her form showed that she should pay.

OVERVIEW: The debtor contended that her Form 22C did not accurately reflect her situation because her income during the six months before filing her petition was unusually high due to overtime work and was more than she would earn in the foreseeable future. At the time that debtor filed her case, she worked on the assembly line at an automotive plant. The debtor's proposed plan contemplated disbursements to the unsecured creditors of approximately $18,900. The trustee objected to the plan, contending that based on the Form 22C and a 60-month payment period, the debtor had disposable income available to the unsecured creditors of $39,551. The court determined that it was required, pursuant to precedent from the Eighth Circuit, to calculate the debtor's income for purposes of plan confirmation from the income set forth in her Form 22C, regardless of whether or not this was the debtor's actual current income. Because the debtor did not use the Form 22 C figure, the plan was not confirmable.

In re Riding*, 2007 Bankr. LEXIS 3660 (Bankr. W.D. Mo. October 30, 2007) (Federman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

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

1107-087 (**Consumer**) **Bifurcation of debt precluded as inclusion of negative equity in financing does not destroy purchase money security interest status.** (*Bankr. W.D.N.C.)*

PROCEDURAL POSTURE: This matter was before the court on a creditor's Objection to Confirmation of the debtors' chapter 13 plan. That plan proposed to bifurcate the creditor's secured claim in the debtors' recently purchased car because as part of the purchase, the creditor financed the "negative equity" in the debtors' trade-in vehicle.

OVERVIEW: The issue was whether the debtors' chapter 13 plan could modify the rights of the holder of a secured claim in a vehicle purchased within 910 days of the petition date when the purchase price financed included the financing of "negative equity" in a trade-in vehicle. Stated another way, the issue was whether the negative equity qualified as a "purchase money" obligation or whether the presence of

that component destroyed the "purchase money" status of the entire claim. This issue implicated the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9). The court concluded that the financing of a motor vehicle that included negative equity in a trade-in vehicle constituted a "purchase money security interest" that was not subject to modification by the debtors' chapter 13 plan.

***In re Wall**, 2007 Bankr. LEXIS 3476 (Bankr. W.D.N.C. September 17, 2007) (Hodges, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

1107-088 (**Consumer**) **Secured claim against truck allegedly purchased for business purposes but clearly used for personal purposes could not be bifurcated due to operation of hanging paragraph.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: A chapter 13 bankruptcy debtor sought a determination of the secured status of a claim of a creditor secured by the debtor's truck, and the debtor moved to value the truck under 11 U.S.C. § 506(a) for purposes of stripping down the creditor's lien. The creditor asserted that section 506 did not apply pursuant to 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5) since the truck was purchased for personal use.

OVERVIEW: The debtor contended that he purchased the truck because he needed the flatbed to transport pallets of software in his business, and thus the truck was purchased for business purposes. The bankruptcy court held, however, that the evidence indicated that the truck was acquired for significant and material personal uses, and thus valuation of the truck under 11 U.S.C. § 506 did not apply. Even though the putative primary business use of the truck was to move pallets, the debtor admitted that he used the truck to run personal errands and had taken friends and family to the beach. Further, the truck had several luxury options such as rear seat DVD players which lacked a business rationale and indicated that the intended use of the truck at the time of purchase was personal.

***In re Fletcher**, 2007 Bankr. LEXIS 3549 (Bankr. S.D. Fla. June 19, 2007) (Ray, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.01**

§ 1325(a)(3) Confirmation of Plan; Conditions for Confirmation; Plan Proposed in Good Faith.

1107-089 (**Consumer**) **Confirmation denied due to failure to provide evidence for vehicle operation expense and excessive 10% deduction of plan payments.** (*Bankr. E.D. Tex.)*

PROCEDURAL POSTURE: A chapter 13 trustee objected to the confirmation of debtors' plan on the grounds that were not applying all of their projected disposable income to make payments to unsecured creditors as required by 11 U.S.C. § 1325(b) and that the plan was not proposed in good faith in violation of 11 U.S.C. § 1325(a)(3).

