

July 2009

# Collier Bankruptcy Case Update

## CURRENT BANKRUPTCY CASES ANALYZED

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July 13, 2009

Issue 2

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*Miller v. Christensen* (In re Christensen) (Bankr. D. Utah March 30, 2009) (Consumer) ..... 0709-065

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

### § 101(14A) Definitions; “Domestic Support Obligation”.

0709-036 **Monetary judgment for premarital expenditures of debtor's former spouse was not a domestic support obligation.** (*Bankr. D. Neb.*)  
(Consumer)

**PROCEDURAL POSTURE:** Hearing was held on debtors' amended objection to a claim. The debtor's former spouse filed a claim in the amount of \$ 26,796 as a domestic support obligation.

**OVERVIEW:** The court found that the claim was not a domestic support obligation (DSO) under 11 U.S.C.S. § 101(14A), which had priority status and was nondischargeable in a chapter 13 case. There was nothing in the divorce decree to indicate that the monetary judgment awarded to the former spouse for premarital expenditures had anything to do with alimony, maintenance, or support. In fact, the trial judge specifically declined to award alimony. A court of appeals determined that the trial court's award of the judgment was to be fair and equitable in the division of property since the payments were made upon debtor's financial advice. Further, that court noted the particularly short duration of the marriage of the former spouse and debtor and saw it as a primary factor in determining that the former spouse was not entitled to alimony. Thus, it seemed clear that the court of appeals determined that the former spouse was not entitled to a payment in the nature of alimony, maintenance, or support. Further, the judgment with respect to the premarital expenditures was clearly made in the interest of fairness and reasonableness, not as support. Therefore, there was no basis for finding the judgment to be a DSO.

*In re LaGrange*, 2009 Bankr. LEXIS 1242 (*Bankr. D. Neb. May 27, 2009*) (*Saladino, C.B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 2:101.14A*

### § 105 Power of Court.

0709-037 **Consolidation of debtors' chapter 11 cases denied where debtors were distinct entities.** (*Bankr. E.D.N.C.*)  
(Consumer)

**PROCEDURAL POSTURE:** A creditor and the bankruptcy administrator objected to the debtors' motion for substantive consolidation of their chapter 11 cases.

**OVERVIEW:** The bankruptcy administrator and the debtors' largest secured creditor objected to the debtors' motion for substantive consolidation of their chapter 11 cases. The court agreed that substantive consolidation was not appropriate or justified under 11 U.S.C.S. § 105 and the Augie/Restivo test. The court held that, although the debtors shared the secured claim, the vast majority of unsecured creditors dealt with the debtors as separate economic units. The court held that the affairs of the debtors were not so entangled as to require substantive consolidation because they structured themselves as separate entities with separate collateral, credit, and contractual arrangements and filed separate chapter 11 plans, disclosure statements, schedules, and monthly reports.

*In re Smith*, 2009 Bankr. LEXIS 1225 (*Bankr. E.D.N.C. April 29, 2009*) (*Leonard, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 2:105.01*

### § 105(a) Power of Court; Issuance of Necessary or Appropriate Order, Process, or Judgment.

0709-038 **Debtor authorized to continue to manage cash through system maintained prior to petition date.** (*Bankr. S.D.N.Y.*)  
(Commercial)

**PROCEDURAL POSTURE:** Debtors moved, pursuant to 11 U.S.C.S. §§ 105(a), 345(b), 363(b), 363(c), 364(a), and Fed. R. Bankr. P. 6003, 6004, for (a) authority to (i) continue to operate the Cash Management System, (ii) honor certain prepetition obligations related to the use of the Cash Management System, (iii) maintain existing business forms, and (iv) maintain existing bank accounts; (b) extend the time to comply with § 345(b), and (c) to schedule a final hearing.

**OVERVIEW:** The court determined that debtors had provided due and proper notice of the Motion and Hearing and no further notice was necessary. The legal and factual bases set forth in the Motion established just and sufficient cause to grant the requested relief; the relief granted was necessary to avoid immediate and irreparable harm to debtors and their estates, as provided in Fed. R. Bankr. P. 6003. Among numerous other matters, the court determined that debtors were authorized, pursuant to 11

U.S.C.S. §§ 105(a), 363(c), to continue to manage their cash pursuant to the Cash Management System (CMS) maintained by debtors prior to the commencement date. Debtors were ordered to continue to maintain all receipts and disbursements and records of all transfers within the CMS utilized postpetition so that all postpetition transfers and transactions would be properly documented, and accurate intercompany balances would be maintained. All intercompany claims against a debtor by another debtor or non-debtor affiliate arising after the commencement date as a result of intercompany transactions and transfers in the ordinary course of business were to be accorded administrative expense priority status.

*In re Gen. Growth Props.*, 2009 Bankr. LEXIS 1199 (Bankr. S.D.N.Y. May 14, 2009) (Gropper, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 2:105.05

### § 330 Compensation of Officers.

0709-039      **Reasonable attorneys' fees allowed in dismissed case for services that were necessary when rendered.** (Bankr. M.D.N.C.)  
(Consumer)

**PROCEDURAL POSTURE:** A debtor filed for relief under chapter 13. An attorney for the debtor filed an application for allowance and payment of attorney's fees.

**OVERVIEW:** The debtor filed for relief in November 2008, and at the time the case was commenced the attorney represented the debtor. The attorney was allowed to withdraw from representation in February 2009. The debtor made some of the required payments to the trustee in the case, but thereafter fell behind in making the payments required by 11 U.S.C.S. § 1327. As a result of the debtor's default the trustee sought dismissal of the case, and a hearing was scheduled. The court then granted the debtor a continuance of the dismissal hearing on condition that the debtor pay the trustee the sum of \$5,050, to bring the debtor current. The debtor failed to make the payment as required and also failed to attend the meeting of creditors. In March 2009, the court dismissed the case. Thereafter the attorney filed an application for fees in the amount of \$2,500 for services rendered to the debtor. The court found that the services rendered were necessary at the time and the amount requested was reasonable. The court had authority to award the expenses pursuant to 11 U.S.C.S. §§ 503(b) and 330, and the fees allowed could be deducted from the funds held by the trustee pursuant to 11 U.S.C.S. § 1326.

*In re Witherspoon*, 2009 Bankr. LEXIS 1217 (Bankr. M.D.N.C. April 29, 2009) (Stocks, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 3:330.01

### § 362 Automatic Stay.

0709-040      **Bank's failure to halt automatic deductions from debtor's account violated stay.** (B.A.P. 8th Cir.)  
(Consumer)

**PROCEDURAL POSTURE:** Appellant, a debtor who had filed a chapter 7 bankruptcy, challenged an order of the U.S. Bankruptcy Court for the District of Nebraska denying appellant's motion for turnover and for sanctions against appellee credit union on account of what appellant claimed to be appellee's violations of the automatic stay imposed per 11 U.S.C.S. § 362.

**OVERVIEW:** When appellant filed her chapter 7 case, her employer was automatically deducting \$268 from her biweekly pay and transferring it to appellee, which applied \$188 thereof to appellant's auto loan and transferred the balance into other accounts. Appellant claimed that she notified appellee that she was surrendering the auto that was the subject of the loan and had advised that she wanted the automatic deductions to stop, but appellee claimed that it lacked the authority to terminate the deductions and only did so some time later on receipt of a form from appellant. Post-discharge, appellant sought turnover of the \$1127 that had accumulated and for sanctions for violation of stay. The bankruptcy court denied relief, but the court reversed. It held that the lower court's finding that only appellant could terminate the payments was erroneous. It was persuaded by evidence that appellee had applied, to the auto loan, only part of the sum deducted biweekly. It reasoned that since appellee had control over the actual amount that was applied to the loan, it must also have had the power to terminate deductions altogether. Its failure to do so thus was an act to collect a debt that violated § 362.

