

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

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Issue 3

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§ 110 Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions.

1009-071 **Unlicensed bankruptcy petition preparer ordered to disgorge fees due to unauthorized practice of law.** (*Bankr. E.D. Va.*)
(Consumer)

PROCEDURAL POSTURE: The United States Trustee sought relief against an unlicensed bankruptcy petition preparer who had been employed by the debtor. The trustee filed a motion for disgorgement of fees paid to the preparer and for imposition of sanctions against her for violations of 11 U.S.C.S. § 110.

OVERVIEW: The filing was the debtor's third in the court. Her prior chapter 13 case was dismissed for failure to file a certificate of credit counseling. The present case, filed a week later, was dismissed for failure to file a further modified plan within the allowed 20 day period. The debtor had apparently commenced the present case by refiled the petition and papers from the prior case, apparently using white-out to change the original signature dates of both herself and the preparer. The court found that the preparer violated applicable rules governing the unauthorized practice of law and applicable provisions of 11 U.S.C.S. § 110. The Virginia exemption scheme was not simple, and the nonattorney preparer committed the unauthorized practice of law even if the exemptions were selected by a computer program. The court found the fee charged was unreasonably high, and disgorgement of the difference between the amount the preparer received and the presumptively reasonable amount.

In re Gross, 2009 Bankr. LEXIS 2761 (*Bankr. E.D. Va. August 28, 2009*) (*Mitchell, B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 2:110.01

1009-072 **Bankruptcy petition preparer ordered to disgorge fees due to self-reported failure to disclose information and for unauthorized practice of law.** (*Bankr. N.D. Iowa*)
(Consumer)

PROCEDURAL POSTURE: Movant U.S. Trustee (UST) filed a motion for an order directing examination of compensation which a chapter 7 debtor paid to a bankruptcy petition preparer. The court granted the motion and held a hearing to examine fees the debtor paid to the preparer and whether services the preparer provided were allowed by law.

OVERVIEW: The debtor hired a bankruptcy petition preparer who held a license to practice law in California until 1993 to help him file bankruptcy, and he paid the preparer \$ 750 for his services. When the preparer learned that he violated 11 U.S.C.S. § 110 by not disclosing information required by § 110, he self-reported to the UST. An Assistant UST concluded that she would recommend approval of a fee of \$ 250 for work the preparer performed, and when the preparer withdrew from that agreement, the UST asked the court to conduct a hearing to determine whether the preparer was entitled to compensation. The court ordered the preparer to return the \$ 750 he received from the debtor. Although the preparer was a "bankruptcy petition preparer" as that term was defined by § 110, work he performed for the debtor went well beyond work a preparer was allowed to perform and was tantamount to the practice of law, and that fact alone allowed the court to order him to disgorge all fees he received from the debtor. The court also found no merit to the preparer's claim that § 110 was unconstitutional and that he was denied due process of law during the hearing on the UST's motion.

In re Simons, 2009 Bankr. LEXIS 2972 (*Bankr. N.D. Iowa September 21, 2009*) (*Kilburg, C.B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 2:110.01

§ 110(i) Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions; Violations, Fraud and Unfair or Deceptive Acts.

1009-073 **Bankruptcy petition preparer ordered to discharge excess fees due to mistakes and omissions.** (*Bankr. E.D. Va.*)
(Consumer)

PROCEDURAL POSTURE: In this chapter 7 case, the United States Trustee (UST) moved to require a bankruptcy petition preparer (the preparer) to disgorge fees paid to him and to impose sanctions under 11 U.S.C.S. § 110(i).

OVERVIEW: The preparer assisted the debtor in preparing her schedules and other materials. The materials, however, contained various mistakes and omissions. The UST asserted that the preparer violated 11 U.S.C.S. § 110 in several respects and sought disgorgement of the fees and damages payable to the debtor pursuant to 11 U.S.C.S. § 110(i). The court concluded that the evidence was not sufficient to support sanctions but was sufficient to support disgorgement of any fee paid in addition to the \$200 fee disclosed by the preparer. The court identified the quality of the services, or lack thereof, as the central issue here. While the absence of quality did not necessarily translate into a violation of 11 U.S.C.S. § 110, it did affect the determination of the proper compensation for the preparer. Also important was the accuracy of the preparer's disclosure of his own compensation. The court determined that, given the amount of time the work took to perform and the quality of the work performed, the appropriate fee was that which the preparer disclosed, \$ 200. The balance of the fee, \$ 500, to the extent actually paid, was ordered to be disgorged to the trustee.

In re Builta, 2009 Bankr. LEXIS 2758 (Bankr. E.D. Va. September 3, 2009) (Mayer, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 2:110.10

§ 362(a) Automatic Stay; Scope.

1009-074 **Creditor held in contempt for knowing violation of both automatic stay and discharge**
 (Consumer) **injunction.** (Bankr. N.D. Iowa)

PROCEDURAL POSTURE: The debtors brought a motion for contempt against a creditor lender for violating both the automatic stay under 11 U.S.C.S. § 362(a), and the discharge order under 11 U.S.C.S. § 524(a)(2).

OVERVIEW: The debtors alleged that the creditor improperly filed a postpetition civil collection action against debtors. The debtors' attorney had repeatedly sent written notice to the creditor at several of its national addresses of the automatic stay, but the creditor continued to send monthly billing statements to debtors postpetition and postdischarge. The creditor did not respond to the motion or appear at the contempt motion hearing. The court found that the debtors incurred total attorney fees and expenses of \$ 1,623.70 to bring the motion for contempt. The court also found that actual damages of \$5,000 were incurred by the debtors for the harassment.

In re Mann, 2009 Bankr. LEXIS 2939 (Bankr. N.D. Iowa September 21, 2009) (Kilburg, C.B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:362.03

§ 362(a)(1) Automatic Stay; Scope; Commencement or Continuation of Proceedings Against Debtor.

1009-075 **Judge's memorandum decision violated stay so that subsequent judgment and sale were void.**
 (Consumer) (Bankr. E.D.N.Y.)

PROCEDURAL POSTURE: This matter was before the court on the Application of movant, the successful bidder (the bidder) at a foreclosure auction sale of debtor's real property held on June 19, 2009. In substance, the bidder sought an order which would have ratified the auction sale and the events from February 20, 2009 onward which preceded it.