OVERVIEW: The debtors contended that they incurred vehicle operation expenses that could be legitimately deducted pursuant to 11 U.S.C. § 1325(b)(3) under the exception to the means test standards in 11 U.S.C. § 707(b)(2)(B). The court concluded that they failed to demonstrate the existence of special circumstances to warrant approval of the additional expense because they did not provide the necessary statutorily mandated documentary evidence. Even if the monthly gasoline consumption had been verified, they failed to provide any evidence of their actual costs of insurance, licensing fees, repairs, and maintenance. The debtors also attempted to deduct 10 percent of their proposed plan payment as a deductible expense under 11 U.S.C. § 707(b)(2)(A)(ii)(III). The court disagreed, finding that the schedules issued by the Executive Office for the U.S. Trustees for their district only permitted a deduction of 8.7 percent. The court concluded that the plan failed to meet the standards for confirmation, and it therefore did not reach the trustee's objection that the plan was not proposed in good faith.

***In re Sadler**, 2007 Bankr. LEXIS 3473 (Bankr. E.D. Tex. October 9, 2007) (Parker, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.04**

§ 1325(b) Confirmation of Plan; Objections.

1107-090 (**Commercial**) **Debtors could deduct ordinary and necessary business expenses when calculating disposable income.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13 and a plan for paying their creditors. A trustee was appointed to administer the bankruptcy estate, and he objected to confirmation of the debtors' plan because the debtors deducted ordinary and necessary expenses one of the debtor's incurred to operate a business when they calculated their monthly income and determined the commitment period under 11 U.S.C. § 1325(b).

OVERVIEW: The debtors filed a joint petition under chapter 13 and a Form 22C which showed a below-median income, and they proposed to make payments under the plan in the amount of $298 per month for 36 months. One of the debtors listed his monthly business income as $1,382, after gross receipts of $6,192 were reduced by deducting ordinary and necessary expenses of $4,810 to operate the business. The trustee filed an objection to the debtors' plan, claiming that it should not be confirmed because the debtors should not have deducted business expenses when calculating their commitment period and disposable income under 11 U.S.C. § 1325(b). The court found no reason to depart from case law which allowed a taxpayer to deduct ordinary and necessary trade or business expenses in determining the amount of income the taxpayer earned, and it allowed the debtors to deduct business expenses allowed by the Internal Revenue Code, as though they were preparing their federal income tax return.

In re Wiegand, *2007 Bankr. LEXIS 3480 (Bankr. D. Mont. October 9, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08**

§ 1325(b)(1) Confirmation of Plan; Objections; Considerations on Objection By Trustee or Allowed Unsecured Claimholder.

1107-091 (**Consumer**) **Plan provision for surrender of mobile home could not include post-filing installment payments in expense deductions.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: Chapter 13 trustee objected to confirmation of the debtor's proposed chapter 13 plan on the ground that it did not satisfy the disposable income test of 11 U.S.C. § 1325(b)(1).

OVERVIEW: The debtor calculated disposable income by deducting installment payments on a secured debt for the 60 months after the filing of his chapter 13 case. The debtor did not intend to make those payments or any regular payments to the secured creditor because his proposed chapter 13 plan provided for surrender of the mobile home securing the debt and payment of the debt as unsecured. The trustee contended that the plan did not require the debtor to use all his projected disposable income for payments under the plan. The court held that the plan provision for surrender of the mobile home meant that the expense deductions should not include the post-filing installment payments. The court held that the result was that the debtor's projected disposable income was larger than the amount shown on Form B22C by the amount of the monthly installment payment. The court concluded that the proposed plan could not be confirmed because it did not devote all of the debtor's projected disposable income to payments under the plan.

In re Spurgeon, *2007 Bankr. LEXIS 3511 (Bankr. E.D. Tenn. October 10, 2007) (Stinnett, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[2]**

§ 1325(b)(3) Confirmation of Plan; Objections; Calculation of Disposable Income.

1107-092 (**Commercial**) **Form 22C, allowing deduction of business expenses in determining "cuurent income" is erroneous.** (*Bankr. M.D. Tenn.)*

PROCEDURAL POSTURE: Chapter 13 trustee objected to the debtors' three-year, zero percent plan.