*Krivohlavek v. Boys Town Fed. Credit Union (In re Krivohlavek)*, 2009 Bankr. LEXIS 1190 (B.A.P. 8th Cir. May 22, 2009) (Venters, B.J.).

*Collier on Bankruptcy, 15th Ed. Revised 3:362.01*

0709-041 **Debtor awarded damages and attorneys' fees for creditor's repeated postpetition collection efforts in violation of stay.** (*Bankr. S.D. Ill.*)  
(Consumer)

**PROCEDURAL POSTURE:** A debtor filed an amended motion for sanctions for a willful violation of the automatic stay against a creditor, pursuant to 11 U.S.C.S. § 362. The court held a hearing and issued findings of fact and conclusions of law.

**OVERVIEW:** The court determined that the creditor had notice of the bankruptcy proceeding, based upon mail notifications and a telephonic notice. The testimony of the debtor was credible and established that for over a month after the bankruptcy petition had been filed, the creditor, through various agents, continually contacted the debtor and obtained additional payments of \$405 from the debtor, in willful violation of the automatic stay. The facts showed that the creditor knew of the bankruptcy petition, and in spite of that knowledge, acted intentionally to continue to demand postpetition payments from the debtor. The creditor also willfully violated the automatic stay after receiving the debtor's amended motion for sanctions. After receiving the motion, the creditor was under an affirmative duty to remedy the violations of the automatic stay by returning the funds collected from the debtor postpetition. The creditor failed to return the \$ 405 until the hearing. The court concluded that an award of compensatory damages in the amount of \$1,000 and attorney fees was appropriate. The court accepted the fees of \$2,673 submitted by the debtor's counsel.

*In re Webb*, 2009 *Bankr. LEXIS 1238* (*Bankr. S.D. Ill. May 27, 2009*) (*Fines, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 3:362.01*

### § 362(a) Automatic Stay; Scope.

0709-042 **Motion for relief from stay granted upon reconsideration due to debtors' prior submission of false and misleading evidence.** (*Bankr. D. Colo.*)  
(Consumer)

**PROCEDURAL POSTURE:** Debtors filed a chapter 13 case. Creditor filed a motion for relief from automatic stay. The court approved a stipulation for resolution of the motion. The creditor moved to enforce the terms of the stipulation and for relief from the automatic stay. The court denied the motion after finding that the debtors had made the alleged payments. The creditor moved for relief from the court's order under Fed. R. Bankr. P. 9024.

**OVERVIEW:** The debtors misled the court and the creditor by submitting fraudulent evidence to the court. The court found that the debtors' fraudulent evidence was the product of careful, deliberate, specific, and repeated acts. The debtors intended to and did mislead the court. One of the debtors provided false testimony to the court. The testimony from a bank proved that the debtors' prior testimony was nothing more than a fabricated story. No payment was ever presented for payment or negotiated to the creditor in June, July, October, or December 2007. Additionally, the testimony of the bank proved that the debtors manipulated and lied to the court and the creditor during the course of the matter. The debtors refused to testify or refute the bank's testimony. The debtors' prior testimony was false and misleading, and further, the evidence submitted by the debtors was fabricated and altered. The debtors failed to perform under the terms of the stipulation approved by the court.

*Wells Fargo Bank v. Burrier (In re Burrier)*, 2009 *Bankr. LEXIS 1205* (*Bankr. D. Colo. April 8, 2009*) (*Brooks, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 3:362.03*

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

0709-043 **Debtor's former spouse's motion for relief from stay denied where secured claim was adequately protected.** (*Bankr. D. Or.*)  
(Consumer)

**PROCEDURAL POSTURE:** Chapter 13 debtor's former spouse filed a secured claim for real property identified in a property division judgment and an unsecured priority claim and domestic support obligation in the form of attorney fees awarded in the dissolution proceeding. The debtor objected to the claims. The spouse moved for relief from the stay to pursue collection of the state court property division. The court held a hearing.

**OVERVIEW:** The property claim objection was overruled where, pursuant to Or. Rev. Stat. § 107.105(1)(f), the parties' property interests were vested at the time of the bankruptcy filing, the spouse was awarded the property division judgment, and under Or. Rev. Stat. § 18.150, that judgment became a lien on the subject real properties. Thus, the spouse's prepetition inchoate co-ownership interest in the real properties was converted into a secured claim, a result authorized by a bankruptcy judge's order granting automatic stay relief. The 11 U.S.C.S. § 362(d)(1) request for relief from the stay for cause was denied as the spouse's lien was adequately protected throughout the bankruptcy plan's life. The argument that the attorney fees award was not a claim was rejected because even though it was inchoate and unliquidated until judgment was entered under Or. Rev. Stat. § 107.105(1)(j), the potential claim existed on the date that the marital dissolution proceeding was filed. Since that date was pre-petition, the attorney fees judgment was properly treated as a claim. However, the issue of the claim's status was not ripe for review as the debtor's plan required him to pay all allowed unsecured claims.

*In re Gross*, 2009 Bankr. LEXIS 1189 (Bankr. D. Or. April 29, 2009) (Dunn, B.J.).

*Collier on Bankruptcy*, 15th Ed. Revised 3:362.07[3]

### § 363 Use, Sale, or Lease of Property.

0709-044 **Bankruptcy court declined to withdraw reference of issues relating to government orchestrated (Commercial) sale of substantially all assets of auto manufacturer.** (S.D.N.Y.)

**PROCEDURAL POSTURE:** Certain state pension and benefit funds, which held approximately \$ 40 million in debtor's senior secured loans filed three motions. The first was to withdraw the reference to the bankruptcy court. The second was to stay proceedings in the bankruptcy court pending determination of the motion to withdraw the reference. The third, assuming the withdrawal of the reference, was to appoint a chapter 11 trustee and also to appoint an examiner.

**OVERVIEW:** The purpose of the motion to withdraw the reference was to remove from the bankruptcy court issues related to the proposal to sell virtually all the assets of the debtor, pursuant to 11 U.S.C.S. § 363, to a new company. The pension funds objected to the proposed sale. The United States Government orchestrated the sale under the Emergency Economic Stabilization Act of 2008 (EESA), 12 U.S.C.S. §§ 5201 et seq., which established the Troubled Asset Relief Program (TARP). The pension funds contended that these actions by the Government were not authorized by EESA and TARP, and therefore had no legal authority. They also urged that the movement of the collateral for the senior secured loans to the new company would amount to a taking in violation of the United States Constitution. Although there was a need to interpret EESA and TARP, resolution of the issues about the sale involved a number of standard factual and legal issues presented in bankruptcy matters, including whether responsible parties performed their fiduciary duties, whether the terms of the proposed sale were such as to give proper recognition to secured creditors, and whether the proposed sale was in fact a reorganization.

*In re Chrysler, LLC*, 2009 U.S. Dist. LEXIS 44833 (S.D.N.Y. May 26, 2009) (Griesa, D.J.).

