November 2007

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

November 26, 2007 Issue 4

Cases of Particular Interest in This Issue

Occasional personal use of debtor contractor's truck did not trigger application of hanging paragraph.
In re Gonzales (Bankr. N.D. Tex. October 29, 2007) (Consumer) **1107-119**

Inclusion of negative equity in vehicle loan did not defeat purchase money security interest status for purposes of hanging paragraph.
In re Burt (Bankr. D. Utah October 24, 2007) (Consumer) **1107-120**

Secured claim against "910 vehicle" was not protected from bifurcation due to inclusion of negative equity in addition to purchase money debt.
In re Sanders (Bankr. W.D. Tex. October 18, 2007) (Consumer) **1107-121**

Avoiding transfer of substantially all of debtor's oil and gas assets could add equity to reorganized company to benefit of creditor.
Calpine Corp. v. Rosetta Res., Inc. (In re Calpine Corp.) (Bankr. S.D.N.Y. October 24, 2007) (Commercial) **1107-133**

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

2d Circuit

§ 303(h) Failure to pay three petitioning creditors was not sufficient grounds to support involuntary petition.
In re A&J Quality Diamonds, Inc. (*Bankr. S.D.N.Y. October 29, 2007*) (*Commercial*) 1107-106

§ 362(a) Condominium association granted relief from stay to take possession of debtor's office unit.
In re Pantani (*Bankr. D. Conn. October 26, 2007*) (*Consumer*) 1107-109

§ 1325(b)(1)(B) Failure to step up payments after vehicle loans were paid off was not grounds for denial of confirmation.
In re McLain (*Bankr. N.D.N.Y. October 24, 2007*) (*Consumer*) 1107-123

3d Circuit

§ 362(c)(3)(B) Extension of stay in debtor's sixth case in fifteen years denied due to insufficient liklihood of success.
In re Scarborough (*Bankr. E.D. Pa. October 25, 2007*) (*Consumer*) 1107-110

§ 523(a)(2)(B) Debtor's overestimation of income in lease application was made with intent to deceive landlord and resulted in nondischargeable debt.
Ganz v. Rudko (In re Rudko) (*Bankr. D.N.J. October 23, 2007*) (*Consumer*) 1107-114

4th Circuit

§ 362 Creditor would be entitled to relief from stay to foreclose on property without equity absent conversion to chapter 13 and imposition of repayment plan.
LaSalle Nat'l Ass'n v. Cordova (In re Cordova) (*Bankr. E.D. Va. October 22, 2007*) (*Consumer*) 1107-108

§ 707(b)(1) Case dismissed on consideration of nondebtor spouse's contributions to household income and numerous acts to hinder, delay and defraud creditors.
In re Adams (*Bankr. D. Md. October 19, 2007*) (*Consumer*)..... 1107-116

5th Circuit

§ 522(b)(3) Avoidance of lien as impairing debtor's homestead exemption granted where creditor's objection was untimely.
In re Caudill (*Bankr. S.D. Tex. October 25, 2007*) (*Consumer*)..... 1107-113

§ 1325(a) Occasional personal use of debtor contractor's truck did not trigger application of hanging paragraph.
In re Gonzales (*Bankr. N.D. Tex. October 29, 2007*) (*Consumer*) 1107-119

§ 1325(a) Secured claim against "910 vehicle" was not protected from bifurcation due to inclusion of negative equity in addition to purchase money debt.
In re Sanders (*Bankr. W.D. Tex. October 18, 2007*) (*Consumer*) 1107-121

6th Circuit

§ 523(a)(15) Obligation in separation agreement to pay one-half of marital credit card debt was nondischargeable.
Johnson v. Johnson (In re Johnson) (*Bankr. N.D. Ohio October 23, 2007*) (*Consumer*) 1107-115

§ 1327(a) Overruling of objection to confirmation stood after reversal due to creditor's failure to obtain stay pending appeal.
In re Keck (*Bankr. E.D. Tenn. October 23, 2007*) (*Consumer*) 1107-124

28 U.S.C. § 1930(f) Debtor below 150% of poverty threshold and with monthly shortfall granted waiver of chapter 7 filing fee.
In re McFarland (*Bankr. N.D. Ohio October 25, 2007*) (*Consumer*) 1107-126

7th Circuit

§ 362(d)(1) Creditor with improperly granted security interest in debtor's business interests not entitled to relief from stay.
In re Weiss (*Bankr. N.D. Ill. October 23, 2007*) (*Commercial*) 1107-111

§ 1325(a)(5)(B) Plan proposing "adequate protection payments" followed by a balloon payment could not be confirmed.
In re Luckett (*Bankr. E.D. Wis. October 24, 2007*) (*Consumer*) 1107-122

8th Circuit

§ 502(b)(6) Lessor's sale of premises after debtor's rejection of lease defeated any claim for future damages.
In re Timber Lodge Steakhouse, Inc. (*Bankr. D. Minn. October 29, 2007*) (*Commercial*) 1107-112

§ 727(b)(1) Presumption of abuse applied where extra income due to debtor's overtime occurred regularly and possible upcoming retirement was not mandatory.
In re Binninger (*Bankr. N.D. Iowa October 19, 2007*) (*Consumer*) 1107-118

9th Circuit

§ 330(a)(3) Attorneys' fee reduced due to unnecessary preparation and filing of alternative plan and collection of settlement from creditor.
In re Van Nice (*Bankr. D. Mont. October 22, 2007*) (*Consumer*) 1107-107

10th Circuit

§ 1325(a) Inclusion of negative equity in vehicle loan did not defeat purchase money security interest status for purposes of hanging paragraph.
In re Burt (*Bankr. D. Utah October 24, 2007*) (*Consumer*) 1107-120

28 U.S.C. § 1930(a)(6) Quarterly fees for small business debtor were to be calculated based on disbursements regardless of source, including ordinary business expenses.
In re Sgaverdea (*Bankr. D.N.M. October 23, 2007*) (*Commercial*) 1107-125

11th Circuit

§ 727(a) Debtor's concealment of proprietary interest in optical company resulted in denial of discharge.
Patchett v. Marsh (In re Marsh) (*Bankr. S.D. Fla. October 29, 2007*) (*Consumer*) 1107-117

§ 327(a) Application for contingency fee based on amounts recovered for the estate reduced by amounts related to sale of properties that already belonged to the estate.
In re Flanagan (*Bankr. D. Conn. October 22, 2007*) (*Consumer*) 1107-128

PRE-2005 ACT CASES IN THIS ISSUE

2d Circuit

§ 502(b)(7) Claim for termination damages not in excess of contractual rate of annual compensation allowed without limitation.
In re Sheehan Mem. Hosp. (*Bankr. W.D.N.Y. October 18, 2007*) (*Commercial*) 1107-130

§ 548 Avoiding transfer of substantially all of debtor's oil and gas assets could add equity to reorganized company to benefit of creditor.
Calpine Corp. v. Rosetta Res., Inc. (In re Calpine Corp.)
(*Bankr. S.D.N.Y. October 24, 2007*) (*Commercial*) 1107-133

§ 727(a)(4)(A) Multiple nondisclosures by debtor resulted in denial of discharge.
Schmitt v. O'Brien (In re O'Brien) (*Bankr. W.D.N.Y. October 19, 2007*) (*Consumer*) 1107-136

Rule 9011(b) Attorney who represented debtors in original chapter 13 case sanctioned for misrepresentations in chapter 7 case filed on behalf of same debtors.
In re Hill (*Bankr. D. Conn. October 23, 2007*) (*Consumer*) 1107-140

7th Circuit

§ 727(a) Discharge denied due to debtors' actions to hinder, delay or defraud creditor.
Centrue Bank v. Diekemper (In re Diekemper) (*Bankr. S.D. Ill. October 26, 2007*) (*Consumer*) 1107-135