OVERVIEW: On their Official Form 22C, the debtors deducted business expenses to determine their current monthly income, which they annualized. The resulting figure fell below the applicable median income, allowing a commitment period of three rather than five years, and permitting the debtors to avoid completing the remainder of Form 22C which calculated disposable income based upon the rigorous Internal Revenue Service standards required by 11 U.S.C. § 1325(b)(3) and 11 U.S.C. § 707(b)(2)(A) and (B). If the debtor were not permitted to take the business deductions in calculating their

current income, the resulting figure would have exceeded the applicable median family income, requiring a five-year plan and their completion of the entire Form 22C. The court held that Form 22C, Part I, Line 3, which permitted the deduction of business expenses to determine "current income" under 11 U.S.C. § 1325(b)(3) was wrong. The court held that above-median income debtors had to fill out the remainder of Form 22C and deduct business expenses in the "Other Expenses" category in Part VI of Form 22C.

***In re Arnold**, 2007 Bankr. LEXIS 3508 (Bankr. M.D. Tenn. July 3, 2007) (Harrison, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[5]**

§ 1329 Modification of Plan After Confirmation.

1107-093 (**Consumer**) **Plan modification that did not pay all unsecured creditors in full, as was possible per valuation, denied.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: Debtors, a married couple, moved to modify their chapter 13 plan to allow them to refinance their residence and to use the proceeds to satisfy all of their obligations under the plan with an early payoff. The chapter 13 trustee objected. At issue was whether the plan, as debtors were proposing to modify it, met the requirements of 11 U.S.C. § 1325(a)(4) and 11 U.S.C. § 1329.

OVERVIEW: Though debtors' first plan was not confirmed after the trustee objected, citing discrepancies in the valuation of debtors' residence, debtors then resolved objections to the plan, and confirmation resulted. In the interim, their mortgagee moved to modify the same, raising issues as to the residence's value. When debtors failed to comply with the terms of a stipulation resolving that motion, the mortgagee sought to foreclose on the residence. Inasmuch as debtors had significant equity therein, they sought to modify the plan to refinance the residence and to pay the plan off in full. The court denied modification. After noting that debtors, by failing to controvert the value assigned to the residence by the mortgagee, had essentially conceded it was correct, the court held that debtors' equity therein was sufficient to pay all unsecured creditors in full. Because debtors did not propose to modify the plan to provide for full payment thereof, they had failed to carry their burden to show that the plan, if modified as requested, was in the creditors' best interests. As the proposed modified plan satisfied neither 11 U.S.C. § 1325(a)(4) nor 11 U.S.C. § 1329, the motion was denied.

***In re Clouser**, 2007 Bankr. LEXIS 3506 (Bankr. D. Mont. October 9, 2007) (Kirscher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1329.01**

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

§ 1930(f) Bankruptcy Fees; Waiver.

1107-094 (**Consumer**) **Debtors at 150% of poverty threshold entitled to waiver of filing fee.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: The debtors filed an application to waive the chapter 7 filing fee and proceed in forma pauperis, pursuant to 28 U.S.C. § 1930(f).

OVERVIEW: The debtors filed an application to waive the chapter 7 filing fee. The court granted the application, pursuant to section 1930(f). The court held that, at 150% of poverty, the poverty income for a family of 5 was $36,195 annually or $3,016 per month. The court held that the debtors earned less than 150% of the poverty threshold because Form B22A (the "means test") and current paystubs indicated that their annualized current monthly income was $9,648; Schedule I indicated that their monthly net income was $1,295 per month, which represented net monthly earnings, plus $541 in food stamps; and their income tax return indicated that their adjusted gross monthly income was $14,609. The court held that the debtors did not have the ability to pay the filing fee in installments because their modest budget resulted in a monthly shortfall of $160.

***In re Fleming**, 2007 Bankr. LEXIS 3515 (Bankr. N.D. Ohio October 9, 2007) (Kendig, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:9.05**

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

§ 330 Compensation of Officers.

1107-095 **Attorney's $200,000 flat fee disallowed.** (*Bankr. N.D. Cal.)*
(**Consumer**)

PROCEDURAL POSTURE: The chapter 7 trustee objected to the allowance of the claim of an attorney for the debtor.