*Collier on Bankruptcy*, 15th Ed. Revised 3:363.01

### § 364(e) Obtaining Credit; Appeal of Approval Order Moot Absent a Stay.

0709-045 **Chapter 11 debtor's motions for financing and use of cash collateral granted as necessary to (Commercial) continued operations.** (Bankr. S.D.N.Y.)

**PROCEDURAL POSTURE:** Debtors filed voluntary petitions under chapter 11. The debtors filed a motion for entry of an order authorizing the debtors to, among other things, (1) obtain postpetition secured financing pursuant to 11 U.S.C.S. §§ 105(a), 362, and 364; (2) use cash collateral and grant adequate protection pursuant to 11 U.S.C.S. §§ 361 and 363; and (3) repay in full amounts owed under a certain prepetition secured loan agreement.

**OVERVIEW:** The court found that notice of the final hearing was due and sufficient notice. Entry of the order was necessary to prevent substantial harm to the debtors' estates that would have otherwise resulted if the debtors failed to obtain the financing contemplated in the order to preserve the debtors' assets and continue their operations. The debtors had made reasonable efforts, under the circumstances, to locate financing of the type contemplated by the order. The debtors were unable to obtain, in the ordinary course of business or otherwise, financing of the type contemplated in the order on an

unsecured basis. The terms of the documents were extended in good faith and any credit extended, loans to be made, or other financial accommodations granted to the debtors pursuant to the documents were deemed to be extended in good faith, as that term was used in 11 U.S.C.S. § 364(e). The debtors demonstrated good cause for the entry of the order and for the order to become immediately effective and enforceable upon entry. The terms of the borrowings and other financial accommodations were fair and reasonable and reflected the debtors' exercise of prudent business judgment.

*In re Gen. Growth Props.*, 2009 Bankr. LEXIS 1197 (Bankr. S.D.N.Y. May 14, 2009) (Gropper, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 3:364.06

**§ 365 Executory Contracts and Unexpired Leases.**

0709-046      **Debtor could assume executory contract where formal notice of default had never issued.**  
 (Commercial)    (*Bankr. E.D. Mich.*)

**PROCEDURAL POSTURE:** A chapter 11 debtor moved for entry of an order authorizing assumption of an executory contract concerning the construction and operation of a casino. The city, which was a party to the contract, objected on the grounds that the debtor was in default, was legally incapable of curing the nonmonetary defaults, and had not provided any evidence of its ability to promptly cure the defaults or provide adequate assurance of performance.

**OVERVIEW:** Under the parties' agreement, the issuance and proper service of a stated formal notice of default was required for a default to exist. However, the required notice of default had not yet been given. Thus, for purposes of 11 U.S.C.S. § 365, no default existed at the time the debtor filed the assumption motion. The specific and detailed default and notice requirements were not to ignored or passed off given the particularity of the development agreement generally, and its default provisions in particular. The city's argument that the debtor should have been estopped from arguing that it was not in default was rejected where the city was fully aware of the agreement's default provisions, but made a conscious decision to refrain from sending a formal notice of default on several occasions.

*In re Greektown Holdings, LLC*, 2009 Bankr. LEXIS 1231 (Bankr. E.D. Mich. May 13, 2009) (Shapero, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 3:365.01

0709-047      **Debtor's assumption of purchase and sale agreements but not closely related accommodation agreements for condominium units, denied.** (*Bankr. M.D. Fla.*)  
 (Commercial)

**PROCEDURAL POSTURE:** This case came before the court for hearing to consider debtor developer's Motion for Summary Judgment on Motion for Order Authorizing Assumption and Sale Pursuant to Contracts for Purchase of Condominium Units. The responding parties were all identified as "buyers" in the "Purchase and Sale Agreements" listed in debtor's motion for summary judgment.

**OVERVIEW:** Debtor requested authority to assume certain "Purchase and Sale Agreements" that were entered by a debtor as the seller, prior to the filing of its bankruptcy petition. The Agreements related to condominiums. The respondents whose claims remained at issue were referred to by the court collectively as the purchasers. According to the purchasers, the "Accommodation Agreements" and the "Purchase and Sale Agreements" constituted single, integrated agreements between debtor and the respective purchaser. Thus, they contended that debtor could not sever and assume only a portion of the parties' entire agreement pursuant to 11 U.S.C.S. § 365. Debtor asserted, however, that the "Purchase and Sale Agreements" and the "Accommodation Agreements" were divisible, severable agreements, and that it could therefore separately assume or reject the individual contracts. The court found that each "Purchase and Sale Agreement" and the corresponding "Accommodation Agreement" should be construed as a single contract under Florida law. They were executed at or near the same time by the same parties. Further, the documents concerned the same subject matter. The court also considered the parties' intent.

*In re Ecoventure Wiggins Pass, Ltd.*, 2009 Bankr. LEXIS 1206 (Bankr. M.D. Fla. May 13, 2009) (Paskay, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 3:365.01

### § 365(b)(1) Executory Contracts and Unexpired Leases; Effect of Existing Defaults; Requirements for Assumption.

0709-048 **Assumption and assignment of commercial sublease denied absent adequate assurance of (Commercial) future performance.** (*Bankr. D. Del.*)

**PROCEDURAL POSTURE:** Pursuant to 11 U.S.C.S. § 365(b)(1), a chapter 11 debtor moved to assume and assign the lease of a commercial office building to the group of tenant-in-common owners. The sublessee objected to the assumption and assignment.

**OVERVIEW:** The sublessee was entitled to stop tenant improvements where the debtor had sought to reject the sublease, the sublessee's planned tenant improvements were greater in value than the reimbursement it was allowed, and thus, it was foolhardy to believe that its lease rights would have been preserved and enforceable. The sublessee was also not required to proceed according to construction timetables that no longer efficiently utilized its internal and external resources. Therefore, the sublessee was to be compensated and provided with adequate assurance pursuant to § 365(b)(1). In order to restore the sublessee to the position it would have been in had the debtor not filed for bankruptcy and indicated that the lease would be rejected, the sublessee was to be reimbursed for, inter alia, restacking another building to accommodate its employees, the expense to temporarily relocate employees, and the renewal of a lease on a building where other employees were located. Based on the pecuniary losses and rent abatement that the sublessee was owed, adequate assurance of future performance had not been shown where the funds available to the new landlord could not cover the expected expenses.

*In re DBSI, Inc.*, 2009 Bankr. LEXIS 1211 (*Bankr. D. Del. May 28, 2009*) (*Walsh, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 3:365.05*

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

0709-049 **Claim for "liquidated damages" for debtor's breach of lease after hurricane Katrina was (Commercial) subject to cap.** (*Bankr. S.D. Miss.*)

**PROCEDURAL POSTURE:** Debtor corporations filed petitions under chapter 11 and a lessor filed a proof of claim for the principal sum of \$ 136,429. The debtors filed an objection to the lessor's claim, contending that the claim was subject to the statutory cap contained in 11 U.S.C.S. § 502(b)(6).

**OVERVIEW:** The debtors entered into a lease with the lessor on August 1, 2005, to rent parking for employees. The lease contained a liquidated damages clause which stated that the lessor was entitled to recover the full amount of payments that were due under the lease if the debtors failed to pay the lessor \$ 4,000 per month for 36 months. The debtors paid rent for August and September 2005, but stopped paying rent after Hurricane Katrina struck Mississippi on August 29, 2005, and destroyed a casino they owned. The lessor terminated the lease for nonpayment of rent and demanded payment of the remaining balance due on the lease, and it filed a claim against the debtors' bankruptcy estates after the debtors declared bankruptcy. The court found that the lessor's claim was governed by 11 U.S.C.S. § 502(b)(1) and (6) and had to be capped. The lessor was not entitled to liquidated damages because its actual damages were readily ascertainable, and under those circumstances, the liquidated damages provision in the lease was unenforceable under Mississippi law.