§ 727(d) Discharge revoked due to debtor's nondisclosure of real property.
de Guzman Torre v. Abequibel (In re Abequibel) (*Bankr. N.D. Ill. October 18, 2007*) (*Consumer*) 1107-137

8th Circuit

§ 523(a)(2) Simple breach of contract judgment was not sufficient basis for nondischargeability.
EBCO Construction Group, LLC v. Garretson (In re Garretson)
(*Bankr. E.D. Ark. October 23, 2007*) (*Commercial*) 1107-131

§ 727(d)(2) Discharge revoked due to debtor's failure to disclose intent to mortgage exempt homestead and spending tax refunds that were property of the estate.
Seaver v. Markey (In re Markey) (*Bankr. D. Minn. October 29, 2007*) (*Consumer*) 1107-138

9th Circuit

§ 330 Trustee's attorney not entitled to compensation for services generally performed by trustee without assistance of counsel.
In re Tan (*Bankr. D. Ore. October 24, 2007*) (*Consumer*) 1107-129

10th Circuit

§ 109(e) Reduction in homestead exemption to bring case within chapter 13 debt limits allowed on reconsideration.
In re Sims (*Bankr. D.N.M. October 26, 2007*) (*Consumer*) 1107-127

§ 524(a) Action by trustee of family trust against former debtor did not violate discharge injunction due to debtor's failure to raise discharge as defense.
In re Barrett (*Bankr. D. Colo. October 18, 2007*) (*Consumer*) 1107-132

§ 706(a) Chapter 7 debtor's motion to reconvert to chapter 13 denied as late notice of deadline for objection was prejudicial to creditors.
In re Johnson (*Bankr. D.N.M. October 29, 2007*) (*Consumer*) 1107-134

11th Circuit

Rule 9006(b)(1) Late filed personal injury claim allowed where prejudice to debtor was outweighed by right to pursue claim.
In re SunCruz Casinos, LLC (*Bankr. S.D. Fla. October 26, 2007*) (*Commercial*) 1107-139

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

§ 303(h) Involuntary Cases; Relief Against Debtor.

1107-106 (**Commercial**) **Failure to pay three petitioning creditors was not sufficient grounds to support involuntary petition.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: After petitioners, three trade creditors, filed an involuntary chapter 7 bankruptcy petition against debtor, which contested the petition, the matter was tried. The only evidence offered was a two-item factual stipulation agreed to by the parties. At issue was whether the creditors were entitled to relief under 11 U.S.C. § 303(h).

OVERVIEW: The petition alleged that the creditors' claims against debtor exceeded $345,000. Debtor contested the petition, arguing that it was negotiating acceptable payment arrangements with the vast majority of its creditors and that the interests of the petitioning creditors, two of whom had already obtained attachments, were protected. Pretrial stipulations that the creditors had undisputed, unsecured, non-contingent claims exceeding $12,600 and that those claims had not been paid were filed. No evidence other than the stipulations was submitted at trial. The court concluded that the creditors had not carried their burden to prove that an order for relief against debtor was properly issued. Noting that one prerequisite to relief under § 303 was a finding that debtor was "generally" not paying debts as they became due, the court cited to four factors ordinarily considered, including number and amount of unpaid claims, materiality of such claims, and debtor's overall conduct of financial affairs. It concluded that the most that had been shown was that the three petitioning creditors had not been paid. Because the creditors thus failed to meet their statutory burden, relief was denied.

In re A&J Quality Diamonds, Inc.*, 2007 Bankr. LEXIS 3586 (Bankr. S.D.N.Y. October 29, 2007) (Glenn, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:303.14**

§ 330(a)(3) Compensation of Officers; Determination of Amount; Factors to Be Considered.

1107-107 (**Consumer**) **Attorneys' fee reduced due to unnecessary preparation and filing of alternative plan and collection of settlement from creditor.** (*Bankr. D. Mont.)*

PROCEDURAL POSTURE: The debtors filed for relief under chapter 13. Counsel for the debtors filed an amended application for professional fees and costs. The trustee objected to the application. The court held a hearing and issued findings of fact and conclusions of law.

OVERVIEW: After the debtors filed their petition, they filed a proposed chapter 13 plan. A day after filing the first plan, the debtors, through counsel, filed a motion for leave to file an alternate plan, which the court denied. One debtor testified that the attorney also persuaded the debtors to let the attorney recover damages on their behalf, on a contingency fee basis, from a creditor. After some proceedings, the debtors and the creditor proposed a settlement of the matter for $2,500, which was eventually approved by the court. The attorney's amended application for fees and costs sought a total amount of $10,199 plus costs. The court declined to award fees to the extent that they related to the unnecessary work involved in filing the alternative plan, and to the collection of a settlement from the creditor. Counsel had a duty to disclose the compensation arrangements and in fact did not disclose the actual details of the arrangements, in violation of 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016. The court allowed a total fee of $3,650, plus costs. The total amount currently due to the attorney was $162.

In re Van Nice*, 2007 Bankr. LEXIS 3625 (Bankr. D. Mont. October 22, 2007) (Peterson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.04[1][b]**

§ 362 Automatic Stay.

1107-108 (**Consumer**) **Creditor would be entitled to relief from stay to foreclose on property without equity absent conversion to chapter 13 and imposition of repayment plan.** (*Bankr. E.D. Va.)*

PROCEDURAL POSTURE: Movant mortgage creditor sought relief from the automatic stay of 11 U.S.C. § 362 in respondent debtor's chapter 7 case.

OVERVIEW: The creditor, being in first-lien position and having (by its own figures) an equity cushion of over $100,000, could not justifiably claim its interest was not adequately protected, at least in the short term. On the other hand, debtor by her own admission had no equity in the property (taking into account a second mortgage), and because a chapter 7 case was by definition not a reorganization case, the property was not necessary for debtor's reorganization. Additionally, even when a secured creditor had an ample equity cushion, relief from the stay normally was granted if there was a significant payment default. Although the court was sympathetic with debtor's desire to work out payment plan with the creditor, it could not, in a chapter 7 case, impose such a plan on the secured creditor. The court could impose a repayment plan on a secured creditor only in the context of a reorganization case, which included a case under chapter 13. Debtor had the right, which could only be denied for bad faith, to convert her case to chapter 13. But absent a conversion of the case to chapter 13, there was no legal basis upon which to impose a payment plan.

LaSalle Nat'l Ass'n v. Cordova (In re Cordova), *2007 Bankr. LEXIS 3577 (Bankr. E.D. Va. October 22, 2007) (Mitchell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

§ 362(a) Automatic Stay; Scope.

1107-109 (**Consumer**) **Condominium association granted relief from stay to take possession of debtor's office unit.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: A condominium association (creditor) filed a motion seeking relief from the automatic stay that was imposed under 11 U.S.C. § 362(a) after a debtor filed a petition under chapter 13. The debtor filed a motion seeking an order requiring the creditor to turn over title to a condominium unit which it obtained in a foreclosure action.

OVERVIEW: Before the debtor declared bankruptcy, he owned an office condominium unit located in New Haven, Connecticut. The creditor sued the debtor, and on May 1, 2006, a Connecticut superior court granted the creditor a judgment of strict foreclosure of a lien. The debtor failed to satisfy the judgment, and title to the unit passed to the creditor. The state court issued an Execution for Ejectment, but that judgment was stayed when the debtor declared bankruptcy. The creditor filed a motion to lift the automatic stay so it could take possession of the unit, and the debtor filed a motion for turnover, arguing, *inter alia*, that the foreclosure transfer was avoidable as a constructively fraudulent transfer under 11 U.S.C. § 548 because he had substantial equity in the unit that was lost when title passed to the creditor. The court found that the creditor was entitled to an order lifting the automatic stay because the debtor's evidence did not show he had any equity in the unit. As such, the debtor received reasonably equivalent value in exchange for the foreclosure transfer, and cause existed for granting relief from the automatic stay so the creditor could take possession of the unit.