OVERVIEW: The attorney represented the debtor in a case filed against him in state court before bankruptcy. The attorney and debtor entered into an agreement whereby the attorney would receive a flat fee of $200,000 for all work in the case, past and future. The attorney was not paid and filed a claim for the $200,000. The court sustained the trustee's objection to the claim. The court held that the trustee demonstrated that the attorney had no documentation for his time under an agreement that was to be paid at some unspecified time in the future. The court found that the trustee, through another lawyer's testimony that she saw only a few inches of discovery documents in the case and was normally retained on an hourly basis, rebutted the allegations of many hours spent in consultations. The court was not convinced that the agreement was genuine and held that the attorney totally failed to come up with a credible explanation as to why he agreed to the unusual "flat fee in the future for work now" arrangement or why he did not keep any time records in case his employment was terminated.

In re Burt*, 2007 Bankr. LEXIS 3497 (Bankr. N.D. Cal. October 9, 2007) (Jaroslovsky, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

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

1107-096 **Trustee's motion to sell debtor's residence denied due to failure to file adversary proceeding.**
(**Consumer**) (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: Chapter 7 trustee filed a motion to sell the debtor's residence at public auction, pursuant to 11 U.S.C. § 363(b) and (f). The debtor filed a motion to amend his exemption claims, so as to declare his residence exempt under state law.

OVERVIEW: The debtor and his non-debtor wife owned their home as tenants by the entireties. A niece held a judgment against the debtor. The debtor attempted to claim his automobile and IRA account as exempt under federal law and his interest in the home and a trailer as exempt under state entireties law. The court sustained the niece's objections to the debtor's attempt to claim both federal bankruptcy and state law exemptions, disallowing the debtor's exemption claims under state law for both pieces of realty. The order became final. Eighteen months later, the debtor filed the instant motion. The court held that the debtor was barred by *res judicata* from amending his exemptions and, in any event, the niece and the trustee would be prejudiced if the court were to permit the debtor to switch his exemption election from federal to state law. The trustee sought to sell the marital home free and clear of any liens. There was no evidence that the debtor's wife was served with the motion. In denying the motion, the court held that the trustee was not entitled to relief under section 363(h) because of his failure to seek it by an adversary proceeding properly served upon the wife.

In re Romano*, 2007 Bankr. LEXIS 3571 (Bankr. E.D. Pa. October 11, 2007) (Fox, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.02**

§ 363(h) Use, Sale, or Lease of Property; Sale of Estate and Co-Owner Interests.

1107-097 **Trustee could not sell debtor's half interest in hunting cabin claimed as exempt with no**
(**Consumer**) **objections to the exemption.** (*B.A.P. 6th Cir.)*

PROCEDURAL POSTURE: Appellant, the trustee in bankruptcy, sought review of an order of the Bankruptcy Court for the Western District of Michigan that disapproved a settlement agreement as to certain real property between the trustee and the debtors upon the court's conclusion that the debtors' unchallenged exemption of the property removed it, in its entirety, from the bankruptcy estate, invalidating the settlement.

OVERVIEW: Debtors amended their schedules to list a hunting cabin property that they owned half of, which they listed as having a total value of $30,000. They claimed the property as exempt. The trustee did not object to the exemption within 30 days, but later had the property appraised at a value of $60,000. As a result of this newfound equity, the trustee filed an adversary proceeding against the defendants, who were co-owners of the cabin with the debtors, seeking authority under 11 U.S.C. § 363(h) to sell both the estate's and the defendants' interests in the property. The debtors argued that the exemption, which had not been objected to, acted to remove the entire property from the debtors' estate. The bankruptcy court erroneously rejected the application of the "fair and equitable" standard, contrary to the U.S. Supreme Court's directive in TMT Trailer Ferry, which established a standard for every court to apply when evaluating a proposed settlement agreement. However, the court was correct in finding the property was entirely exempt under the circumstances of the case, and its decision rejecting the settlement as stating an estate claim to an exempt property, had to be affirmed.

Olson v. Anderson (In re Anderson)*, 2007 Bankr. LEXIS 3709 (B.A.P. 6th Cir. November 7, 2007) (Scott, B.A.P.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:363.08**

§ 503(b)(4) Allowance of Administrative Expenses; Types of Expenses Allowed; Compensation for Attorneys and Accountants.