*In re Premier Entm't Biloxi, LLC*, 2009 Bankr. LEXIS 1222 (*Bankr. S.D. Miss. April 29, 2009*) (*Olack, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 4:502.03[7]*

### § 503(b) Allowance of Administrative Expenses; Types of Expenses Allowed.

0709-050 **Inter-creditor agreement did not bar administrative expense claim.** (*Bankr. S.D. Fla.*) (Commercial)

**PROCEDURAL POSTURE:** The cause was before the court for hearing upon the motion of applicant creditor (hereafter applicant) for allowance and payment of administrative expense claim pursuant to 11 U.S.C.S. § 503(b) and the objection thereto filed by a second creditor (hereafter objector). The applicant sought legal fees of \$ 78,694 and expenses of \$ 1,568, a total of \$ 80,263, for its efforts.

**OVERVIEW:** The principal issues were whether an Inter-creditor Agreement between the applicant and the objector barred the administrative expense claim and, in the event that it did not bar the claim, whether the applicant's efforts in connection with the Joint Consolidated Plan of Reorganization

proposed by the applicant and the chapter 11 trustee provided a substantial contribution to the estate. The applicant argued that its efforts provided a substantial contribution to resolution of debtors' cases by working cooperatively with the Trustee to bring finality to the cases and proposing a plan, ultimately confirmed, that materially contributed to and benefited the estates. The court believed the Agreement was an agreement of subordination, enforceable in a case under the Bankruptcy Code to the same extent that such agreement was enforceable under applicable non-bankruptcy law, 11 U.S.C.S. § 510(a). The claim was not barred by the Agreement. Further, the court believed that the applicant may have been entitled to an allowed administrative expense claim under 11 U.S.C.S. § 503(b), though not necessarily in the amount requested, based upon a substantial contribution to the estates, if proven.

*In re Ocean Blue Leasehold Prop. LLC, 2009 Bankr. LEXIS 1193 (Bankr. S.D. Fla. April 23, 2009) (Cristol, C.B.J.).*  
*Collier on Bankruptcy, 15th Ed. Revised 4:503.04*

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

0709-051 **Unsecured creditor could not file claims for postpetition costs of liquidating debtor's collateral.** (Consumer) *(Bankr. C.D. Ill.)*

**PROCEDURAL POSTURE:** In consolidated chapter 13 cases, creditors filed unsecured deficiency claims, which included costs incurred in postpetition liquidation of the debtors' collateral. The trustee objected to each claim, maintaining that 11 U.S.C.S. § 506(b) barred an under-secured or totally unsecured creditor from recovering such postpetition costs. The issue was presented to the court for issuance of findings of fact and conclusions of law.

**OVERVIEW:** In both cases, the debtors entered retail installment contracts for the purchase of cars, giving the creditors a security interest in the vehicles. The creditors filed secured proofs of claims, and the chapter 13 plans provided that the debtors would continue their regular monthly payments. When the debtors fell into arrears, the creditors sold the vehicles. The creditors filed amended claims, consisting of the unsecured deficiencies from the sales and the costs incurred in repossessing and selling the vehicles. In ruling in favor of the trustee, the court found that under the plain language of § 506(b), a secured creditor could recover postpetition interest, fees, costs, and charges only to the extent that its collateral was worth more than the claim. The court rejected the creditors' contention that allowance of their unsecured claims for the costs of repossession and sale was permitted by the "hanging paragraph" of 11 U.S.C.S. § 1325(a), finding that under the plain language of this provision, it was irrelevant to the treatment of amended, unsecured claims. The court further noted that a contrary ruling would violate the basic bankruptcy principle of equitable distribution.

*In re Hitch, 2009 Bankr. LEXIS 1232 (Bankr. C.D. Ill. May 29, 2009) (Gorman, B.J.).*  
*Collier on Bankruptcy, 15th Ed. Revised 4:506.04*

**§ 523(a)(6) Exceptions to Discharge; Types of Debt Excepted; Willful and Malicious Injury to Another Entity or Property of Another Entity.**

0709-052 **Judgment for debtor's willful and malicious injury stemming from breach of non-competitve agreement was nondischargeable although damages for breach were dischargeable.** (Consumer) *(Bankr. M.D. Fla.)*

**PROCEDURAL POSTURE:** Creditor filed an adversary proceeding against chapter 7 debtors on the ground that because the debtors willfully and maliciously violated a non-competition agreement between the parties, the creditor's claim was non-dischargeable under 11 U.S.C.S. § 523(a)(6). The creditor sought summary judgment.

**OVERVIEW:** A Texas court permanently enjoined the debtors from competing with the creditor following their violation of a temporary injunction and a contempt order. The state court also entered an agreed judgment awarding damages against the debtors. Pursuant to the principles of collateral estoppel and full faith and credit under 28 U.S.C.S. § 1738, the court found that it was duty bound to accept the binding effect of the final judgment entered in Texas against the debtors. The court was satisfied that there were indeed no genuine issues of material fact. The creditor established the requisite degree of its burden of proof and, therefore, it was entitled to have the motion for summary judgment granted. However, since the state court judgment failed to specifically what portion of the judgment entered in

favor of the creditor was for damages due to the debtors' breach of contract, which was dischargeable or attributable to the willful and malicious injury caused by the debtors, the court was satisfied that the resolution of the issue was partial. Therefore, the precise amount of damages would be determined by either affidavit and/or by an agreement filed by the parties to the court.

*Major Sports Fantasy, Ltd. v. Dowell (In re Dowell)*, 2009 Bankr. LEXIS 1215 (Bankr. M.D. Fla. April 24, 2009) (Paskay, B.J.).

*Collier on Bankruptcy*, 15th Ed. Revised 4:523.12

### § 541 Property of the Estate.

0709-053 **Bankruptcy court erred in holding that debtor doctor's malpractice policy was not property of the estate.** (10th Cr.)  
(Consumer)

**PROCEDURAL POSTURE:** During a malpractice suit, debtor doctor filed for bankruptcy and was discharged in bankruptcy. Plaintiff parents sued defendants, a trustee and an insurer, seeking a declaration that the doctor's liability policy was part of the doctor's estate under 11 U.S.C.S. § 541. The bankruptcy court ruled against the parents under 11 U.S.C.S. § 365(d)(1). The United States District Court for the District of Utah affirmed. The parents appealed.

**OVERVIEW:** The parents brought a medical malpractice suit against the doctor. The doctor was insured under a liability policy. The doctor filed for bankruptcy. The trustee rejected the parents' offer to buy the estate's interest in the liability policy. The bankruptcy court found that the policy was not the property of the estate because the contract was executory since not all of the obligations owing under the policy had been fully performed. The appellate court determined that the policy was part of the estate because the contract was not rejected under 11 U.S.C.S. § 365(d)(1) since the policy was not an executory contract because the relevant policy period had expired and the doctor had already paid for the policy for that period. In addition, the trustee had discretion to exercise the doctor's rights under the policy or to assign those rights to the parents because the policy's non-assignability clause had no applicability under Utah law after the event triggering the loss had occurred, and once the settlement consent right was assigned in bankruptcy to the trustee, there was no limitation on the trustee's further assignment of the right to the parents.