OVERVIEW: The Application requested the issuance of an order confirming, inter alia, that the state court judge's signing of a Memorandum Decision was not an act in violation of the automatic stay of 11 U.S.C.S. § 362(a)(1) and that the stay was not in effect on April 3, 2009 when the Judgment of Foreclosure and Sale was signed and entered in the state court. The court determined that the state court judge's act of signing the Memorandum Decision confirming a referee's report was an act in violation of the automatic stay, that such an act was void, and that the subsequent entry of the judgment of foreclosure and sale and the foreclosure auction sale were unauthorized since they were dependent upon a void act. Further, the bidder failed to present any compelling evidence which would have justified an award of relief from the stay retroactively. It was the creditor's obligation, as plaintiff in the state court action against debtor, to inform the state court of debtor's bankruptcy filing. Having failed to take necessary steps, including having failed to seek relief from the automatic stay, before taking any post petition collection activity, the creditor acted in violation of the stay.

In re Vela, 2009 Bankr. LEXIS 2719 (Bankr. E.D.N.Y. September 3, 2009) (Milton, B.J.).

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

§ 502 Allowance of Claims or Interests.

1009-076 **“Secured claim” for fixture that was not a “consumer good” under the UCC allowed as (Consumer) unsecured.** (*Bankr. S.D. Ill.*)

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13 and a plan for repaying their creditors. A creditor filed a secured claim against the debtors' bankruptcy estate and objected to confirmation of the debtors' plan because the debtors' plan treated the creditor's claim as an unsecured claim. The creditor's objection was tried to the court.

OVERVIEW: Before they declared bankruptcy, the debtors entered into a home improvement contract with an LLC for the installation of an energy guard for their house. The energy guard was an insulation blanket that was installed on the attic floor over existing insulation, cut to fit the contours of the floor and around roof support beams, and stapled to the floor to prevent movement. The contract, which included a Uniform Commercial Code (UCC) security agreement, was assigned to a financial services company (creditor), but neither the LLC nor the creditor filed a UCC financing statement or a real estate mortgage. The debtors declared bankruptcy and treated the creditor's claim for payment of a debt the debtors owed on the energy guard as an unsecured claim, and the creditor objected, claiming that it held a secured claim because the energy guard was a “consumer good” under the UCC. The court disagreed. The energy guard was a “fixture,” as that term was defined in 810 ILCS 5/9-102(a)(41), and because neither the LLC nor the creditor perfected a security interest in the energy guard, the creditor held an unsecured claim against the debtors' bankruptcy estate.

In re Troutt, 2009 Bankr. LEXIS 2673 (Bankr. S.D. Ill. September 4, 2009) (Altenberger, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:502.01

§ 503(b)(9) Allowance of Administrative Expenses; Types of Expenses Allowed; Value of Goods Sold to Debtor Within 20 Days Prior to Filing Date in Ordinary Course of Business.

1009-077 **Creditor that processed steel plates for debtor was not entitled to administrative expense (Commercial) claim.** (*Bankr. N.D. Ill.*)

PROCEDURAL POSTURE: A creditor that processed steel plates for the debtor asserted an administrative expense claim under 11 U.S.C.S. § 503(b)(9). The debtor objected, asserting that the creditor had merely provided services, and that no title had passed as to any goods.

OVERVIEW: The creditor asserted a right to be paid \$ 6,129.60 as an administrative expense pursuant to § 503(b)(9) on account of goods sold to the debtor during the 20 day period immediately preceding the petition date. The debtor provided the raw materials for steel products. The debtor had tendered its own steel plates to the creditor, which then processed the plates by broaching and deburring into two separate parts with teeth. The creditor then returned the finished parts to the debtor. The debtor objected to the claim, asserting that the basis of the claim was not based on goods having been sold; rather, the creditor merely performed a service on behalf of the debtor. As no sale of goods occurred, the debtor's objection was sustained.

In re Modern Metal Prods. Co., 2009 Bankr. LEXIS 2881 (Bankr. N.D. Ill. September 16, 2009) (Barbosa, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:503.16

§ 507(a)(2) Priorities; Order of Priorities; Administrative Expenses; Fees and Charges Against Estate.

1009-078 **Debtor's attorneys was not entitled to administrative claim for fees and was limited to amount (Consumer) of original retainer.** (*Bankr. D. Mass.*)

PROCEDURAL POSTURE: The chapter 13 debtor's attorney filed an application for allowance of compensation pursuant to 11 U.S.C.S. §§ 330 and 331 and Fed. R. Bankr. P. 2016 and Bankr. D. Mass. R. 2016-1.

OVERVIEW: The attorney, who had already received a \$3,500 retainer, sought to collect the balance of \$ 6,952.40 as an administrative claim under 11 U.S.C.S. § 507(a)(2) through payments made by the debtors in their chapter 13 plan. The court found that such an allowance was approximately twice the norm, and

was not justified in the case. The attorney described doing only a garden-variety chapter 13 duties with few complexities, and nothing to warrant an increased award.

In re Boyd, 2009 Bankr. LEXIS 2888 (Bankr. D. Mass. September 16, 2009) (Boroff, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:507.03

§ 522(d)(10)(A) Exemptions; Types of Exempt Property; Benefits Akin to Future Earnings; Social Security, Unemployment Compensation and Public Assistance.

1009-079 Debtor not entitled to exemption for federal child tax credit. (Bankr. D. Kan.)
 (Consumer)

PROCEDURAL POSTURE: Debtor filed a petition under chapter 7, and a trustee was appointed to administer the debtor's bankruptcy estate. The trustee filed a motion pursuant to 11 U.S.C.S. § 542, seeking an order requiring the debtor to turn over part of the federal and state tax refunds she received for 2008, and objected to exemptions the debtor claimed under 11 U.S.C.S. § 522(d)(10)(A).

OVERVIEW: The debtor declared bankruptcy on April 30, 2008, and in 2009 she filed her 2008 federal and state tax returns, claiming four children as dependents, and the IRS paid her an earned income credit of \$ 4,648, an additional child tax credit of \$ 1,212, and a recovery rebate credit of \$ 1,500. In addition, she received a payment from the Kansas Department of Revenue that was part earned income credit and part food sales tax refund. In February 2009, the trustee filed a motion for an order requiring the debtor to surrender \$ 2,540 as the bankruptcy estate's share of her 2008 tax refunds and \$ 36.33 she had in a bank account on the date she declared bankruptcy. The court reviewed the trustee's calculations and found, inter alia, that the estate's share of the federal and state earned income credits had to be determined by analyzing how the amount the debtor was eligible to receive changed during 2008 as she earned more money. The court also found that the debtor was entitled to claim an exemption for the Kansas food sales tax refund under 11 U.S.C.S. § 522(d)(10)(A), but was not entitled to claim an exemption for the additional child tax credit she received from the U.S. Government.

In re Lee, 2009 Bankr. LEXIS 2799 (Bankr. D. Kan. September 4, 2009) (Somers, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:522.09[10]

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

1009-080 Judgment that did not include specific findings as to debtor's fraud was not basis for
 (Consumer) nondischargeability. (Bankr. S.D. Fla.)