1107-098 (**Commercial**) **Bankruptcy appellate panel erred in denying fees incurred by creditors in successfully appealing claim for attorneys' fees in involuntary case.** (*9th Cir.)*

PROCEDURAL POSTURE: Appellants, creditors and their counsel, sought review of an order of the Bankruptcy Appellate Panel for the Ninth Circuit that denied them compensation for their work in appealing the bankruptcy court's denial of a fee award. The creditors asserted they were entitled to such fees pursuant to 11 U.S.C. § 503(b)(4), in addition to compensation for their services in connection with the involuntary petition brought against the debtor.

OVERVIEW: The creditors filed an involuntary petition to initiate the case against the debtor. The attorneys for the petitioning creditors filed an application for payment of their fees under 11 U.S.C. § 503(b)(4). The bankruptcy court held that the creditors were not entitled to attorney's fees under that section when it had not incurred an allowable expense under 11 U.S.C. § 503(b)(3). The BAP reversed as to the fees incurred in prosecuting the involuntary petition, but denied the creditors recovery for the fees incurred in the appeal of the claim for attorney's fees. The court of appeals noted that it typically granted such compensation for litigation over a fee award under fee shifting statutes, even when those statutes did not expressly allow for it. The purpose was to prevent the dilution of the fees that would occur if the creditors' attorneys were forced to absorb the time devoted to successfully litigating the fee award on appeal, which would be contrary to Congressional intent against fee award dilution. The appellate litigation was necessary because the petitioning creditors did not frivolously appeal the lower court's decision merely to acquire litigation fees.

Bloom v. Knupfer (In re Wind N' Wave)*, 2007 U.S. App. LEXIS 25507 (9th Cir. November 1, 2007) (Hall, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.11**

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

1107-099 (**Consumer**) **Debt for health care of debtor's former spouse was nondischargeable due to failure to notify benefit plan of divorce.** (*Bankr. C.D. Ill.)*

PROCEDURAL POSTURE: Plaintiff trustees of a health benefit plan brought an adversary proceeding against defendant bankruptcy debtor, alleging that the debtor failed to notify the trustees of his divorce and that a debt for health benefits paid by the plan on behalf of the debtor's former spouse was nondischargeable based on fraud under 11 U.S.C. § 523(a)(2)(A).

OVERVIEW: The debtor admitted that the plan required the debtor to notify the plan of the debtor's divorce, but the debtor contended that he notified a representative of the union which sponsored the plan of the divorce and did not open or read correspondence from the plan concerning benefits paid on behalf of the spouse. The bankruptcy court held, however, that the debt to the plan was nondischargeable since the debtor fraudulently failed to inform the plan of his divorce and the resulting ineligibility of the spouse to receive plan benefits. The debtor knew that the spouse was not eligible for benefits, and his

failure to notify the plan of his divorce was a clear misrepresentation by omission. Further, the debtor was not credible with regard to the unsubstantiated notification to a union representative or to a lack of knowledge concerning substantial correspondence from the plan over a period of 14 years. Also, the plan had no actual knowledge of, or any reason to suspect, the divorce, and the plan justifiably relied on the debtor's silence in paying the spouse's medical expenses.

Trustees of the Operating Engineers Local #965 Health Benefit Plan v. Westfall (In re Westfall)*, 2007 Bankr. LEXIS 3702 (Bankr. C.D. Ill. November 1, 2007) (Gorman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[1]**

§ 523(a)(19) Exceptions to Discharge; Types of Debt Excepted; Debt Relating to Securities Violations.

1107-100 (**Commercial**) **Creditors knowing participation in Ponzi scheme precluded nondischargeability for willful, malicious injury but related securities law judgment was nondischargeable.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: Plaintiff purchasers of promissory notes from defendant bankruptcy debtor brought an adversary proceeding against the debtor, seeking a determination a debt to the plaintiffs arising from the notes was not dischargeable based on willful and malicious injury, false pretenses, and a judgment under 11 U.S.C. § 523(a)(2), (6) and (19). The bankruptcy court conducted a trial.