In re Pantani, *2007 Bankr. LEXIS 3696 (Bankr. D. Conn. October 26, 2007) (Dabrowski, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.03**

§ 362(c)(3)(B) Automatic Stay; Duration; Cases Refiled Within One Year of Dismissal of Single Prior Case; Extension.

1107-110 (**Consumer**) **Extension of stay in debtor's sixth case in fifteen years denied due to insufficient liklihood of success.** (*Bankr. E.D. Pa.)*

PROCEDURAL POSTURE: A chapter 13 debtor filed a motion for continuation of the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B).

OVERVIEW: The debtor filed a chapter 13 case. The debtor also filed an adversary proceeding against the holder of a mortgage on the debtor's home seeking to reduce the mortgage holder's claim. The debtor's plan assumed success in the adversary proceeding. The court dismissed the case. Soon thereafter, the debtor filed the instant chapter 13 case, which was the debtor's sixth case in 15 years. The new plan also assumed success in the adversary proceeding. The debtor argued that she expected that her income would increase soon. In denying the debtor's motion for a continuation of the stay, the court held that it did not find that the instant case had a sufficient likelihood of success to merit the extension of the automatic stay. The court held that the debtor's evidence of her expected increased income was not persuasive and, even if the debtor's increased income materialized, it was the same employment the

debtor represented would be a major funding source for the plan payments in the prior case. The court also held that the debtor had not presented evidence sufficient to persuade it that she had a reasonable prospect of success in her adversary proceeding against the mortgage holder.

In re Scarborough, *2007 Bankr. LEXIS 3690 (Bankr. E.D. Pa. October 25, 2007) (Frank, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.06[3]**

§ 362(d)(1) Automatic Stay; Relief from Stay; For Cause.

1107-111 (**Commercial**) **Creditor with improperly granted security interest in debtor's business interests not entitled to relief from stay.** (*Bankr. N.D. Ill.)*

PROCEDURAL POSTURE: The matter came before the court on the motion, opposed by debtor, of two creditors for relief from the automatic stay. The creditors sought relief from the stay in order to foreclose on their collateral pursuant to 11 U.S.C. § 362(d).

OVERVIEW: 11 U.S.C. § 362(d) provided two grounds for relief from the automatic stay. The first ground was cause, including lack of adequate protection. The second ground was that a debtor lacked equity in the property and the property was not necessary to an effective reorganization. With respect to the second ground for relief, the court found that debtor's interests in certain companies were necessary to an effective reorganization, and accordingly, the creditors were not entitled to relief under section 362(d)(2). Therefore, the creditors had to demonstrate that they were entitled to relief under section 362(d)(1). At issue there was the creditors' assertion that they held security interests in debtor's interests in the companies by virtue of a pledge agreement. The court determined that the creditors did not have a security interest in debtor's interests in the companies, and therefore, they were not entitled to relief from the stay. Debtor's rights in the collateral were not properly assigned under the operating agreements. Debtor could not transfer all, or any part of, his interest in the companies unless the other members or partners had consented in writing prior to the transfer.

In re Weiss, *2007 Bankr. LEXIS 3648 (Bankr. N.D. Ill. October 23, 2007) (Hollis, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[3]**

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

1107-112 (**Commercial**) **Lessor's sale of premises after debtor's rejection of lease defeated any claim for future damages.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: The debtor filed an objection to a claim filed by creditor for an amount resulting from the debtor's rejection of a lease of Wisconsin real estate where the debtor had operated one of its restaurants.

OVERVIEW: The undisputed fact was that the creditor sold the property to a third party purchaser who occupied the property in the operation of a business. Consummation of the sale terminated the lease and was a mitigation of damages. Sale of the leased property to a third party constituted the unequivocal proof that the creditor intended to forgive the debtor's further obligations under the lease and accepted the debtor's surrender of the premises.

In re Timber Lodge Steakhouse, Inc., *2007 Bankr. LEXIS 3584 (Bankr. D. Minn. October 29, 2007) (O'Brien, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[7]**

§ 522(b)(3) Exemptions; Choice Between Federal and State Law; Alternative Exemptions.

1107-113 (**Consumer**) **Avoidance of lien as impairing debtor's homestead exemption granted where creditor's objection was untimely.** (*Bankr. S.D. Tex.)*

PROCEDURAL POSTURE: Debtor, an individual who filed a chapter 7 case, moved for an order avoiding a judgment lien on her homestead that was asserted by claimant, a lienholder, who had objected to avoidance of the lien on the ground that the property was not an exempt homestead by reason of debtor's alleged abandonment thereof. At issue, *inter alia*, was whether the lien impaired debtor's exemptions under state law and 11 U.S.C. 522(b)(3).

OVERVIEW: Claimant argued that for enforcement of the lien on the ground that it was not an exempt homestead, that debtor had abandoned it, and that the lien, in any case, did not impair the exemption. The court disagreed, and granted the motion to avoid the lien on the grounds of impairment.

Preliminarily, it held that claimant had failed to assert timely objections to the amount of the exemption per 11 U.S.C. § 522(l) and that, in the absence of a timely objection, the court lacked power to extend the deadline. Thus, claimant's objection to debtor's claim of exemption, even though based on a claim that she did not have timely notice of the proceedings, was not before the court. Second, it held that the property at issue was debtor's homestead under state law. Third, when the parties' rights were assessed by reference to federal law, which controlled, the lien in fact impaired the exemption per 11 U.S.C. § 522(f)(2)(A), noting that debtor was entitled to claim the full value of the property, that the full value was the amount that "debtor could claim if there were no lien," and that under the proper calculation, the lien impaired the exemption and therefore was avoidable under section 522(f).

In re Caudill, *2007 Bankr. LEXIS 3699 (Bankr. S.D. Tex. October 25, 2007) (Steen, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:522.10[8]**

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

1107-114 (**Consumer**) **Debtor's overestimation of income in lease application was made with intent to deceive landlord and resulted in nondischargeable debt.** (*Bankr. D.N.J.)*

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendant debtor seeking a determination that his debt was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (B). The underlying debt arose from a breach of a lease.

OVERVIEW: The debtor made representations about his financial condition to the creditor but he did not seem to have made false representations about anything else other than his financial condition. There was no evidence that the debtor did not intend to follow the terms of the lease or occupy the premises as required by the lease. Thus, the claim under 11 U.S.C. § 523(a)(2)(A) failed. Undoubtedly, the debtor's written application presented a financial condition that was materially false for purposes of 11 U.S.C. § 523(a)(2)(B). Even if the debtor had understood that the creditor merely wanted the debtor to estimate his salary, it was suspicious that the debtor overestimated his income by at least $34,000. He also misstated his liabilities. Given the discrepancies in the application, it was reasonable to infer that the debtor intended to deceive the creditor. The creditor relied on the information. Even if the debtor believed that the application process was simply a formality and that the creditor would have rented the property to him regardless, there would have been no cause to hide his true financial condition unless he believed that it would cause him to lose the lease.

Ganz v. Rudko (In re Rudko), *2007 Bankr. LEXIS 3665 (Bankr. D.N.J. October 23, 2007) (Ferguson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08[2]**

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

1107-115 (**Consumer**) **Obligation in separation agreement to pay one-half of marital credit card debt was nondischargeable.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: Plaintiff, the former wife of defendant chapter 7 debtor, filed a motion for summary judgment in her action against the debtor, seeking to except certain debt from the debtor's discharge pursuant to 11 U.S.C. § 523(a)(15). The debtor also filed a motion for summary judgment. The wife also sought attorney fees.