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bankruptcy debtors seeking a determination that the debtors' judgment debt to the creditor was not dischargeable in the debtors' bankruptcy under 11 U.S.C.S. § 523(a) based on the debtors' fraud and larceny. The creditor moved for summary judgment based on the preclusive effect of the state-court judgment.

OVERVIEW: The creditor's state court action alleged breach of contract, fraud, and conversion on the part of the debtors, and a default judgment was entered against the debtors. The creditor contended that the judgment for fraud and conversion established the debtors' fraud and larceny to establish nondischargeability of the judgment debt by collateral estoppel. The bankruptcy court held that the state-court judgment did not have preclusive effect since it could not be determined whether the potentially nondischargeable claims of fraud and conversion were critical and necessary parts of the state court judgment. The judgment stated a general award of damages without specific findings relating to the separate counts of the state-court complaint, and it was possible that the entire damage award was attributable to the dischargeable claim for breach of contract.

Tobin v. Labidou (In re Labidou), 2009 Bankr. LEXIS 2800 (Bankr. S.D. Fla. September 8, 2009) (Kimball, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.07

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

1009-081 Claim of gun buyer was nondischargeable due to debtor seller's misrepresentations. (Bankr.
 (Consumer) E.D. Wis.)

PROCEDURAL POSTURE: Plaintiff gun buyer filed this adversary proceeding claiming that defendant debtor's debt to the gun buyer arose from fraud and therefore was non-dischargeable under 11 U.S.C.S. § 523(a)(2)(A). He also contended that the debtor withheld information on his schedules and that the entire discharge should be denied.

OVERVIEW: The gun buyer had purchased a number of collector guns from the debtor, an experienced gun dealer. All of the guns had been transferable. The gun buyer advanced a substantial amount to purchase additional guns, but the debtor informed him that he could not take possession without obtaining a special license because the guns were nontransferable. The buyer contended that he never wanted to purchase guns in that category and the debtor duped him by taking money for guns he failed to deliver. Although the court considered this a close case, it concluded that the credibility scale favored the gun buyer. The court found that the buyer proved by a preponderance of the evidence that the debtor intentionally made a material misrepresentation (by failing to disclose that the guns were nontransferable), on which the buyer justifiably relied. However, the court found that the gun buyer failed to meet his burden of proof that the debtor knowingly and fraudulently made false oaths in this case by leaving certain information out of his schedules. The debtor's failure to produce more voluminous records also did not rise to the level required to deny his discharge under 11 U.S.C.S. § 727(a)(4).

Christenson v. Lee (In re Lee), 2009 Bankr. LEXIS 2670 (Bankr. E.D. Wis. September 2, 2009) (Kelley, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.08[1]

1009-082 **Judgment debt could be contested by debtor where underlying fraud claim was not actually**
(Consumer) **litigated in state court.** (Bankr. N.D. Ill.)

PROCEDURAL POSTURE: This matter came before the court on the motion for summary judgment, pursuant to Fed. R. Civ. P. 56, Fed. R. Bankr. P. 7056, 9014, filed by plaintiff judgment creditor, with respect to its Complaint to determine the dischargeability under 11 U.S.C.S. § 523(a)(2)(A) of a debt arising under a prepetition state court judgment it obtained against defendant debtor.

OVERVIEW: The key question was whether collateral estoppel precluded debtor from contesting any of the elements of 11 U.S.C.S. § 523(a)(2)(A). The first issue was which jurisdiction's law should apply to determine the collateral estoppel effect of the Virginia Judgment. The court looked to the law of Virginia. The court found that the creditor had not presented sufficient evidence to meet its burden of demonstrating that the fraud claim was "actually litigated" in the Virginia proceedings, and therefore, summary judgment was not appropriate. For a default judgment to trigger collateral estoppel, there had to be testimony, exhibits, or some form of evidence presented to the trial court by the appearing party notwithstanding the one party's absence. Furthermore, this testimony or evidence had to be duly considered by the trial judge notwithstanding the party's absence. Here, the creditor claimed that evidence was presented to the trial court, but gave no description of what that evidence was, or how the trial court considered it. Therefore, the creditor failed to meet its burden of establishing that the matter was "actually litigated" for purposes of Virginia collateral estoppel doctrine.

Nova Datacom, Inc. v. Verzani (In re Verzani), 2009 Bankr. LEXIS 2971 (Bankr. N.D. Ill. September 17, 2009) (Barbosa, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.08[1]

1009-083 **Debt arising from false pretenses, representations or fraud while debtor was acting as**
(Consumer) **"financial advisor" was nondischargeable.** (Bankr. W.D. Pa.)

PROCEDURAL POSTURE: Plaintiffs, an unsophisticated investor and her son, filed a complaint against defendant debtor objecting to dischargeability of debt pursuant to 11 U.S.C.S. § 523(a)(2)(A), asserting that debtor obtained funds from them by false pretenses, a false representation or actual fraud. The matter was pending decision following trial.

OVERVIEW: At all times, the investor considered debtor her investment adviser and relied upon him to safely invest her money and provide a return on that investment. 11 U.S.C.S. § 523(a)(2)(A) provided that a discharge under 11 U.S.C.S. § 727 did not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud. The court stated that the investor had equitable ownership of the funds at issue at all times. Debtor knew it was her money and participated in efforts to keep the Social Security Administration from having knowledge of the asset. Debtor at all times held

himself out as a financial advisor, assisting her to obtain a return on her funds. She was very unsophisticated and lacked even a minimum knowledge of investing. She relied completely on debtor, a sophisticated expert in financial dealings. When debtor borrowed money from her, it was borrowed with the false representation that the money was being invested by a financial advisor through debtor's company. She relied totally upon debtor to protect her only asset, which he failed to do.

Klaes v. Davison (In re Davison), 2009 Bankr. LEXIS 2966 (Bankr. W.D. Pa. September 16, 2009) (Bentz, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.08[1]

1009-084 **Creditor failed to establish that debtor's alleged inducement not to record deed of trust was**
 (Consumer) **grounds for nondischargeability.** (Bankr. D. Utah)

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bankruptcy debtor seeking determinations that a loan debt to the creditor was excepted from discharge under 11 U.S.C.S. § 523 based on fraud and willful and malicious injury, and that the debtor was not entitled to a discharge under 11 U.S.C.S. § 727 based on false oaths and concealment and loss of assets.

OVERVIEW: The creditor contended that nondischargeability of the debt to the creditor was warranted by the debtor's conduct in inducing the creditor not to record a deed of trust against property which the debtor sold without payment to the creditor. The creditor also asserted that denial of discharge was appropriate in view of the debtor's failure to disclose a trust interest, beneficial interests in real property and a bank account, and a property transfer. The bankruptcy court held that the creditor failed to show any basis for exception of the debt from discharge or denial of discharge. The creditor's testimony concerning the debtor's alleged representations about recording the deed of trust was vague, illogical, and not credible, the loan was not due until after the property sale, and there was no showing the debtor intended to injure the creditor. Further, the debtor disclosed what limited knowledge he had concerning the trust interest and explained that the real properties and the account were in the name of the debtor's spouse who closely controlled the family's finances, and there was no indication that any errors or omissions in the debtor's disclosures were knowing and fraudulent.