OVERVIEW: The purchasers contended that the debtor failed to disclose that the purportedly secured notes were unsecured and that a lawsuit related to the notes was pending. The purchasers also asserted that the debtor sold the unregistered securities without a state license and that the debtor pleaded guilty to violations of securities laws. The bankruptcy court first held that the purchasers showed only a deliberate act which led to injury, and thus failed to show a willful and malicious injury. Further, the purchasers expected that money from new investors would pay off old investors such as the purchasers, and the purchasers' knowing participation in the classic Ponzi scheme precluded any finding of justifiable reliance on the debtor's fraudulent omissions. Also, there was no current judgment based on the securities violations since the debtor's plea was held in abeyance, but the debt to the purchasers was nondischargeable to the extent that the plea and a resulting judgment might subsequently be entered.

Stokes v. Jeppesen (In re Jeppesen)*, 2007 Bankr. LEXIS 3478 (Bankr. D. Utah June 27, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:523.24B**

§ 544(b) Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers; Extent of Trustee's Avoidance Powers.

1107-101 (**Consumer**) **Trustee could sell debtor's house as final report did not have effect of abandoning the property.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: Debtors filed a petition under chapter 7, and a trustee was appointed to administer the bankruptcy estate. The trustee filed a motion seeking reconsideration of the court's ruling denying, without prejudice, the trustee's motion to employ a real estate broker.

OVERVIEW: The debtors declared bankruptcy in April 2005, a meeting of creditors was held in May 2005, and in October 2006, the trustee filed a final report. The report stated, *inter alia*, that the trustee had disposed of the debtors' assets and that the estate was ready to be closed. The court reviewed the final report, and on November 6, 2006, it approved the trustee's Application for Compensation and Reimbursement of Expenses and Trustee's Procedures. In May 2007, however, the trustee filed an application for permission to employ a real estate broker to sell the debtors' house. Although the court approved that application, it vacated its order after the debtors filed a motion to vacate based on their claim that the trustee's final report and the court's November 6, 2006, order had the effect of removing their house from the bankruptcy estate. The court found that although the trustee's final report was ambiguous, it did not have the legal effect of abandoning remaining unadministered property of the bankruptcy estate, and the order the court entered on November 6, 2006, did not authorize the trustee to abandon the debtors' house, pursuant to 11 U.S.C. § 554(b) or (c).

In re Wintercorn*, 2007 Bankr. LEXIS 3482 (Bankr. D. Utah August 22, 2007) (Thurman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:544.09**

§ 707(a) Dismissal; For Cause.

1107-102 (**Consumer**) **Bankruptcy court denial of voluntary dismissal vacated where debtor proposed to pay all debts in full immediately.** (*2d Cir.)*

PROCEDURAL POSTURE: The bankruptcy court -- at the request of the chapter 7 trustee -- ordered the removal of debtor's preferred choice of special personal injury ("PI") counsel and then denied debtor's motion to dismiss her bankruptcy case, even though she had arranged to pay all of her debts in full in an attempt to have her preferred counsel continue to prosecute the PI case. The District Court for the Eastern District of New York affirmed. Appeals were filed.

OVERVIEW: The appellate court found no error in the bankruptcy court's determination that there were "no circumstances" that would have given it reason to interfere with the trustee's decision to remove the attorney in question as special personal injury counsel. The only factor weighing in favor of rejecting the trustee's motion to remove was debtor's preference to have the attorney and his co-counsel prosecute the personal injury action. But that preference alone was insufficient to turn this into one of the "rarest cases" in which interference with the trustee's choice could be justified. With respect to the order denying debtor's dismissal motion, the appellate court concluded that the proper course was to remand the case to the bankruptcy court for it to reconsider its dismissal decision. The appellate court opined that, if certain conditions were satisfied, the fact that debtor would be able to immediately pay all debts and fees--and thus secure an effective fresh start--should weigh heavily in favor of granting the dismissal motion. The legislative history of 11 U.S.C. § 707(a) did not preclude a debtor's ability to repay her debts from constituting cause for dismissal.

Smith v. Gletzer (In re Smith)*, 2007 U.S. App. LEXIS 25690 (2d Cir. November 5, 2007) (Straub, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.03**

§ 727(a) Discharge; Grounds for Denial.