OVERVIEW: The debtor and the wife entered into a separation agreement, under which they agreed that each would be responsible to pay one-half of certain credit card debts. The debtor argued that his obligation did not come within the scope of section 523(a)(15) because it was not a debt owed to or recoverable by a spouse, former spouse, or child of the debtor, but was instead owed directly to third party credit card issuers. He also contended that the debt was not incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement because the obligation arose prior to the divorce and separation agreement. In granting the wife's motion for summary judgment, the court held that an obligation incurred in connection with a separation agreement incorporated into a dissolution decree was excepted from discharge as nonsupport divorce debt notwithstanding that the debt was payable to a third party and the agreement lacked specific hold harmless language. The court also held that the obligation created a new liability running from the debtor to the wife that was not in existence prior to the commencement of the divorce proceeding.

Johnson v. Johnson (In re Johnson), *2007 Bankr. LEXIS 3645 (Bankr. N.D. Ohio October 23, 2007) (Shea-Stonum, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.21**

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

1107-116 (**Consumer**) **Case dismissed on consideration of nondebtor spouse's contributions to household income and numerous acts to hinder, delay and defraud creditors.** (*Bankr. D. Md.)*

PROCEDURAL POSTURE: The United States Trustee (UST) moved to dismiss the debtor's chapter 7 case pursuant to 11 U.S.C. § 707(b)(1) and (b)(3).

OVERVIEW: In determining the debtor's ability to repay her debts, the court considered the income of the debtor's non-filing spouse as he received significant income. The court found that the debtor had the ability to repay. The bankruptcy case was not filed because of sudden illness, calamity, disability or unemployment. The debtor incurred large consumer expenses which, while not beyond her ability to repay, were beyond her ability to repay under her current budget. The debtor's proposed budget was excessive and unreasonable. The court highlighted the fact that the budget was based on $7,740.46 of net income that contained a $6,581 monthly mortgage payment for a $1.3 million dollar residence and two car payments totaling $1,884. There was no evidence of any dishonesty on the part of the debtor. However, the petition was not filed in good faith. The debtor and her husband had engaged in acts designed to hinder, delay, and defraud creditors. They built up debts in the debtor's name in order to invest in assets exempt from creditors under state law or to reduce the husband's debt load. One example was the use of the debtor's credit cards to pay off the couple's jointly-held mortgage.

In re Adams, *2007 Bankr. LEXIS 3642 (Bankr. D. Md. October 19, 2007) (Schneider, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:707.05**

§ 727(a) Discharge; Grounds for Denial.

1107-117 (**Consumer**) **Debtor's concealment of proprietary interest in optical company resulted in denial of discharge.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: Plaintiff creditor filed a complaint objecting to a discharge for defendant debtor and objecting to the dischargeability of a debt. The creditor alleged, in part, that a discharge should be denied pursuant to 11 U.S.C. § 727(a)(2), (3) and (4). The court held a hearing and issued findings of fact and conclusions of law.

OVERVIEW: The debtor had filed for relief under chapter 7. The creditor was owed $776,089 pursuant to a state court judgment. The creditor claimed that the debtor had concealed a proprietary interest in an optical company. The court acknowledged that the debtor might have received payments from the optical company and the company might have made payments to others for the debtor's benefit, but the record did not establish that the debtor had a secret interest in the company. The court found that the defendant knowingly and falsely made a false oath, as evidenced by the debtor's gross misstatement of his income set forth in the statement of financial affairs. The debtor indicated in his schedule that he earned only $3,500 in wages in 2006, but the trial record in fact established that the debtor earned at least an additional $27,624 more in a salary from the corporation. Considering the magnitude of the oversight, the court concluded that the debtor's omission was made knowingly and fraudulently to mislead creditors and the bankruptcy trustee.

Patchett v. Marsh (In re Marsh), *2007 Bankr. LEXIS 3606 (Bankr. S.D. Fla. October 29, 2007) (Friedman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

§ 727(b)(1) Discharge; Debts Affected.

1107-118 (**Consumer**) **Presumption of abuse applied where extra income due to debtor's overtime occurred regularly and possible upcoming retirement was not mandatory.** (*Bankr. N.D. Iowa)*

PROCEDURAL POSTURE: The United States Trustee ("UST") moved to dismiss the debtors' chapter 7 case for abuse under 11 U.S.C. § 707(b)(1). Alternatively, the UST argued that the petition be dismissed under 11 U.S.C. § 707(b)(3)(B), the totality of the circumstances test.

OVERVIEW: The presumption of abuse under 11 U.S.C. § 707(b)(2)(A)(i)(II) applied because the debtors' sixty-month disposable income exceeded $10,000. The debtors contended that special circumstances existed to rebut the presumption of abuse. First they claimed that the husband's 2006 income was unusually high and should not have been used in the Means Test. The UST acknowledged this fact. The debtors also argued that their current monthly income should have been further reduced because the husband would not receive overtime in the future and would have a change of income due to retirement in September, 2008. The debtors failed in their burden of proof on these issues. The evidence, on the issue of overtime, established that although overtime was not guaranteed, it had been occurring regularly for the last three years. Further, the husband was eligible for retirement in September 2008, but retirement was not mandatory. The debtors did not present evidence establishing income levels after retirement. Finally, the UST correctly calculated mandatory payroll and took into account the husband's mandatory Railroad Retirement Board contributions.

In re Binninger, *2007 Bankr. LEXIS 3663 (Bankr. N.D. Iowa October 19, 2007) (Kilburg, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.13**

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

1107-119 (**Consumer**) **Occasional personal use of debtor contractor's truck did not trigger application of hanging paragraph.** (*Bankr. N.D. Tex.)*

PROCEDURAL POSTURE: A secured creditor objected to the bifurcation of its claim arising from a purchase money lien on a vehicle. The creditor contended that the bifurcation in the debtors' chapter 13 plan violated 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5).

OVERVIEW: The specific issue upon which confirmation depended was whether the vehicle, a pickup truck, was acquired for the personal use of the debtors. The court concluded that the evidence was undisputed that the vast majority of the debtor's use of the truck was for his work as a contractor installing sheetrock. From his testimony, the court determined that the debtor did extensive traveling for his jobs. While he admitted that he occasionally drove his children to school and used the truck for personal doctors' appointments, it was clear that the truck was used almost exclusively for his work. The court concluded that the debtor's personal use of the truck was not significant and material and that the hanging paragraph of 11 U.S.C. § 1325(a) did not apply. Although the parties had no other disputes concerning the creditor's treatment, the court wanted to reconsider whether the debtors otherwise satisfied the standards of confirmation under 11 U.S.C. § 1325.

In re Gonzales, *2007 Bankr. LEXIS 3635 (Bankr. N.D. Tex. October 29, 2007) (Jones, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.02**

1107-120 (**Consumer**) **Inclusion of negative equity in vehicle loan did not defeat purchase money security interest status for purposes of hanging paragraph.** (*Bankr. D. Utah)*

PROCEDURAL POSTURE: A creditor of a chapter 13 debtor objected to the confirmation of the debtor's plan on the grounds that it sought to improperly cram down the creditor's secured claim in violation of 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5). The debtor objected to the creditor's claim, arguing that such provision did not apply to the creditor's claim because the creditor did not hold a purchase money security interest.