Hauser v. Lusk (In re Lusk), 2009 Bankr. LEXIS 2953 (Bankr. D. Utah September 14, 2009) (Boulden, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.08[1]

§ 544(a)(1) Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers; Rights and Powers; Trustee's Avoidance Powers as Judicial Lien Creditor.

1009-085 **Creditor's alleged interest in debtor's manufactured home properly avoided by bankruptcy**
 (Consumer) **court in accordance with state law.** (B.A.P. 6th Cir.)

PROCEDURAL POSTURE: Creditor challenged an order of the bankruptcy court for the Eastern District of Kentucky granting the motion for summary judgment of plaintiff, the chapter 7 Trustee, and avoiding the creditor's lien on debtor's manufactured home.

OVERVIEW: The issues were whether the doctrine of lis pendens applied to personal property for which a certificate of title was required under Kentucky law, and whether the bankruptcy court was precluded by a prior state court judgment from avoiding the creditor's interest in debtor's manufactured home. Whether the Trustee's interest as a hypothetical judgment lien holder under 11 U.S.C.S. § 544(a)(1) was superior was governed by Kentucky law. The creditor asserted, inter alia, that its notice of lis pendens filed in the land records put the Trustee on constructive notice of its interest in the home. The court stated that the doctrine of lis pendens, as applied in *Gruseck* and *Periandri*, did not apply to personal property for which Kentucky law required a certificate of title. Moreover, the Kentucky statute governing lis pendens did not create a lien or affect the priority of security interests. Further, the bankruptcy court did not violate either *res judicata* or *Rooker-Feldman*. Because the creditor failed to perfect its lien as required by Kentucky law, its interest in debtor's manufactured home yielded to the trustee's interest as a hypothetical judgment lien creditor.

Palmer v. Washington Mut. Bank (In re Ritchie), 2009 Bankr. LEXIS 2950 (B.A.P. 6th Cir. September 24, 2009) (Fulton, B.A.P.J.).
Collier on Bankruptcy, 15th Ed. Revised 5:544.04

§ 547 Preferences.

1009-086 **Relief from stay granted to allow creditor bank to foreclose in absence of sufficient equity cushion.** (*Bankr. D.N.H.*)
(Consumer)

PROCEDURAL POSTURE: Creditor bank filed three motions for relief from the automatic stay under 11 U.S.C.S. § 362 for the purpose of foreclosing on properties owned by debtors. The debtors filed a motion to avoid attachment against the bank pursuant to 11 U.S.C.S. § 547.

OVERVIEW: The bank provided the debtors with seven loans secured by 13 properties. The bank moved for relief from the automatic stay so it could continue with foreclosure proceedings on all of the properties. The debtors objected, claiming that the total value of all of the debtors' properties provided an ample equity cushion. The debtors pointed to the total list prices on the properties while the bank relied on appraisal values for purposes of liquidation. The court found that, even if it did assume the debtors could sell all the properties at their list prices, the equity cushion for the bank was small and would not take into account taxes, costs, and other fees associated with selling property. Further, the subject properties provided little value and were not necessary for the debtors' reorganization. Accordingly, the court found that the bank was not adequately protected and was entitled to relief from the automatic stay under 11 U.S.C.S. § 362. The court also ruled that the debtors could not avoid attachment because they failed to prove all the elements of a preferential transfer subject to avoidance under 11 U.S.C.S. § 547(b).

In re McLaughlin, 2009 Bankr. LEXIS 2665 (*Bankr. D.N.H. September 3, 2009*) (*Vaughn, C.B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 5:547.01

1009-087 **Payment by debtor to parents which was returned was protected from avoidance by "new value" defense.** (*Bankr. N.D. Ill.*)
(Consumer)

PROCEDURAL POSTURE: Chapter 7 Trustee sought to avoid the transfer of \$ 21,000 in cashier's checks by the debtor to defendants, his parents, approximately ten months before the debtor's bankruptcy petition as preferential transfers under 11 U.S.C.S. § 547(b).

OVERVIEW: A creditor filed an involuntary bankruptcy petition against the debtor. Within the one-year period preceding the petition, the debtor gave his father a cashier's check for \$ 9,000 and his mother a cashier's check for \$ 12,000 to repay loans they had made to him in the past. The debtor's parents initially accepted the money and cashed the checks, but returned the entire \$ 21,000 to their son within the next few days after they learned that he still owed considerable back taxes. The parents contended that because they subsequently returned the money, there was no "transfer" under 11 U.S.C.S. § 547. The court noted that the definition of "transfer" for purposes of § 547(b) was broad, and such subsequent payback actions were irrelevant to the determination of whether there was a transfer. However, because the parents showed that they subsequently returned the \$ 21,000 given to them, the initial transfer was not an avoidable preference because it was protected in full by the "new value" exception provided by 11 U.S.C.S. § 547(c)(4).

Donahue v. Beaulieu (In re Beaulieu), 2009 Bankr. LEXIS 2917 (*Bankr. N.D. Ill. September 16, 2009*) (*Barbosa, B.J.*).

Collier on Bankruptcy, 15th Ed. Revised 5:547.03

§ 548 Fraudulent Transfers and Obligations.

1009-088 **Motion to dismiss avoidance proceeding where third party against whom claim had been abandoned was not a necessary party.** (*Bankr. D.N.M.*)
(Consumer)

PROCEDURAL POSTURE: Plaintiff bankruptcy trustee brought an adversary proceeding against defendant transferees of funds from a bankruptcy debtor, alleging that the transfers of funds were fraudulent or preferential. The transferees moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to join a necessary party.

OVERVIEW: The transferees contended that the trustee abandoned the debtor's claims against a third party involving a real estate contract, and thus the trustee abandoned claims against the transferees of the funds which were the proceeds of that contract. The transferees also argued that joinder of the third party was necessary to resolve any claim of the third party to the transferred funds. The bankruptcy court first held that abandonment of the claims against the third party did not accomplish an abandonment of the claims against the transferees, since the trustee sought only to avoid the transfers to the transferees regardless of the manner in which the debtor obtained the funds. Further, the third party was not a necessary party since the trustee could avoid the transfers without the third party, the third party was not

liable to the trustee for the transfers, and any risk of a claim by the third party to the funds was merely speculative.