*Olah v. Baird (In re Baird)*, 2009 U.S. App. LEXIS 11930 (10th Cr. June 3, 2009) (McConnell, C.J.).

*Collier on Bankruptcy*, 15th Ed. Revised 5:541.01

### § 544 Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers.

0709-054 **Deed of trust that was outside chain of record title to subject property was avoidable.** (Bankr. Commercial) E.D. Va.)

**PROCEDURAL POSTURE:** Banking association filed an adversary proceedings against a chapter 7 corporate debtor, the debtor's shareholders, officers, and directors, a Virginia general partnership, and a trustee who was appointed to represent the debtor's bankruptcy estate, seeking an order which allowed it to enforce its rights under a deed of trust.

**OVERVIEW:** A Virginia partnership acquired real property in 2000, and it conveyed a deed of trust to the property to a bank as security for a loan it obtained. The partners established a corporation in 2003, and in May 2005, the corporation obtained a loan from a banking association and issued a deed of trust on the property to provide security for the loan it obtained. After the corporation declared bankruptcy in 2008, the banking association learned that the corporation did not own the property, and it withdrew a motion for relief from the automatic stay and filed an adversary proceeding against the corporation. The court found that the corporation owned equitable title to the property on the date it declared bankruptcy, that the bankruptcy trustee succeeded to that interest and was entitled to receive a deed to the property from the partnership, that the trustee had the right to avoid any transfer of property that belonged to the corporation that was avoidable by a bona fide purchaser, and that the deed of trust the corporation issued was avoidable and had been avoided pursuant to 11 U.S.C.S. §§ 544 and 550 and preserved for the benefit of the corporation's bankruptcy estate.

*First Cmty. Bank v. E.M. Williams & Sons, Inc. (In re E.M. Williams & Sons, Inc.)*, 2009 Bankr. LEXIS 1224 (Bankr. E.D. Va. May 8, 2009) (Huennekens, B.J.).

*Collier on Bankruptcy, 15th Ed. Revised 5:544.01*

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

0709-055 **401(k) loan was not a "debt" and payments could not be deducted in means test calculation.**  
(Consumer) (9th Cir.)

**PROCEDURAL POSTURE:** On a direct appeal, appellant debtor sought review a decision of the U.S. Bankruptcy Court for the Central District of California, which dismissed his chapter 7 petition for abuse under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C.S. § 707(b), by concluding that the debtor's inclusion of the funds for repayment of a 401(k) loan in his schedule of necessary expenses was abusive.

**OVERVIEW:** The debtor took a loan from his 401(k) plan, and the plan automatically deducted funds from his paychecks to repay the loan. The bankruptcy court found that the 401(k) loan was a secured debt, but dismissed the petition because it would be an abuse to permit the case to continue under chapter 7 since the loan would be repaid within a year, and the debtor would have funds to repay unsecured creditors. On appeal, the court held that the debtor's obligation to repay this loan was not a "debt" under the Bankruptcy Code since the debtor had borrowed his own money, and the repayment obligation was essentially a debt to the debtor himself. Because the debtor's loan repayment obligation was not a debt, he could not include payments on it as a deduction for purposes of the means test under § 707(b)(2). The debtor's 401(k) loan repayments were also not "other necessary expenses" for purposes of applying the means test under § 707(b) since the initial plan contributions and loan repayments were voluntary. Further, the loan repayments were not "special circumstances" that could rebut the presumption of abuse under § 707(b)(2)(B) since retirement plan loans were not extraordinary or rare.

*Egebjerg v. Anderson (In re Egebjerg)*, 2009 U.S. App. LEXIS 11651 (9th Cir. May 29, 2009) (Hawkins, C.J.).

*Collier on Bankruptcy, 15th Ed. Revised 6:707.04*

0709-056 **Case dismissed for abuse due to debtors' unreasonable expenditures.** (Bankr. M.D.N.C.)  
(Consumer)

**PROCEDURAL POSTURE:** The debtors filed for relief under chapter 7. A bankruptcy administrator filed for dismissal of the case pursuant to 11 U.S.C.S. § 707(b)(1) and (3).

**OVERVIEW:** In March 2006 the debtors and their son moved from Florida to North Carolina so the debtor could start a new job. The debtors purchased a home for \$418,000, using \$86,000 of their own money toward the purchase. The debtors had a mortgage for the remaining purchase price and executed a second deed of trust on the home for future advances up to \$ 60,000. Shortly after closing on the house, the debtor's job opportunity fell through. At the time of the hearing, the debtor had a job as a physical therapist earning \$31 to \$35 per patient. The other debtor had not been employed since 2005. The debtors' schedules reflected a monthly deficit of \$717. In addition to \$3,839 in housing expenses, the debtors owned two cars and a boat. The court found that the debtors' current budget in light of their current financial condition, was not reasonable. The debtors' housing expenses were excessive. If the debtors obtained more affordable housing, and reduced other unreasonable expenses, they could fund a chapter 13 plan. There were other signs of abuse including the fact that the case was not precipitated by a sudden calamity, and the debtors made consumer purchases in excess of the ability to pay.

*In re Myers*, 2009 Bankr. LEXIS 1237 (Bankr. M.D.N.C. May 22, 2009) (Waldrep, B.J.).

*Collier on Bankruptcy, 15th Ed. Revised 6:707.04*

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

0709-057 **Debtor properly claimed deductions in four vehicles which were not grounds for bad faith dismissal.** (Bankr. E.D.N.C.)  
(Consumer)

**PROCEDURAL POSTURE:** Debtors filed a petition under chapter 13 and a plan for repaying their creditors. The chapter 13 trustee filed a motion to dismiss the debtors' case, claiming that the debtors did

not file their plan in good faith because they claimed monthly expenses on four vehicles which they were not entitled to take.

**OVERVIEW:** The debtors declared bankruptcy in December 2008, and they proposed a plan for repaying their creditors that paid no dividends to unsecured creditors. The trustee filed an objection to the debtors' plan, claiming that it was not filed in good faith because the debtors improperly claimed expenses for four vehicles they owned, and when those expenses were adjusted, they had a monthly disposable income of \$ 90.05 that was not being paid to unsecured creditors. The court overruled the trustee's objection. The debtors properly reduced their monthly income of \$ 16,189 by \$ 489 as the local allowance for vehicle ownership of a vehicle they owned free and clear of all liens, \$ 411 as the local allowance for a second vehicle that was encumbered by a lien, and \$ 222 and \$ 78.33 on two other vehicles. Nothing in 11 U.S.C.S. §§ 1325(b) or 707(b)(2), or in the standards adopted by the Internal Revenue Service, precluded the debtors from claiming the local vehicle allowance for an unencumbered vehicle and a vehicle with the lowest average monthly payment, and also claiming the secured payment expense deduction for the vehicles with higher average monthly payments.

*In re Stallings*, 2009 Bankr. LEXIS 1187 (Bankr. E.D.N.C. May 4, 2009) (Small, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 6:707.05[2]

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

0709-058 **Trustee's motion for abuse dismissal denied where vehicles owned by non-debtor spouse (Consumer) could not be factored into consideration.** (Bankr. D. Neb.)