OVERVIEW: The debtor purchased a truck. The total amount financed was greater than the price of the truck because the amount included charges associated with the truck's purchase and an amount that was used to pay off the obligation owed on a trade-in vehicle. The dealer would not have financed the purchase had the debtor not agreed to the refinancing of negative equity. The dealer assigned its interest to the creditor, which perfected a security interest in the truck. The debtor proposed to bifurcate the creditor's claim into a secured portion and an unsecured portion in the amount of the negative equity paid off by the financing transaction. In sustaining the creditor's objection, the court held that the debtor could not cram down the creditor's claim under 11 U.S.C. § 506 because the whole claim, including that portion of the claim attributable to negative equity and costs associated with the purchase of the truck, qualified under Utah Code Ann. § 70A-9a-103(2) as a purchase money security interest, within the meaning of 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5), because of the close nexus between the negative equity and the financing of the debtor's new vehicle.

In re Burt, *2007 Bankr. LEXIS 3680 (Bankr. D. Utah October 24, 2007) (Thurman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.02**

1107-121 (**Consumer**) **Secured claim against "910 vehicle" was not protected from bifurcation due to inclusion of negative equity in addition to purchase money debt.** (*Bankr. W.D. Tex.)*

PROCEDURAL POSTURE: A creditor of a chapter 13 debtor objected to confirmation of the debtor's plan, on the grounds that the plan did not accord to it proper treatment of its secured claim on a motor vehicle under 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5).

OVERVIEW: The creditor advanced funds to pay off the negative equity of the debtors' trade-in vehicle while also advancing funds to purchase the new vehicle. In their plan, the debtors bifurcated the claim into two parts — a secured claim based on the debtors' estimate of current value of the vehicle, and an unsecured claim for the remaining deficiency in the amount. The creditor claimed that its claim qualified for exclusion from bifurcation because it qualified as a "910-day" claim under 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5). The court held that the part of the loan attributable to the negative equity from the debtors' old vehicle was not part of the purchase money obligation as defined by Tex. Bus. & Com. Code Ann. § 9.103(a)(2). The court held that, because the creditor's claim contained non-purchase money debt, the claim did not qualify for the exception in 11 U.S.C. § 1325(a) (hanging paragraph referencing paragraph 5), and so was subject to the general provisions for secured creditors in § 1325(a)(5).

In re Sanders, *2007 Bankr. LEXIS 3599 (Bankr. W.D. Tex. October 18, 2007) (Clark, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.02**

§ 1325(a)(5)(B) Confirmation of Plan; Conditions for Confirmation; Allowed Secured Claimholders; Retention of Lien and Distribution of Property.

1107-122 (**Consumer**) **Plan proposing "adequate protection payments" followed by a balloon payment could not be confirmed.** (*Bankr. E.D. Wis.)*

PROCEDURAL POSTURE: A chapter 13 trustee and a secured creditor filed objections to confirmation of the debtors' plan. The plan proposed to reduce and fix the creditor's interest on its claim, to provide the creditor with adequate protection payments for the life of the plan, and to make a balloon payment to pay the secured creditor in full.

OVERVIEW: The debtors asserted that making adequate protection payments followed by one balloon payment at the end of the plan did not constitute periodic payments under 11 U.S.C. § 1325(a)(5)(B)(iii). However, the court concluded that Congress did not intend to allow a proposal for 36 months of adequate protection and a balloon payment at the end of the plan. The debtors' plan proposed to pay the value, as of the effective date of the plan, of the creditor's allowed secured claim. Part of that payment was the interest component of the debtors' monthly adequate protection payment. Thus, the plan distributed property in the form of interest payments to the creditor pursuant to 11 U.S.C. § 1325(a)(5)(B), and that property was in the form of periodic payments. Calling the property distributed on the claim "adequate protection payments" did not change the fact that property was distributed on the claim. If made over time, the distributions of property on the claim had to be in equal monthly amounts, and unless the creditor consented, the balloon payment at the end of the plan would not satisfy this requirement.

In re Luckett, *2007 Bankr. LEXIS 3638 (Bankr. E.D. Wis. October 24, 2007) (Kelley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.06[3]**

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

1107-123 (**Consumer**) **Failure to step up payments after vehicle loans were paid off was not grounds for denial of confirmation.** (*Bankr. N.D.N.Y.)*

PROCEDURAL POSTURE: Debtors moved for confirmation of their proposed chapter 13 plan. The chapter 13 trustee and a creditor both filed objections to confirmation on the grounds that the proposed plan failed to devote all of the debtors' "projected disposable income" to be received in the "applicable commitment period" within the meaning of 11 U.S.C. § 1325(b)(1)(B).

OVERVIEW: The issue was whether a plan that did not propose to "step up" payments after vehicle loans matured during the life of the plan could be confirmed. Disposable income and projected disposable income were interrelated and were based on historical numbers as mandated in 11 U.S.C. § 1325(b). Financial events that would occur over the course of the debtors' plan had no relevance to the plan payment necessary for confirmation purposes. Future events simply did not mesh with the backward glance required by section 1325(b)(1)(B) at confirmation. Thus, the fact that the debtors would have paid off their vehicle loans before the end of the plan and would have had additional funds, but did not propose to increase plan payments to reflect these additional funds, was not a consideration for purposes of section 1325(b)(1)(B). Additionally, the creditor's argument regarding a transportation ownership/lease expense on Official Bankr. FormB22C was misplaced. The core premise that was relied upon was that a debtor could not deduct as an expense from income an allowance for automobile ownership when a debtor's vehicle was owned outright. In the instant case, the debtors did not own their vehicles outright.

***In re McLain**, 2007 Bankr. LEXIS 3646 (Bankr. N.D.N.Y. October 24, 2007) (Littlefield, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1325.08[4]**

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

1107-124 (**Consumer**) **Overruling of objection to confirmation stood after reversal due to creditor's failure to obtain stay pending appeal.** (*Bankr. E.D. Tenn.)*

PROCEDURAL POSTURE: A chapter 13 trustee objected to a creditor's proof of claim under a retail installment contract and security agreement with the debtors.

OVERVIEW: The creditor had a purchase money security interest in the debtors' automobile. The court sustained the trustee's objection to the creditor's unsecured deficiency claim based upon the *res judicata* effect of the confirmed plan under 11 U.S.C. § 1327(a). The court held that the debtors' confirmed chapter 13 plan provided for the surrender of the automobile "in full satisfaction" of the debt. The court held that, although the creditor appealed the order overruling its objection to confirmation and the confirmed plan, the effect of the orders was not stayed pending appeal; therefore, the order overruling its objection to confirmation and the plan constituted the law of the case notwithstanding the appeals.

***In re Keck**, 2007 Bankr. LEXIS 3674 (Bankr. E.D. Tenn. October 23, 2007) (Stair, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1327.02**

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

§ 1930(a)(6) Bankruptcy Fees; Filing Fees; Chapter 11 Quarterly Fee.

1107-125 (**Commercial**) **Quarterly fees for small business debtor were to be calculated based on disbursements regardless of source, including ordinary business expenses.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: In connection with confirmation proceedings relative to a plan proposed by debtor, an individual who had filed a small business chapter 11 bankruptcy, debtor and the U.S. Trustee sought a ruling from the court as to whether fees owed to the trustee post-confirmation under 28 U.S.C. § 1930(a)(6) were to be calculated as a percentage of all of debtor's disbursements.

OVERVIEW: Debtor argued that the proper interpretation of the word "disbursement" as used in § 1930(a)(6) was one that limited its meeting to disbursements made pursuant to the confirmed plan; that a fee structure based on gross disbursements overly burdened small businesses; that unequal treatment of individual and corporate debtors was not intended by the overall chapter 11 scheme; and that individual chapter 11 debtors should not bear a greater burden to finance the program. The trustee argued that under the plain language of the statute, "disbursements" meant all payments made by debtor, including ordinary business expenses. Noting the three approaches to the issue, the court concluded that it was required by standard rules of statutory interpretation to accord a plain and ordinary meaning to the word "disbursement." It thereupon joined with the majority of courts in concluding that any change in the way that such fees were calculated had to come from Congress because it could not apply statutory language that contained no indication that post-confirmation fees should be based on a measure different than gross disbursements, especially in light of circuit court decisions to the contrary.