Bloom v. Reynolds (In re Wilson), 2009 Bankr. LEXIS 2823 (Bankr. D.N.M. August 21, 2009) (Starzynski, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 5:548.01

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

1009-089 (Consumer) **United States Trustee's motion for denial of discharge on grounds of abuse denied where debtor's difficulties were rooted in efforts on behalf of daughters from prior marriage.** (Bankr. N.D. Tex.)

PROCEDURAL POSTURE: Debtors, a husband and wife, filed a petition under chapter 7, and the United States Trustee (UST) filed a motion to dismiss the debtors' bankruptcy case, pursuant to 11 U.S.C.S. § 707(b), claiming, inter alia, that it would have been an abuse of chapter 7 to allow the debtors to discharge their debts under that chapter.

OVERVIEW: The husband and his former wife divorced in 2007, and his former wife moved from Illinois to Texas. The husband took a lower paying job with his employer and followed his former wife to Texas so he could be closer to his daughters, and he incurred legal expenses when his former wife cut off his access to his daughters. The husband reached a compromise with his former wife which allowed her to move back to Illinois and take their daughters with her, he remarried in 2008, and after he remarried, he and his new wife declared chapter 7 bankruptcy. However, the UST filed a motion to dismiss the debtors' case, claiming that the debtors had the ability to pay debts they owed under a chapter 13 bankruptcy plan. The court found that granting the debtors relief under chapter 7 would not be an abuse of 11 U.S.C.S. § 707(b). The evidence showed that the husband acted in good faith and had done his best to serve the needs of his family, his employer, and his creditors. The debtors' financial difficulties were rooted in the husband's efforts to be a good father, and the debtors had not led a lavish lifestyle and were not trying to use bankruptcy to take unfair advantage of their creditors.

In re Daughtery, 2009 Bankr. LEXIS 2691 (Bankr. N.D. Tex. September 8, 2009) (Lynn, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:707.05

1009-090 (Consumer) **Case of debtors living beyond means dismissed based on totality of circumstances.** (Bankr. E.D. Tex.)

PROCEDURAL POSTURE: Bankruptcy debtors claimed an expense for their former residence, which they were unable to sell after relocating, in the calculation of their disposable income, but the U.S. Trustee asserted that the claimed expense was improper since the debtors intended to abandon the property. The trustee moved to dismiss the debtors' case based on abuse of chapter 7 bankruptcy.

OVERVIEW: The debtors contended that they were entitled to claim the expense of their former residence as an amount which was contractually due, even though they would not be incurring the expense. The Trustee argued that, without the unwarranted former residence expense, the debtors had sufficient disposable income to create a presumption of abuse of bankruptcy under 11 U.S.C.S. § 707(b)(2) and, in any event, the totality of the debtors' circumstances indicated abuse under § 707(b)(3). The bankruptcy court held that, regardless of whether the expense for the former residence was properly claimed, the totality of the circumstances indicated that granting chapter 7 relief would be an abuse of bankruptcy, since the debtors' financial problems were the result simply of living beyond their means. The debtors' discretionary expenses were unusually high, and the debtors did not prioritize their expenses to fit within their income. Further, the debtors enjoyed a stable income and good health and did not make any significant changes to their relatively affluent lifestyle, and creditors were not required to bear the burden of maintaining the lifestyle that precipitated the debtors' bankruptcy.

In re Camp, 2009 Bankr. LEXIS 2760 (Bankr. E.D. Tex. September 4, 2009) (Rhoades, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:707.05

1009-091 (Consumer) **Case dismissed for abuse based on totality of circumstances.** (Bankr. S.D. Ohio)

PROCEDURAL POSTURE: The United States trustee asserted that the debtor took improper deductions for the payment of mortgages and taxes on a house that she surrendered prior to filing her bankruptcy

petition raising a presumption of abuse under 11 U.S.C.S. § 707(b)(2), or alternatively that it constituted an abuse under the totality of the circumstances test pursuant to 11 U.S.C.S. § 707(b)(3), requiring dismissal or conversion of the debtor's case.

OVERVIEW: The trustee questioned the debtor's calculations on Official Bankr. Form 22A, the means test form. The court concluded that, under the majority rule adopted by the Sixth Circuit, the language of § 707(b)(2) allowed the debtor to take the deductions on her means test form for payments towards unextinguished obligations for mortgages and taxes pertaining to a home, even though it had been surrendered. Consequently, the Debtor's deductions were appropriate and no presumption of abuse arose under § 707(b)(2). However, the court also determined that, under the totality of the circumstances analysis pursuant to § 707(b)(3), the debtor had the ability to pay a meaningful distribution to unsecured creditors in a chapter 13 case, and her chapter 7 case therefore constituted an abuse requiring either dismissal of the case or conversion to chapter 13. By deleting loan payments to her retirement account and loan repayments, the debtor would have an additional \$ 794 per month to pay towards creditors in a chapter 13 plan.

In re Phillips, 2009 Bankr. LEXIS 2855 (Bankr. S.D. Ohio September 22, 2009) (Walter, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:707.05

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

1009-092 **Discharge denied due to failure to schedule multiple creditors, assets and criminal judgment.**
 (Consumer) (Bankr. M.D.N.C.)

PROCEDURAL POSTURE: Plaintiff trustee filed a complaint objecting to defendant debtor's discharge pursuant to 11 U.S.C.S. § 727(a)(4)(A). Specifically, the complaint alleged that debtor failed to list multiple creditors, bank accounts, assets, and criminal restitution judgments on the petition. The matter was pending decision following trial.

OVERVIEW: 11 U.S.C.S. § 727(a)(4)(A) provided that a court shall grant a debtor a discharge under chapter 7, unless the debtor knowingly and fraudulently, in or in connection with the case made a false oath or account. The court concluded that debtor must be denied a discharge under § 727(a)(4)(A). The first, second, and fifth elements of the trustee's § 727 claim were easily satisfied. The court further found that the third element of the Trustee's claim had been established. Debtor knew that statements he made under oath were false. He listed only two creditors despite that fact that he had multiple judgments against him and was in the midst of criminal charges relating to defrauding numerous investors. The court noted that debtor did amend his schedules twice; however, voluntary disclosure through testimony or an amendment to the schedules or statement of financial affairs did not expunge the falsity of the prior oath. Finally, the pattern of nondisclosure and the untimely and incomplete amendments evidenced a reckless indifference for the truth that supported a finding of fraudulent intent. Debtor made a false statement under oath with fraudulent intent when he filed the petition.

Northern v. Mack (In re Mack), 2009 Bankr. LEXIS 2937 (Bankr. M.D.N.C. September 18, 2009) (Carruthers, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:727.04

1009-093 **Discharge denied due to pattern of concealment by debtor.** (Bankr. E.D. Tex.)
 (Consumer)

PROCEDURAL POSTURE: In this adversary proceeding, plaintiff judgment creditor objected to the dischargeability of defendant debtor's obligations to him as well as, more generally, the entry of a discharge order in the bankruptcy case. The court conducted a trial on the adversary complaint.