1107-103 (**Consumer**) **Discharge denied due to debtor's major omissions from schedules.** (*Bankr. M.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff judgment creditor filed a complaint against defendant chapter 7 debtor, seeking a denial of the debtor's discharge pursuant to 11 U.S.C. § 727(a)(2), (a)(3), (a)(4) and (a)(5).

OVERVIEW: On her schedules and statement of financial affairs, the debtor failed to list three bank accounts, numerous items of personal property, ownership of a pure breed dog and cat, gifts transferred to her sons, early withdrawal from her retirement plan, and payments made to selected creditors within 90 days of filing. In addition, the debtor failed to schedule her 100 percent interest in her corporation, including office equipment, an account receivable due to the debtor from her corporation, a transfer of funds from the debtor to her corporation within one year of filing her petition, another transfer within six months of filing, and her interest in a safe deposit box. In denying the debtor's discharge, the court held that the evidence was overwhelming to support the claim of false oath under section 727(a)(4).

Reynolds v. Trafford (In re Trafford)*, 2007 Bankr. LEXIS 3536 (Bankr. M.D. Fla. September 27, 2007) (Paskay, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 1129(a)(10) Confirmation of Plan; Requirements; Acceptance by at Least One Impaired Class.

1107-104 (**Commercial**) **Corporate shell debtor with insider as sole creditor denied plan confirmation.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: The U.S. Trustee objected to the confirmation of a chapter 11 debtor's plan on the grounds that no impaired, non-insider creditor class had accepted the plan, as 11 U.S.C. § 1129(a)(10) required, and that the principal purpose of the plan was avoidance of taxes in violation of section 1129(d).

OVERVIEW: The debtor was a corporate shell with no business operation or income. Its only assets were net operating losses, a tax attribute. It had a single creditor. The debtor proposed a plan under which stock of the debtor held by its defunct parent would be canceled and new stock issued to the creditor, which would then pay the debtor an amount sufficient to enable it to use up the net operating losses, shielding the payment from taxes. The debtor and the creditor shared the same address and the same

controlling principal. The court held that the creditor was an insider of the debtor because the creditor controlled the debtor. The court held that the debtor's plan did not comply with section 1129(a)(10) because the debtor's only creditor was an insider holding an impaired claim. As for the trustee's objection under section 1129(d), the court held that the trustee had standing to raise the objection because the trustee was not serving as a trustee in a bankruptcy case, but rather was a governmental unit, within the meaning of 11 U.S.C. § 101(27). The court held that the principal purpose of the plan was avoidance of taxes in violation of 11 U.S.C. § 1129(d).

In re South Beach Secs., Inc.*, 2007 Bankr. LEXIS 3687 (Bankr. N.D. Ill. November 1, 2007) (Goldgar, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 7:1129.03[10]**

§ 1328 Discharge.

1107-105 (**Consumer**) **Failure to provide accurate social security number in notice of creditors' meeting deprived tax authority of proper notice so that taxes were not discharged.** (*9th Cir.)*

PROCEDURAL POSTURE: Appellant chapter 13 debtor challenged the decision entered by the District Court for the Eastern District of California that affirmed the bankruptcy court's denial of the debtor's requests for a declaratory judgment that his prepetition taxes owed to the state franchise tax board were discharged, and an injunction against further efforts to collect the taxes.

OVERVIEW: The appellate court had to determine whether debtor's failure to provide an accurate social security number (SSN) to a creditor in the notice mailed to the creditor informing it of the first meeting convening under 11 U.S.C. § 341(a) placed the creditor on sufficient notice to protect to protect its rights in a chapter 13 bankruptcy proceeding in light of the fact that the mailing otherwise contained the debtor's correct name and address. The appellate court held that the claim for payment of prepetition taxes owed to the Franchise Tax Board was not discharged because it did not receive adequate notice of debtor's chapter 13 action. Accordingly, the court affirmed the district court's judgment. The FTB should not have been punished because debtor failed to provide proper notice, and therefore taxes owed by debtor were not discharged pursuant to 11 U.S.C. § 1328.

Ellett v. Stanislaus*, 2007 U.S. App. LEXIS 25293 (9th Cir. October 29, 2007) (Alarcon, C.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1328.01**