***In re Sgaverdea**, 2007 Bankr. LEXIS 3614 (Bankr. D.N.M. October 23, 2007) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:9.06**

§ 1930(f) Bankruptcy Fees; Waiver.

1107-126 (**Consumer**) **Debtor below 150% of poverty threshold and with monthly shortfall granted waiver of chapter 7 filing fee.** (*Bankr. N.D. Ohio)*

PROCEDURAL POSTURE: A debtor 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 debtor filed an application to waive the chapter 7 filing fee. The court granted the application, pursuant to section 1930(f). The court held that the debtor earned less than 150% of the poverty threshold for a family of two, which was $1,711 per month, because her schedule indicated that her monthly net income was $409 per month, her income tax return indicated that her adjusted gross income was $6,339, and she received a $2,672 refund. The court held that the debtor did not have the ability to pay the filing fee in installments because her modest budget, with expenses for two people totaling $584 per month, resulted in a monthly shortfall of $174.

***In re McFarland**, 2007 Bankr. LEXIS 3681 (Bankr. N.D. Ohio October 25, 2007) (Kendig, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 1:9.05**

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

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

1107-127 (**Consumer**) **Reduction in homestead exemption to bring case within chapter 13 debt limits allowed on reconsideration.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: The debtors filed a motion for reconsideration of an order dismissing their bankruptcy case on the ground that their unsecured debt exceeded the limits of 11 U.S.C. § 109(e).

OVERVIEW: The debtors sought reconsideration of the order dismissing their case. They sought the option of amending their homestead exemption downwards from $60,000 to $27,888, which would reduce the unsecured debt and increase the secured portion of a bank's claim. The court treated the motion, filed within 10 days after entry of the order, as a motion under Fed. R. Civ. P. 59(e), granted it, set aside the order dismissing the case, and directed them to amend their homestead exemption and file a new plan. The court erred in not considering the debtors' argument that they would reduce their homestead exemption if required to fit within the debt limits of 11 U.S.C. § 109(e) and, thus, misapprehended the facts and their position regarding the exemption. The court found that a reduction of $32,112 would enable them to qualify as chapter 13 debtors. The court declined to change its prior ruling refusing to include interpleaded funds and the full value of jointly owned land in the bank's secured claim and upholding the bank's method of applying payments.

***In re Sims**, 2007 Bankr. LEXIS 3691 (Bankr. D.N.M. October 26, 2007) (Starzynski, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:109.06**

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

1107-128 (**Consumer**) **Application for contingency fee based on amounts recovered for the estate reduced by amounts related to sale of properties that already belonged to the estate.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: An attorney who was employed by a chapter 7 trustee with the court's approval, pursuant to 11 U.S.C. § 327(a), filed an application for approval of attorney's fees in the amount of $66,746.27, and expenses in the amount of $71.02. A creditor filed an objection to the application.

OVERVIEW: A debtor filed a petition under chapter 11, and in January, 2003, the case was converted to one under chapter 7. A chapter 7 trustee was appointed to represent the bankruptcy estate, and on April 1, 2003, the bankruptcy court approved the trustee's application to employ counsel. The order approving the employment of counsel provided that attorney's fees would be paid on a contingent fee basis of all amounts the attorney recovered for the bankruptcy estate. The trustee hired counsel, and counsel subsequently submitted an application seeking payment of $66,746.27 in attorney's fees, and reimbursement of $71.02 in expenses. The court found that although counsel participated in transactions

which led to the sale of property that belonged to the debtor, he was not entitled to payment of attorney's fees for work he did on one of those sales because the property already belonged to the bankruptcy estate, and he did not recover anything for the estate. Counsel was entitled to receive one-third of $15,000 the trustee obtained from the sale of two parcels of land the debtor owned because that property did not clearly belong to the bankruptcy estate.

***In re Flanagan**, 2007 Bankr. LEXIS 3621 (Bankr. D. Conn. October 22, 2007) (Dabrowski, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:327.02**

§ 330 Compensation of Officers.

1107-129 (**Consumer**) **Trustee's attorney not entitled to compensation for services generally performed by trustee without assistance of counsel.** (*Bankr. D. Ore.)*

PROCEDURAL POSTURE: The law firm for a chapter 11 trustee filed a second supplemental application for compensation. The debtor challenged the reasonableness of the hours expended.

OVERVIEW: The trustee's firm applied for $7,584 in attorney's fees and $876 in expenses. Under the confirmed plan, the firm was to be compensated for post-confirmation services under 11 U.S.C. § 330. The court allowed the application in the amount of $6,213 in fees and $876 in costs. The court denied the firm compensation for services in the following general categories: 1) preparing notices/motions to sell real property; 2) drafting applications to employ professionals; 3) drafting liquidation analyses; 4) corresponding with the United States Trustee's office regarding the United States Trustee's fees; 5) calculating and corresponding about the amount and disbursement of claims; 5) reviewing financial information for inclusion in an interim report of estate assets filed in conjunction with fee applications; 6) corresponding with parties regarding a tax return; and 7) conferences with the estate's realtor about keeping buyers "on track" and the timing of closing. The court held that, under 11 U.S.C. § 328(b), compensation was not allowed for the performance of the trustee's duties that were generally performed without an attorney's assistance.

***In re Tan**, 2007 Bankr. LEXIS 3695 (Bankr. D. Ore. October 24, 2007) (Radcliffe, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:330.01**

§ 502(b)(7) Allowance of Claims or Interests; Disallowance; Employee's Claim for Damages.

1107-130 (**Commercial**) **Claim for termination damages not in excess of contractual rate of annual compensation allowed without limitation.** (*Bankr. W.D.N.Y.)*

PROCEDURAL POSTURE: An employee filed an administrative claim in the debtor's chapter 11 bankruptcy case for national origin discrimination and for damages arising from the termination of her employment without notice.

OVERVIEW: The employee claimed that, because she received no prior notice of her postpetition termination, she had an administrative claim for wages that would have been paid during the notice period. The court allowed termination damages, but only as a general unsecured claim to be paid in accord with the plan of reorganization. The court held that the only damages resulting from termination were the wages that the employee would have received after the notice; therefore, because those damages did not exceed the contractual rate of annual compensation, 11 U.S.C. § 502(b)(7) imposed no limitation on their allowance. However, her claim enjoyed no right to priority of distribution under 11 U.S.C. § 503(b)(1)(A) because the rejection of the executory prepetition contract constituted a breach as of the moment immediately before the date of the filing of the petition. The court, in the best interests of the estate, exercised jurisdiction over the allowance of the tort claim for a postpetition violation of a state anti-discrimination law, which did not fall within the statutory exclusions of 28 U.S.C. § 157, and denied abstention under 28 U.S.C. § 1334(c)(1).

***In re Sheehan Mem. Hosp.**, 2007 Bankr. LEXIS 3601 (Bankr. W.D.N.Y. October 18, 2007) (Bucki, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[8]**

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

1107-131 (**Commercial**) **Simple breach of contract judgment was not sufficient basis for nondischargeability.** (*Bankr. E.D. Ark.)*

PROCEDURAL POSTURE: Plaintiff limited liability company (LLC) filed an action against defendant chapter 7 debtor, seeking a judgment determining that a debt the debtor owed was nondischargeable under 11 U.S.C. § 523. The LLC filed a motion for summary judgment.