OVERVIEW: A state court entered a final judgment by default against debtor for damages stemming from an automobile accident. The primary dispute in the adversary proceeding involved debtor's contention that he was unaware of the transfers of his interest, if any, in three properties located in Texas. The creditor claimed that debtor's actions in connection with the accident were willful and malicious and, therefore, that his obligation to plaintiff was nondischargeable pursuant to 11 U.S.C.S. § 523(a)(6). However, the court stated, inter alia, that the creditor failed to establish that the collision was substantially certain to result at the time debtor made the decision to drive. Turning to 11 U.S.C.S. § 727(a)(4)(A), the court stated that the evidence revealed a pattern of concealment by debtor. It concluded that debtor made a false statement in his Statement of Financial Affairs by failing to disclose the transfer of his interest in one of the properties. His failure to disclose was intentional, and the transfer was made

and concealed for the purpose of frustrating the efforts of the creditor to collect his judgment. Further, the false statement was material to the bankruptcy case.

Burford v. Novak (In re Novak), 2009 Bankr. LEXIS 2957 (Bankr. E.D. Tex. September 17, 2009) (Rhoades, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:727.04

§ 1112(b) Conversion or Dismissal; Involuntary Conversion or Dismissal.

1009-094 **Motion to dismiss or convert chapter 11 case for cause denied provided debtor rectified failure**
 (Commercial) **to comply with filing requirements and obtain insurance.** (Bankr. D.N.M.)

PROCEDURAL POSTURE: This matter came before the court on a creditor bank's motion to dismiss or convert debtor's chapter 11 case to chapter 7 under 11 U.S.C.S. § 1112(b).

OVERVIEW: The court noted that a chapter 11 case could not be converted or dismissed under 11 U.S.C.S. § 1112(b) except for "cause." It found "cause" from the following: (i) failures on the part of debtor to schedule or disclose substantial claims against insiders until raised by the bank's motion to convert or dismiss, (ii) failure to timely file the June 2009 monthly operating report, and failure to include an income statement and balance sheet as part of the operating reports for either June or July 2009, together with pre-petition conduct on the part of debtor, (iii) discrepancies between debtor's equipment list and the equipment list for the insurance policy, and (iv) debtor's lack of care in producing documents required by the Fed. R. Bankr. P. 2004 order. These circumstances suggested a pattern of lack of diligence in complying with obligations of a litigant or debtor in possession. Based on the evidence, and common knowledge of the depressed market in New Mexico in the current recessionary environment, the court found there were unusual circumstances that established that dismissal or conversion of debtor's case would not have been in the best interests of creditors and the estate.

In re Melendez Concrete, Inc., 2009 Bankr. LEXIS 2925 (Bankr. D.N.M. September 15, 2009) (Jacobvitz, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 7:1112.04

§ 1325 Confirmation of Plan.

1009-095 **Debtor's attorney ordered to pay trustee's reasonable fees and expenses for negligent failure to**
 (Consumer) **appear at hearing on objections to confirmation.** (Bankr. N.D. Ind.)

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13 and a plan for repaying their creditors. The debtors' attorney failed to appear at a hearing on objections the chapter 13 trustee filed to the debtors' plan, and the court denied confirmation and issued an order requiring the debtors' attorney to show cause why he should not be sanctioned and/or required to pay reasonable attorney fees and expenses the trustee incurred.

OVERVIEW: The court required the debtors' attorney to show cause why he should not be sanctioned or required to pay reasonable attorney fees and expenses incurred by a chapter 13 trustee because he failed to appear at a hearing the court scheduled on objections the trustee filed to a plan the debtors proposed for repaying their creditors. The debtors' attorney explained that he missed the hearing because a person in his office who received electronic notice of the hearing had not annotated his calendar. The court found that the attorney's absence was not willful or contumacious, but was negligent because internal procedures used by employees in his office failed. Although that made the attorney's absence understandable, it did not make it "substantially justified" under Fed. R. Civ. P. 16(f), and the court ordered the debtors' attorney to pay reasonable attorney fees and expenses the trustee incurred to prepare for the hearing, and to pay the clerk of court \$ 200 to compensate the United States for the additional time and attention he caused the court to devote to the case.

In re Leslie, 2009 Bankr. LEXIS 2684 (Bankr. N.D. Ind. August 26, 2009) (Grant, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 8:1325.01

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

1009-096 **Debt secured by "910 vehicle" could not be bifurcated.** (Bankr. E.D. Wis.)
 (Consumer)

PROCEDURAL POSTURE: Debtor vehicle purchasers filed for chapter 13 bankruptcy. Creditor, the lender on the vehicle loan, filed a proof of claim that did not separate the amount attributable to the

purchase price of the vehicle from the negative equity from the debtors' trade-in vehicle's loan. The lender objected to confirmation of the debtors' plan that did separate out the negative equity as unsecured.

OVERVIEW: The debtors purchased a new vehicle within 910 days of filing for bankruptcy. At the time, they traded in a vehicle that had a loan balance that was higher than the vehicle's value. That negative equity was included in the loan for the new vehicle. At issue in this case was whether the negative equity portion of the debt met the definition of purchase money security interest as that term is used in 11 U.S.C.S. § 1325(a), such that the entire amount due under that loan would be a secured claim. The court noted that what has been referred to as the hanging paragraph in 11 U.S.C.S. § 1325(a) has been interpreted and applied in different ways by different courts. Ultimately, the court determined that, in the context of this case, the payoff of the trade-in was an integral part of a single transaction, satisfying the close nexus requirement, and the payoff allowed the debtors to acquire rights in the collateral. Accordingly, the court held that the entire amount of the debt securing the debtors' new vehicle met the definition of purchase money security interest as that term is used in § 1325(a), and the lender's objection to confirmation was sustained.

In re Morey, 2009 Bankr. LEXIS 2757 (Bankr. E.D. Wis. September 9, 2009) (McGarity, C.B.J.).
Collier on Bankruptcy, 15th Ed. Revised 8:1325.02

1009-097 **United States Trustee's objection to confirmation of debtor's plan in converted case overruled**
 (Consumer) **where debtor acted in good faith.** (Bankr. S.D. Cal.)

PROCEDURAL POSTURE: After the debtor converted his chapter 7 case to a chapter 13 case, both the chapter 13 Trustee and the United States Trustee (UST) objected to confirmation of the debtor's plan.