**PROCEDURAL POSTURE:** The debtor filed for relief under chapter 7. The United States trustee filed a motion to dismiss the case, pursuant to 11 U.S.C.S. § 707(b)(3), asserting that the granting of relief under the chapter would be an abuse under the totality of the circumstances.

**OVERVIEW:** The debtor was married to a non-filing spouse. The debtor worked two different jobs and the schedules showed that the debtor had a total monthly net family income, after deduction of expenses, that was negative. The debtor listed payroll deductions of \$55 per month for a 401(k) contribution and \$102 per month for a 401(k) loan payment. The trustee suggested that the total of those two payments, \$157, could be added back into the available income of the debtor. Considering only the 401(k) contribution, the court concluded that the payment of \$55 per month toward creditors would be insignificant. The debtor was also a co-debtor on a camper, motorcycle, ATV, boat, and three vehicles. The court held that the debtor did not have an ownership interest in the boat, motorcycle, ATV, and camper, and those particular assets, which belonged to the spouse did not factor into the consideration of abuse. Even if the debtor were to convert to chapter 13, the significant debt on the three vehicles would not go away. The court concluded that allowing the individual debtor to discharge her personal liabilities through chapter 7 was not an abuse.

*In re Childers*, 2009 Bankr. LEXIS 1241 (Bankr. D. Neb. May 20, 2009) (Mahoney, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 6:707.05[3][b]

### § 1129(a)(7)(A) Confirmation of Plan; Requirements; Impaired Classes; Acceptance or Receipt of Not Less Than Amount Receivable Under Chapter 7.

0709-059 **Confirmation denied in chapter 13 case which was then dismissed in best interests of (Consumer) creditors.** (Bankr. D. Mont.)

**PROCEDURAL POSTURE:** Debtors filed a petition under chapter 11 and a plan for repaying their creditors. Secured creditors filed objections to confirmation of the debtors' plan, arguing, inter alia, that the plan failed to satisfy the "best interest of creditors" test under 11 U.S.C.S. § 1129(a)(7)(A)(ii), and was not fair and equitable under 11 U.S.C.S. § 1129(b). The case was tried to the court.

**OVERVIEW:** The debtors declared bankruptcy in September 2008, and claimed they had assets worth \$ 2,395,143 and total liabilities in the amount of \$ 1,303,648, and they used those valuations to propose a plan for repaying their creditors. Secured creditors objected to the plan, and the debtors filed objections to claims the creditors filed against their bankruptcy estate. The court found that the debtors' plan did not meet the requirement of 11 U.S.C.S. § 1129(b)(2)(A)(i)(II) that "that each holder of a claim of such class

receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim." Land the debtors owned was worth \$ 1,450,000, not the \$ 2,100,000 they claimed, and when the cost of selling that property and paying taxes was considered, the net proceeds the debtors would have derived were less than the amount they owed. The debtors also failed to show that their proposal to cramdown interest rates they agreed to pay secured creditors was fair. The debtors' plan shifted the risk to their secured creditors, and any equity cushion the creditors had in the debtors' property had vanished by the time the court heard the creditors' objections.

*In re Hand*, 2009 Bankr. LEXIS 1233 (Bankr. D. Mont. May 5, 2009) (Kirscher, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 7:1129.03[7]

**§ 1322(e) Contents of Plan; Determination of Amount Necessary to Cure Default.**

0709-060 **Creditor entitled to contract default rate of interest pursuant to underlying agreement.** (Bankr. (Consumer) E.D.N.Y.)

**PROCEDURAL POSTURE:** A chapter 13 debtor filed a motion to reduce a secured creditor's proof of claim for pre-petition arrears at a contractual default interest rate.

**OVERVIEW:** The debtor defaulted on a loan from the creditor. The debtor's motion to reduce the creditor's claim alleged that the pre-default or non-default interest rate was the proper rate, not the default interest rate, because a cure corrected all defaults. The court denied the motion. The court concluded that 11 U.S.C.S. § 1322(e) was unambiguous in its command that the underlying agreement and nonbankruptcy law were dispositive where the debtor sought to cure mortgage arrears under a chapter 13 plan. The court held that the default interest rate was the proper interest rate to be used in calculating the amount needed to cure the debtor's prepetition mortgage arrears because that rate was provided for in his agreement with the creditor, which was in accordance with the applicable nonbankruptcy law, New York law.

*In re Adejobi*, 2009 Bankr. LEXIS 1216 (Bankr. E.D.N.Y. April 29, 2009) (Feller, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 8:1322.18

**§ 1325(a)(5)(C) Confirmation of Plan; Conditions for Confirmation; Allowed Secured Claimholders; Debtor's Surrender of Property.**

0709-061 **Bankruptcy court erred in allowing debtor to surrender vehicle in full satisfaction of debt (Consumer) where state law provided for deficiency.** (5th Cir.)

**PROCEDURAL POSTURE:** Chapter 13 debtors proposed to surrender their vehicle in full satisfaction of the remaining debt to a secured creditor pursuant to 11 U.S.C.S. § 1325(a)(5)(C). The United States Bankruptcy Court for the Western District of Louisiana confirmed the chapter 13 plan over the creditor's objection. The appellate court granted the creditor's request for leave to take a direct appeal from the bankruptcy court.

**OVERVIEW:** The "hanging paragraph," the unnumbered paragraph following 11 U.S.C.S. § 1325(a)(9), prevented 11 U.S.C.S. § 506 from affecting surrendered "910" vehicles (vehicles for which a contract is signed and a security interest granted within 910 days of the filing of a bankruptcy petition) under § 1325(a)(5)(C). But, § 506 was not the only source of authority for a deficiency judgment. Instead, state law determined rights and obligations when the Bankruptcy Code did not supply a federal rule. Using state law, a creditor could still have an unsecured deficiency judgment it could assert against a debtor. Courts generally presumed that claims enforceable under applicable state law would be allowed in bankruptcy unless they were explicitly disallowed. Thus, after the addition of the "hanging paragraph," the court looked not only to federal law but to state law as well. Under such a reading, the creditor still had an unsecured debt it could pursue against the debtors. Although the "hanging paragraph" could deny the creditor the use of § 506 in pursuing the debt, Louisiana state law, La. Rev. Stat. Ann. §§ 6:966, 10:9-615, made the creditor an unsecured creditor.

*DaimlerChrysler Fin. Servs. Ams. LLC v. Miller (In re Miller)*, 2009 U.S. App. LEXIS 12185 (5th Cir. June 5, 2009) (Smith, C.J.).

*Collier on Bankruptcy*, 15th Ed. Revised 8:1325.06[4]

**§ 1325(b) Confirmation of Plan; Objections.**

0709-062 **Confirmation denied where above-median debtors' plan did not propose to pay monthly**  
(Consumer) **disposable income for 60 months.** (*Bankr. D. Utah*)

**PROCEDURAL POSTURE:** Debtors filed a petition under chapter 13 and a plan for repaying their creditors. A trustee was appointed to represent the debtors' bankruptcy estate, and he filed an objection to confirmation of the debtors' plan, claiming that the amount the debtors proposed to pay to nonpriority unsecured creditors did not satisfy the projected disposable income requirements of 11 U.S.C.S. § 1325(b).