OVERVIEW: The LLC filed an action in a Missouri state court in 2003, alleging that the debtor committed breach of contract. The debtor failed to file a timely answer, and the state court granted summary judgment in favor of the LLC in the amount of $294,743. The LLC filed a claim against the debtor's bankruptcy estate, and it asked the bankruptcy court for an order finding that the judgment it obtained in state court was nondischargeable under 11 U.S.C. § 523(a)(2) and (4) because the state court found that the debtor made material misrepresentations. The bankruptcy court found that it was not bound under the doctrine of collateral estoppel to adopt the state court's judgment. The state court's judgment was not entered on the merits of the case and the issue of the debtor's alleged false representations was not addressed by the state court. While it was deemed admitted that the debtor and the LLC had a valid contract, all the state court's judgment established was that the debtor committed breach of contract. The bankruptcy court also found that the LLC and its attorneys presented what could only be referred to charitably as bold inaccuracies to the court.

EBCO Construction Group, LLC v. Garretson (In re Garretson)*, 2007 Bankr. LEXIS 3661 (Bankr. E.D. Ark. October 23, 2007) (Evans, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08**

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

1107-132 (**Consumer**) **Action by trustee of family trust against former debtor did not violate discharge injunction due to debtor's failure to raise discharge as defense.** (*Bankr. D. Colo.)*

PROCEDURAL POSTURE: Co-trustees of a family trust (trustees) filed a motion for summary judgment in a discharged chapter 7 debtor's attempt to enforce his bankruptcy discharge order against the trustees, claiming that the trustees' filing of an action in state court against the debtor violated the discharge injunction of 11 U.S.C. § 524(a).

OVERVIEW: The debtor was a co-trustee with the trustees of a family trust. The trustees were included as creditors on the debtor's schedules, but were scheduled in the amount of "$0." The debtor's discharge order was entered. Almost 20 years later, the trustees filed an action in state court seeking to remove the debtor as trustee, and either reimbursement of pre-bankruptcy obligations the debtor owed the family trust or a determination that such obligations could be deducted from future trust distributions otherwise payable to the debtor. The debtor had his bankruptcy case reopened and argued that the state court action violated the discharge injunction. The state court subsequently found in favor of the trustees. In granting the trustees' motion for summary judgment, the court held that the debtor was collaterally estopped from re-litigating the issues decided in the state court suit. The court held that the debtor had the opportunity to raise his bankruptcy discharge as a defense in the state court suit but failed to timely do so. The court also held that there was no conflict between section 524(a)(1) and the full faith and credit mandate of 28 U.S.C. § 1738.

In re Barrett*, 2007 Bankr. LEXIS 3608 (Bankr. D. Colo. October 18, 2007) (Campbell, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

§ 548 Fraudulent Transfers and Obligations.

1107-133 (**Commercial**) **Avoiding transfer of substantially all of debtor's oil and gas assets could add equity to reorganized company to benefit of creditor.** (*Bankr. S.D.N.Y.)*

PROCEDURAL POSTURE: Plaintiff chapter 11 debtor filed a complaint seeking to avoid the transfer of its property to defendant transferee pursuant to 11 U.S.C. § 548 and 11 U.S.C. § 544. The transferee moved pursuant to Fed. R. Civ. P. 12(b)(1) and (6), or in the alternative, an order staying the adversary proceeding, pending the determination of whether creditor claims would be satisfied in full pursuant to the proposed plan of reorganization.

OVERVIEW: The debtor had sold the transferee substantially all of its domestic oil and gas assets. The transferee argued that because the unsecured creditors would receive full recovery on their claims, with interest, there was no possible way in which the debtor could demonstrate that the creditors would have been harmed as a consequence of the sale of the oil and gas businesses to the transferee or the sale of the transferee's own stock to unaffiliated institutional investors. The transferee argued that avoiding the transfer would not "benefit the estate" as only the debtor or its equity security holders – parties that lacked standing to prosecute fraudulent transfer claims – would have benefitted from the action. Under the proposed plan of reorganization, several classes of unsecured creditors were impaired because they would receive only an equity stake in the reorganized company. The debtor predicted, based upon the estimates of future value of the reorganized company and the value of disputed claims, that the equity in the reorganized company could be sufficient to satisfy the unsecured creditor claims. Thus, it was possible that a recovery could have benefitted certain creditors.

Calpine Corp. v. Rosetta Res., Inc. (In re Calpine Corp.)*, 2007 Bankr. LEXIS 3626 (Bankr. S.D.N.Y. October 24, 2007) (Lifland, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 5:548.01**

§ 706(a) Conversion; By the Debtor.

1107-134 (**Consumer**) **Chapter 7 debtor's motion to reconvert to chapter 13 denied as late notice of deadline for objection was prejudicial to creditors.** (*Bankr. D.N.M.)*

PROCEDURAL POSTURE: Debtors originally filed a voluntary petition under chapter 13 and later converted their case to chapter 7 in response to the chapter 13 trustee's motion to dismiss for failing to make timely payments. Debtors sought to reconvert their chapter 7 case to a chapter 13 case under 11 U.S.C. § 706(a).

OVERVIEW: The debtors filed a motion to convert but did not send a notice of deadline to file objections to the motion until more than seven months later. Instead, they did nothing to bring the motion to convert before the court and remained in chapter 7 without having to make any plan payments for over a year. Due to the pending motion, the chapter 7 trustee took no action, and the debtors' bankruptcy proceeding came to a standstill while the debtors failed to comply with the requirements of either chapter 7 or chapter 13. The court first concluded that reconversion was permitted under section 706(a) at the discretion of the court. However, the debtors failed to meet their burden of showing that reconversion was appropriate. The delay caused by the debtors was prejudicial to creditors and indicated that the debtors did not proceed in good faith.

In re Johnson*, 2007 Bankr. LEXIS 3692 (Bankr. D.N.M. October 29, 2007) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:706.02**

§ 727(a) Discharge; Grounds for Denial.

1107-135 (**Consumer**) **Discharge denied due to debtors' actions to hinder, delay or defraud creditor.** (*Bankr. S.D. Ill.)*

PROCEDURAL POSTURE: A creditor filed an adversary proceeding objecting to debtors' discharge under provisions of 11 U.S.C. § 727(a).

OVERVIEW: The creditor held a first lien on all debtors' real estate and a blanket lien on all farm assets. In examining this case under the elements of section 727(a)(2)(A), the court found that the creditor had proven, by a preponderance of the evidence, all necessary elements. The settlement in adversary case No.

06-3009 evidenced the fact that debtors transferred substantial assets within the year preceding their bankruptcy filing with the intent to hinder, delay, and defraud other creditors. Under section 727(a)(2)(B), the creditor had shown that debtors, without fair consideration and with an intent to hinder, delay, and defraud it, had transferred, removed, destroyed, mutilated, or concealed property of the estate, after the date of the filing of the petition. Under section 727(a)(3), the creditor showed that debtors had concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information from which debtors' financial condition or business transactions might be ascertained. Finally, the evidence clearly established all elements of section 727(a)(4)(A). Overall, debtors utterly failed to act in a forthright, honest manner in their dealings with their creditors and the court.

Centrue Bank v. Diekemper (In re Diekemper), *2007 Bankr. LEXIS 3670 (Bankr. S.D. Ill. October 26, 2007) (Fines, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.01**

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

1107-136 **Multiple nondisclosures by debtor resulted in denial of discharge.** (*Bankr. W.D.N.Y.)* (**Consumer**)

PROCEDURAL POSTURE: Plaintiffs, the U.S. Trustee and a bankruptcy trustee, brought an adversary proceeding against defendant bankruptcy debtor, alleging that the debtor made false oaths and accounts in failing to disclose assets and transfers which warranted a denial of the debtor's discharge under 11 U.S.C. § 727(a)(4)(A). The bankruptcy court conducted a trial.