OVERVIEW: In the debtor's initial chapter 7 case, the UST filed a complaint seeking denial of a discharge pursuant to 11 U.S.C.S. § 727(a)(3),(a)(4) and/or (a)(5). At the center of the complaint were the allegations that the debtor refinanced his real property netting almost \$ 67,000, and that debtor purchased fourteen or more items of jewelry at a cost of more than \$ 23,000, which he promptly resold. The UST's complaint alleged that debtor was unable to produce books and records to explain what happened to either the proceeds or the jewelry. The debtor then converted the chapter 7 case to one under chapter 13. To the extent the UST's objection to confirmation was predicated on the debtor's pre-petition behavior, the court concluded that such an argument was not supportable. The debtor was not attempting to avoid nondischargeability litigation in the chapter 7. Moreover, if allowed to proceed and ultimately receive a discharge, that discharge would not reach any wider than a discharge in chapter 7 would have. The court concluded that the debtor had carried his burden of establishing that his conversion from chapter 7 to chapter 13 was made in good faith as required by 11 U.S.C.S. § 1325(a).

In re Tich Hua, 2009 Bankr. LEXIS 2834 (Bankr. S.D. Cal. August 24, 2009) (Bowie, C.B.J.).
Collier on Bankruptcy, 15th Ed. Revised 8:1325.02

1009-098 **Claim including negative equity secured by "910 vehicle" could not be bifurcated.** (Bankr.
 (Consumer) C.D. Ill.)

PROCEDURAL POSTURE: Debtors filed a plan that proposed to strip down the claim of the creditor that was secured by a motor vehicle. The creditor objected to confirmation, arguing that its purchase money security interest claim, held for less than 910 days, was exempt from strip-down by operation of the hanging paragraph of 11 U.S.C.S. § 1325(a), so that the amount of its secured claim was the petition date balance rather than the fair market value.

OVERVIEW: Within the 910 days preceding the bankruptcy filing, the debtors traded in a vehicle and purchased the current vehicle with funds borrowed from the creditor. At the time of the purchase, they still owed \$ 19,945.69 on the old car, and were given only a \$ 14,000 trade-in allowance. The negative equity of \$ 5,945.69 was rolled into the new loan, thereby increasing the amount financed to \$ 33,234.64. The debtors argued that § 1325(a) did not protect the creditor against bifurcation because the term "purchase money security interest" should not include the refinancing of negative equity in a trade-in. The issue was whether Congress, in using the phrase "purchase money security interest," intended a uniform meaning to be applied with national consistency, or a phrase defined by state law. The court found that the statute required uniform federal interpretation, and thus evidenced an intent that courts treat the debt and the corresponding claim as indivisible for purposes of applying the hanging paragraph.

The financing of the negative equity was part of the purchase money, and the claim could not be stripped down or bifurcated. The objection to the debtors' plan was well taken.

In re Whipple, 2009 Bankr. LEXIS 2882 (Bankr. C.D. Ill. September 21, 2009) (Perkins, C.B.J.).
Collier on Bankruptcy, 15th Ed. Revised 8:1325.02

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

§ 157(b)(2)(B) Procedures; Title 11 Cases and Core Proceedings; Core Proceedings; Authority to Allow or Disallow Claims and Exemptions and Estimate Claims and Interests.

1009-099 (Commercial) **Stay of core proceeding granted to allow arbitration of dispute pursuant to underlying contract.** (Bankr. N.D. Ohio)

PROCEDURAL POSTURE: Creditor brought an adversary proceeding against defendant bankruptcy debtor alleging that the debtor breached a contract whereby the creditor provided mechanical services in connection with construction of an ethanol facility on the debtor's property. The debtor moved for a stay of the proceeding pending arbitration.

OVERVIEW: The subject contract clearly provided for arbitration of disputes, but the creditor contended that, because the dispute was a core proceeding, enforcement of the arbitration provision created an inherent conflict between the federal policy favoring arbitration and the bankruptcy policy of providing a centralized proceeding for resolving core bankruptcy matters. The bankruptcy court held that, in the absence of any showing of a specific and substantial interference with the debtor's reorganization, the creditor failed to show an inherent conflict evidencing a congressional intent to preclude a waiver of a judicial forum for the creditor's claim. While requiring arbitration deviated from the general bankruptcy policy of resolving all issues in a centralized forum, that factor alone was insufficient to find an inherent conflict.

Smith-Boughan, Inc. v. Sun Trust Bank (In re GOE Lima, LLC), 2009 Bankr. LEXIS 2682 (Bankr. N.D. Ohio September 1, 2009) (Whipple, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 1:3.06[1]

§ 1334(c) Bankruptcy Cases and Proceedings; Abstention.

1009-100 (Consumer) **Bankruptcy court abstained from non-core eviction action against debtor's tenants.** (Bankr. E.D.N.Y.)

PROCEDURAL POSTURE: Plaintiff bankruptcy debtor-in-possession, a landlord of an apartment building, brought an adversary proceeding against defendant tenants seeking unpaid rent or eviction of the tenants, and the tenants counterclaimed for remediation of hazardous and deplorable conditions of the building. The tenants moved for abstention under 28 U.S.C.S. § 1334(c) in favor of resolution in the New York City Housing Court.

OVERVIEW: The tenants contended that the debtor's action was a non-core proceeding seeking relief solely under state housing and rent laws, and that the specialized Housing Court was the appropriate forum to resolve the issues. The debtor argued that rental income from the apartment building was property of the estate which was essential to reorganization, and that the bankruptcy court was the only proper forum to decide the issues. The bankruptcy court held that the Housing Court was the more appropriate forum for resolving the disputes and that deferring to the Housing Court would assist the administration of the bankruptcy estate, due to the Housing Court's expertise in the applicable law and procedures. Matters in the Housing Court were heard expeditiously by summary proceeding involving complex landlord-tenant laws, using resources and processes not promptly available in bankruptcy, and the bankruptcy court could efficiently administer the claims and obligations of the parties as fixed by the Housing Court. Further, the debtor had other matters pending in the Housing Court, and the action was not core in substance even if it might be characterized as core in form.

Taub v. Hershkowitz (In re Taub), 2009 Bankr. LEXIS 2968 (Bankr. E.D.N.Y. September 21, 2009) (Stong, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 1:3.05

§ 1334(c)(1) Bankruptcy Cases and Proceedings; Abstention; Discretionary Abstention.

1009-101 **Court abstained from determination of state personal injury claim.** (E.D. La.)
(Commercial)

PROCEDURAL POSTURE: Before the court were plaintiff company's moved motion for withdrawal of reference of an adversary proceeding and defendant motion for abstention. The case implicated 11 U.S.C.S. § 524 and 28 U.S.C.S. § 1334(c)(1).