**OVERVIEW:** The debtors declared bankruptcy in November 2008, and they filed an Official Form 22C which showed that their monthly disposable income was negative \$ 188.70. In February 2009, the debtors filed amended Schedules I and J to Official Form 6, and disclosed that they had a monthly net income of \$ 130. The trustee filed an objection to a plan the debtors proposed for repaying their creditors because it did not require the debtors to pay the trustee \$ 130 per month for a period of 60 months to pay unsecured creditors. The court found that because the debtors were above-median income debtors, 11 U.S.C.S. § 1325(b)(4)(A)(ii) required them to propose a plan that lasted 60 months. The court also found that the presumption that the debtors' disposable income on Form 22C represented their projected disposable income was rebutted by the amended Schedules I and J they filed, and the debtors had to comply with § 1325(b)(1)(B) by providing their unsecured creditors their projected disposable income multiplied by 60 months. The debtors also had to include social security payments they expected to receive when determining the amount they could pay the trustee.

*In re Timothy*, 2009 Bankr. LEXIS 1198 (*Bankr. D. Utah May 12, 2009*) (*Mosier, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 8:1325.08*

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

0709-063 **Objection to confirmation sustained where debtors failed to devote all projected disposable**  
(Consumer) **income to plan.** (*Bankr. D. Del.*)

**PROCEDURAL POSTURE:** A creditor objected to confirmation of the debtors' chapter 13 bankruptcy plan.

**OVERVIEW:** The plan proposed to pay \$ 1,505 per month for 60 months, which would yield a 70% distribution to general unsecured creditors. The court held that the chapter 13 debtors' "disposable income," as determined by Form B22C, was not the same monthly amount as their "projected disposable income" under 11 U.S.C.S. § 1325(b)(1)(B). The court sustained the objection to the plan, which did not meet the requirement that all of their projected disposable income earned during the term of the plan be used to pay unsecured creditors. The debtors calculated their disposable income properly, but their projected disposable income was significantly higher, which resulted from the fact that their actual gross income was \$ 3,000 more than the gross income listed on Form B22C and they deducted \$ 800 per month for payment of a debt formerly secured by a home they surrendered. The court adopted a forward-looking view that "disposable income" set forth the income and expense categories it was to consider in evaluating a plan and "projected disposable income" was what those categories would look like as they were "projected" into the future.

*In re Reeves*, 2009 Bankr. LEXIS 1209 (*Bankr. D. Del. May 18, 2009*) (*Shannon, B.J.*).

*Collier on Bankruptcy, 15th Ed. Revised 8:1325.08[4]*

**28 U.S.C. (Post-2005 Act)****§ 1412 Change of Venue.**

0709-064 **Avoidance proceeding transferred pursuant to forum selection clause in contract with**  
(Commercial) **transferee.** (*Bankr. N.D. Tex.*)

**PROCEDURAL POSTURE:** Debtor and litigation trustee filed an adversary proceeding against car business sellers, alleging, inter alia, breach of contract and seeking avoidance and recovery of transfers

pursuant to 11 U.S.C.S. §§ 544(a), 547, and 548. Relying on 28 U.S.C.S. §§ 1404 or 1406, the sellers moved to dismiss or transfer the adversary proceeding to another judicial district pursuant to a forum selection clause in the parties' contracts.

**OVERVIEW:** The bankruptcy court had previously concluded that all of the claims were core claims. Thus, the relevant transfer provisions were 28 U.S.C.S. § 1412 and Fed. R. Bankr. P. 7087. Although the claims were core, the policy favoring centralization with the underlying bankruptcy case was lessened where the debtor had voluntarily dismissed a state court action that raised similar claims after filing the adversary proceeding, and the confirmed bankruptcy plan had been substantially consummated months ago. Enforcement of the forum selection clause was not unreasonable as there was no evidence that the clause was procured through fraud or overreaching, or that it was gravely inconvenient for the parties to litigate in the preferred judicial district. There was also no evidence that application of that judicial district's law effectively deprived the debtor or litigation trustee of a remedy. Finally, enforcement of the clause did not contra-vene any strong public policy. The case was transferred to a bankruptcy court in the other judicial district as dismissal would have accomplished nothing. Given the claims' core nature, a bankruptcy court was a more appropriate court.

*Manchester, Inc. v. Lyle (In re Manchester, Inc.)*, 2009 Bankr. LEXIS 1234 (Bankr. N.D. Tex. June 1, 2009) (Houser, B.J.).

*Collier on Bankruptcy, 15th Ed. Revised 1:4.04*

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

### § 727(e) Discharge; Time Limit on Request for Revocation.

0709-065 Trustee's claim for revocation of discharge was time barred regardless of whether case was properly closed. (*Bankr. D. Utah*)

**PROCEDURAL POSTURE:** Trustee brought an adversary proceeding against debtors seeking revocation of their discharge pursuant to 11 U.S.C.S. § 727(d)(2). The debtors moved to dismiss the adversary proceeding on the grounds that it was barred by the time limits expressed in 11 U.S.C.S. § 727(e)(2).

**OVERVIEW:** The trustee argued that § 727(e)(2) did not bar the complaint because, inter alia, the case was never fully closed under 11 U.S.C.S. § 350, and equitable principles allowed the § 727(e)(2) deadline to be tolled. Adopting the reasoning of the majority of courts, the bankruptcy court held that the plain language of 11 U.S.C.S. § 727(e) indicated that there was a time limit within which a trustee could request a revocation of discharge. The argument that the case was never properly closed under § 350(a) because the assets were never fully administered, and thus, the § 727(e)(2) deadlines did not begin to run would have rendered § 727(e) obsolete. Equitable tolling did not apply as a plain reading of § 727(e)(2) showed that Congress instituted the deadlines to bar precisely the type of action sought by the trustee, and there was no indication that Congress intended to toll those deadlines. Since the case was properly closed pursuant to § 350(a) and equitable tolling did not apply to extend the § 727(e) deadlines, the trustee's claims under § 727(d)(2) were time barred. The cause of action for money judgment was not time barred as it was based on an entirely different premise.

*Miller v. Christensen (In re Christensen)*, 2009 Bankr. LEXIS 1228 (Bankr. D. Utah March 30, 2009) (Thurman, C.B.J.).

*Collier on Bankruptcy, 15th Ed. Revised 6:727.16*

### § 1322(b)(5) Contents of Plan; Discretionary Provisions; Curing of Default and Maintenance of Payments.

0709-066 Creditor could not assert claims for postconfirmation payment of preconfirmation insurance premium assessments. (*Bankr. N.D. Miss.*)

**PROCEDURAL POSTURE:** In cases addressed jointly, the debtors filed for relief under chapter 13. The chapter 13 trustee sought an order declaring that the claims of a creditor were current and all defaults were cured, pursuant to 11 U.S.C.S. § 1322(b)(5), so that the creditor could not recover claims for hazard insurance that the creditor claimed were owed by the debtors.

**OVERVIEW:** In its claims, the creditor alleged that the first debtor owed \$3,738 for hazard insurance and that the second debtors owed \$4,501 for hazard insurance. The court held that the creditor's attempt to obtain, post-confirmation, payment of pre-discharge assessments of hazard insurance premiums was an effort to seek compensation or reimbursement of expenses from the estate, and such conduct was not appropriate. The court found that the creditor ignored the plain language of Fed. R. Bankr. P. 2016(a) and its efforts to collect the assessments from the debtors was unreasonable and needed to be disallowed. Allowing the creditor's claims for the fees, which were assessed post-confirmation denied the debtors the fresh start they received after their bankruptcy discharges under 11 U.S.C.S. § 1322(b)(5).