OVERVIEW: The U.S. Trustee and the trustee contended that the debtor failed to disclose back salary which was due the debtor, a transfer of substantial funds to the debtor's spouse, a loan payment, and a postpetition repayment to the debtor of a loan. The bankruptcy court held that denial of the debtor's discharge was warranted since the debtor, who was well educated and a highly sophisticated businessperson, fraudulently engaged in a pattern of failing to disclose all assets, liabilities, and financial affairs of the debtor. Regardless of whether the debtor believed the back wages were exempt or uncollectible, the debtor knew the wages were legally owing and the debtor did not disclose payment of the back wages until after the trustee discovered the payment. Further, the evidence was clear that the undisclosed payment to the spouse for no consideration was not made from exempt personal earnings, and reporting the transfer was required in any event. Also, the debtor's check ledger indicated a transfer to repay a loan, rather than a mere bookkeeping adjustment or a contemporaneous offset transaction, and the loan receivable was not a minor transaction which the debtor simply overlooked.

Schmitt v. O'Brien (In re O'Brien), *2007 Bankr. LEXIS 3604 (Bankr. W.D.N.Y. October 19, 2007) (Ninfo, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.04**

§ 727(d) Discharge; Grounds for Revocation.

1107-137 **Discharge revoked due to debtor's nondisclosure of real property.** (*Bankr. N.D. Ill.)* (**Consumer**)

PROCEDURAL POSTURE: Plaintiff creditor filed an adversary proceeding against defendant debtor to revoke the debtor's discharge pursuant to 11 U.S.C. § 727(d).

OVERVIEW: The debtor had failed to list an interest in real property. The court found that it was not credible to believe that she did not know that she owned the property or had an interest in it as of the petition date. The debtor's sister had executed a quitclaim deed for the property to the debtor, the debtor had executed a mortgage on the property, and she was personally served with process commencing a foreclosure action on the property. Her testimony that she did not understand that she owned the property was also not credible. She had a college degree and had previously worked with court records. She was not an unsophisticated debtor. Neither was she an inexperienced debtor, having filed a bankruptcy case previously in Wisconsin. The debtor also claimed that she disclosed her husband's ownership of the property to her attorney and her attorney failed to follow up her disclosure with an investigation of title to the property. However, her attorney testified that the debtor told her that the property was not in the husband's name. Moreover, the debtor's attorney was not obliged to assume that the debtor was lying about the property being owned by her husband.

de Guzman Torre v. Abequibel (In re Abequibel), *2007 Bankr. LEXIS 3630 (Bankr. N.D. Ill. October 18, 2007) (Schwartz, B.J.).*

***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15**

§ 727(d)(2) Discharge; Grounds for Revocation; Failure to Report, Deliver or Surrender Property.

1107-138 (**Consumer**) **Discharge revoked due to debtor's failure to disclose intent to mortgage exempt homestead and spending tax refunds that were property of the estate.** (*Bankr. D. Minn.)*

PROCEDURAL POSTURE: Plaintiff chapter 7 trustee sought a revocation of defendant chapter 7 debtor's discharge pursuant to 11 U.S.C. § 727(d)(2) and objected to the debtor's amended claim of exemptions.

OVERVIEW: The debtor claimed her home as exempt, but noted a value of claimed exemption of 0.00. The trustee discovered that the debtor was entitled to tax refunds for two years for which she had not yet filed tax returns. The debtor agreed to file the returns and give the refund checks to her attorney. The court determined that the debtor's homestead exemption entitled her to nothing. The mortgage on the home was later found to be invalid. After the debtor received a discharge, she mortgaged the home and spent the loan proceeds. She also spent the tax refunds. The court held that the debtor acted fraudulently within the meaning of 11 U.S.C. § 727(d)(2) when she knowingly and deliberately failed to apprise the trustee of her contemplated liquidation of a substantial estate asset and her unauthorized use of proceeds that were legally subject to his administration and knowingly failed to account for and to surrender control over the value of the tax refunds. The court also held that the debtor should not be allowed to amend her exemptions because she had acted in bad faith, and the bankruptcy estate would be prejudiced if the amended exemptions were allowed.

***Seaver v. Markey (In re Markey)**, 2007 Bankr. LEXIS 3598 (Bankr. D. Minn. October 29, 2007) (Kishel, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[4]**

BANKRUPTCY RULES (Pre-2005 Act)

Rule 9006(b)(1) Time; Enlargement; In General.

1107-139 (**Commercial**) **Late filed personal injury claim allowed where prejudice to debtor was outweighed by right to pursue claim.** (*Bankr. S.D. Fla.)*

PROCEDURAL POSTURE: The debtor filed for relief under chapter 11. A former employee filed a motion for rehearing on the court's earlier order denying the judgment creditor's motion to allow a late-filed claim and to allow relief from stay. The debtor and the primary secured creditor objected to the motion.

OVERVIEW: In July, 2005, the former employee had initiated a maritime personal injury action against the debtor alleging he sustained an injury aboard ship in July, 2002. The employee filed a motion in the bankruptcy court proceeding in March, 2006, which sought permission to assert a late-filed claim against the debtor. The court had established September 15, 2004, as the deadline for filing claims. The employee suffered a subsequent injury in 2005, while working for a different owner. The court noted that on the date of the 2002 elevator incident the employee had a cause of action, and thus a bankruptcy claim, against the debtor. The court found that there were valid reasons for the employee's delay in filing a claim, particularly when he had become pain free for a period of time and had been told that he had reached maximum medical improvement. Any prejudice to the debtor and the primary creditor was outweighed by the employee's right to pursue a claim. The employee's delay in filing a claim was not unreasonable. The court found that relief from the stay was appropriate so that the employee could liquidate his claim in a district court.

***In re SunCruz Casinos, LLC**, 2007 Bankr. LEXIS 3629 (Bankr. S.D. Fla. October 26, 2007) (Olson, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9006.06**

Rule 9011(b) Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers; Representations to the Court.

1107-140 (**Consumer**) **Attorney who represented debtors in original chapter 13 case sanctioned for misrepresentations in chapter 7 case filed on behalf of same debtors.** (*Bankr. D. Conn.)*

PROCEDURAL POSTURE: The bankruptcy court issued an order to show cause compelling the debtors' attorney to show cause why he should not be personally sanctioned pursuant to Fed. R. Bankr. P. 9011(b), 28 U.S.C. § 1927, and the court's inherent powers under 11 U.S.C. § 105, for filing false and misleading pleadings and schedules on behalf of the debtors.

OVERVIEW: The attorney represented the debtors when they filed their first case and converted it to a chapter 13. The attorney was aware that the debtors owned a residence and that they sold it just prior to his filing a subsequent chapter 7 petition on their behalf. The newly filed pleadings and schedules did not disclose the real property sale, the proceeds, or the prior bankruptcy filing, and contained a number of outright false statements. When the misrepresentations were discovered by the trustee, the attorney helped to recoup $48,000 of the roughly $60,000 in proceeds remaining from the home sale at the time the petition was filed. The attorney's story that he did not recognize the clients as his former clients was deemed unbelievable. The court concluded that the attorney knowingly, wilfully and intentionally orchestrated, aided and abetted, and enabled the debtors' illicit scheme, and imposed sanctions concurrently under Fed. R. Bankr. P. 9011(b), 28 U.S.C. § 1927, and 11 U.S.C. § 105. The attorney was also required to complete a legal ethics class and his name was referred to the U.S. Attorney for possible criminal prosecution.

In re Hill*, 2007 Bankr. LEXIS 3636 (Bankr. D. Conn. October 23, 2007) (Dabrowski, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 10:9011.04**