*In re Hines*, 2009 Bankr. LEXIS 1223 (Bankr. N.D. Miss. April 16, 2009) (Houston, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 8:1322.09

### § 1329 Modification of Plan After Confirmation.

0709-067 Chapter 13 debtors who were in default under plan could not propose modification except  
(Consumer) through compliance with procedures set forth in Bankruptcy Code. (Bankr. D. Nev.)

**PROCEDURAL POSTURE:** The debtors filed for relief under chapter 13 and a plan was confirmed. The chapter 13 trustee filed a motion to dismiss, pursuant to 11 U.S.C.S. § 1307 (c)(6), because the debtors were delinquent in the payments required by their chapter 13 plan. The debtors sought to add an additional five months of payments to their plan and objected to the motion to dismiss.

**OVERVIEW:** The trustee sought to dismiss the case unless the debtors cured the default, filed a modified plan, or stipulated, with court approval, to resolve the motion to dismiss. Instead of choosing the trustee's options, the debtors filed an opposition to the motion to dismiss, offering to extend the plan period for an additional five months. The court found that the debtors could not extend the plan repayment period without following the requirements and procedures of 11 U.S.C.S. § 1329 and Fed. R. Bankr. P. 3015. The debtors could not just extend the plan because the delay could cause a potential monetary loss to creditors, an extension of time could increase the possibility of future default, and the debtors' position had no discernible legal basis. The debtors could not go through a modification of their confirmed chapter 13 plan without requiring compliance with the procedures set forth in 11 U.S.C.S. § 1329 and Fed. R. Bankr. P. 3015.

*In re Bissell*, 2009 Bankr. LEXIS 1243 (Bankr. D. Nev. May 20, 2009) (Markell, B.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 8:1329.01

## 28 U.S.C. (Pre-2005 Act)

### § 157 Procedures.

0709-068 Injunction barring direct actions against insurers of asbestos products manufacturer issued by  
(Commercial) bankruptcy court more than two decades ago was not subject to jurisdictional attack. (U.S.)

**PROCEDURAL POSTURE:** The Bankruptcy Court for the Southern District of New York found that a 1986 injunction in a debtor's reorganization plan, which barred actions against liability insurers of the debtor, applied to lawsuits brought directly against the insurers by claimants. Upon the grant of a writ of certiorari, the insurers appealed the judgment of the U.S. Court of Appeals for the Second Circuit which held that the claimants' lawsuits were not subject to the bankruptcy injunction.

**OVERVIEW:** The insurers funded a trust to address asbestos-related claims against the debtor, and the debtor's plan enjoined actions against the insurers related to the subject policies. The insurers contended that the injunction applied to bar the claimants' lawsuits which alleged that the insurers concealed the dangers of asbestos, and that the injunction was within the bankruptcy court's jurisdiction. The U.S. Supreme Court held that the bankruptcy injunction barred the claimants' actions and that jurisdiction to issue the injunction was not subject to challenge. Despite claimants' assertion that actions only related to insurance coverage if they sought recovery based on the insurers' obligations to the debtor, the unambiguous language of the injunction applied to the claimants' actions since the actions regarding concealment of the dangers of the debtor's asbestos products clearly related to the insurers' coverage of the debtor's asbestos liability, and there was no language limiting the injunction to suits based upon the

debtor's liability. Further, since the injunction order became final on direct review, jurisdiction to issue the injunction was not subject to collateral challenge.

*Travelers Indem. Co. v. Bailey*, 2009 U.S. LEXIS 4537 (U.S. June 18, 2009) (Souter, J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 1:3.02

**§ 157(c)(1) Procedures; Proceedings Related to Bankruptcy; Authority to Hear.**

0709-069 **Bankruptcy appellate panel erred in holding that bankruptcy court lacked subject matter jurisdiction over tort claims of unsuccessful bidder on chapter 11 debtor's assets.** (8th Cir.)  
(Commercial)

**PROCEDURAL POSTURE:** Appellee, the unsuccessful bidder in a sale of a chapter 11 debtor's assets, appealed after the Bankruptcy Court for the Western District of Missouri dismissed the tort claims that it asserted against appellant asset purchasers. The bankruptcy appellate panel (BAP) sua sponte found that the bankruptcy court lacked jurisdiction over the complaint. The purchasers challenged that decision. The bidder moved to dismiss the appeal.

**OVERVIEW:** The bidder alleged civil conspiracy and interference with a business expectancy claims under Missouri common law against the purchasers almost three years after the bankruptcy court approved the asset sale. The bankruptcy court dismissed the bidder's complaint on both procedural and substantive grounds. The BAP sua sponte determined that the bankruptcy court lacked jurisdiction over the complaint, remanded the matter back, and directed the bankruptcy court to dismiss the complaint. The bidder argued that the BAP's decision was not a final, appealable order. The court disagreed. It could exercise jurisdiction over the appeal pursuant to 28 U.S.C.S. § 158(d) because the BAP's decision disposed of the case. The BAP committed reversible error. The bankruptcy court could exercise subject matter jurisdiction over the bidder's complaint under 28 U.S.C.S. § 157(c)(1) because the bidder's claims were related to the chapter 11 bankruptcy proceedings, as the chapter 11 liquidating trustee had advanced funds from the bankruptcy estate to cover two purchasers' litigation costs. A remand was necessary because the BAP had not yet ruled on the propriety of the bankruptcy court's dismissal order.

*GAF Holdings, LLC v. Rinaldi (In re Farmland Indus.)*, 2009 U.S. App. LEXIS 12415 (8th Cir. June 10, 2009) (Shepherd, C.J.).  
*Collier on Bankruptcy*, 15th Ed. Revised 1:3.03[2]

## BANKRUPTCY RULES (Pre-2005 Act)

**Rule 9011 Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers.**

0709-070 **Loan servicer and its counsel properly sanctioned for failing to disclose assignment.** (D. Mass.)  
(Consumer)

**PROCEDURAL POSTURE:** Two creditors, a mortgage loan servicer and a bank which held the mortgage note, along with the loan servicer's national counsel and bankruptcy counsel, challenged a decision of the bankruptcy court that imposed sanctions pursuant to Fed. R. Bankr. P. 9011.

**OVERVIEW:** The bankruptcy court imposed sanctions because, despite the fact that it had not held the loan or serviced it for several years, the servicer and its attorneys represented to the court that it was the creditor without any reference to the assignment of the loan and without attaching a copy of a power of attorney. The servicer's assertion that the sanctions were a criminal punishment imposed without due process was bereft of authority. Sanctions against the bank were not warranted as it had no role in any of the filings at issue. The servicer's bankruptcy counsel contended that it reasonably relied on the representations of the servicer. However, bankruptcy counsel had the information as to the proper holder and servicer of the mortgage in its own files. It was bankruptcy counsel's utter disregard of its own internal files that the actionable violation of Rule 9011 was found. Finally, the servicer's national counsel simply prepared the proof of claim, which was signed and submitted by servicer. Because national counsel did not present or sign any filings with the bankruptcy court, sanctions against the firm were outside the scope of Rule 9011.

*Ameriquest Mortg. Co. v. United States Bankr. Ct. for the Dist. of Mass. (In re Nosek)*, 2009 U.S. Dist. LEXIS 44835 (D. Mass. May 26, 2009) (Young, D.J.).

***Collier on Bankruptcy, 15th Ed. Revised 10:9011.01***