OVERVIEW: The bankruptcy court could not determine defendant's claim against the company (an unliquidated personal injury tort claim) for purposes of plan distribution. At oral argument, counsel for defendant conceded that the company's motion for withdrawal should be granted. But in her memorandum in opposition to the company's motion for withdrawal, defendant also argued in part that an order modifying the automatic permanent injunction to allow the parties to litigate the personal injury claim in state court was clearly in the interests of justice. Thus, the court found that the company was clearly on notice that the issue as to whether the court should lift the injunction was before the court, and the company had ample opportunity to address this issue. Accordingly, the court modified the injunction imposed by 11 U.S.C.S. § 524(a)(2) for the limited purposes of allowing defendants to name the company as a defendant in the state court case. The court further exercised discretionary abstention under 28 U.S.C.S. § 1334(c)(1) and granted defendants's motion for abstention because it was in the interest of justice or in the interest of comity with state courts or respect to state law.

Beechgrove Redevelopment Phase II, LLC v. Wilson, 2009 U.S. Dist. LEXIS 88128 (E.D. La. September 10, 2009) (McNamara, D.J.).

Collier on Bankruptcy, 15th Ed. Revised 1:3.05[1]

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

§ 330(a) Compensation of Officers; Determination of Amount.

1009-102 **Debtor's attorneys' fees allowed with reductions due to undisclosed deed of trust securing fee and charges for arguably trustee functions.** (Bankr. D. Or.)
(Consumer)

PROCEDURAL POSTURE: Upon liquidation of a bankruptcy debtor's estate, applications for final awards of compensation were submitted by counsel for the debtor, counsel for the bankruptcy trustee, and the trustee.

OVERVIEW: The debtor contended that the debtor's counsel and the trustee made decisions detrimental to the estate and that the trustee's counsel improperly billed for performing trustee functions. The bankruptcy court first held that counsel for the debtor properly recommended conversion of the debtor's case from chapter 7 to chapter 11 and no benefit to the bankruptcy estate would have resulted if counsel had pursued avoidance of a foreclosure sale of real property, but a partial disgorgement of fees was warranted based on counsel's failure to disclose a deed of trust granted by the debtor to secure counsel fees and a renewal of a fee agreement. Further, while counsel for the trustee did not charge for most of the items which were arguably trustee functions, disallowance was warranted for time spent compiling and drafting the final report and securing property after an eviction. Also, any delay in marketing and selling real properties resulted from conduct of the debtor and others rather than inaction by the trustee or his counsel, and the fact that the property sales resulted in no benefit to the estate did not indicate that sales did not have merit when they were approved.

In re Tan, 2009 Bankr. LEXIS 2664 (Bankr. D. Or. September 3, 2009) (Radcliffe, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:330.04

§ 523 Exceptions to Discharge.

1009-103 **Disputed slip and fall claim against debtor airline discharged pursuant to confirmed plan**
(Commercial) **where creditor did not follow required procedures.** (N.D. Miss.)

PROCEDURAL POSTURE: In a slip and fall case, plaintiff passenger sued defendant airline and airport authority. About a year later, the airline filed a voluntary petition under chapter 11. A notice of bankruptcy was filed with the present court, which entered a stay. The bankruptcy court confirmed the airline's plan of reorganization. The airline moved for summary judgment.

OVERVIEW: The passenger's claims against the airline were claims within the meaning of the confirmed plan and 11 U.S.C.S. § 101(5). The confirmed plan provided a procedure for the payment of allowed claims and a procedure for dealing with disputed claims. The passenger's claims met the definition of disputed claims, but she did not follow the procedure for disputed claims or take any action in the bankruptcy court to avoid the discharge provisions of the confirmed plan. Pursuant to the confirmed plan, and because no filings were made by the passenger to pursue her claims in the bankruptcy court or to remove her claims from operation of the plan, it now operated as a discharge of her claims asserted in the present case. The fact that the airline failed to include the passenger in its list of creditors until after its plan of reorganization had been confirmed did not affect the outcome of the analysis. The passenger had sufficient notice of the pending bankruptcy proceedings to excite attention and put her on her guard and call for inquiry.

Brooks v. Northwest Airlines, Inc., 2009 U.S. Dist. LEXIS 87435 (N.D. Miss. September 23, 2009) (Pepper, D.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.01

§ 1107 Rights, Powers, and Duties of Debtor in Possession.

1009-104 **Attorney for chapter 11 estate allowed fees less unaccounted for retainer.** (Bankr. N.D. Cal.)
(Commercial)

PROCEDURAL POSTURE: Before the court were applications for compensation by the attorney for the bankruptcy estate ("Attorney A") while debtor was debtor in possession pursuant to 11 U.S.C.S. § 1107. Also pending were the application of the chapter 7 trustee and her counsel.

OVERVIEW: On March 30, 2000, "Attorney A" filed his first and final fee application. In it, he sought fees of \$ 22,227 and expenses of \$ 1,516. No mention was made of any retainer. On June 4, 2009, the trustee filed her final report. In it, she proposed to pay "Attorney A" the amount he sought, less only a payment on account of \$ 746. "Attorney A" made no attempt to correct this report. The court checked the file and saw that he had received a retainer of \$ 5,000, which was unaccounted for. On August 6, 2009, he filed an amended fee application reflecting the retainer and reducing his net fee application by that amount. There was some authority that the right to all unpaid fees was forfeited where an attorney had undertaken representation of a conflicting interest without a written waiver. Under the facts, the court awarded him fees of \$ 15,000, less his \$ 5,000 retainer, for a net of \$ 10,000. Costs of \$ 1,516.97 were allowed as prayed. Next, the court allowed the fees and expenses of the trustee's counsel as prayed. The trustee's application of \$ 10,384 was reduced by \$ 1,000 and allowed in the amount of \$ 9,384. Her expenses were allowed as prayed.

In re Straightline Invs., Inc., 2009 Bankr. LEXIS 2711 (Bankr. N.D. Cal. September 8, 2009) (Jaroslavsky, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 7:1107.01

BANKRUPTCY RULES (Pre-2005 Act)

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

1009-105 **Creditor's change in position regarding claim in interrogatories was not basis for sanctions.**
(Consumer) (Bankr. D. Mass.)

PROCEDURAL POSTURE: Debtor moved for sanctions against a creditor pursuant to Fed. R. Bankr. P. 9011.

OVERVIEW: The creditor filed a proof of claim in the amount of \$ 149,450. In the course of discovery, the creditor's contentions changed markedly. In responses to interrogatories, he asserted that the debtor owed him more than \$ 1.4 million. The debtor moved for summary judgment to resolve the claims dispute, which the court granted. The debtor then moved for sanctions under Fed. R. Bankr. P. 9011 against the creditor, alleging that the creditor made several allegations and factual contentions in the underlying litigation which had absolutely no evidentiary support and were not likely to have evidentiary support even after a reasonable opportunity for further investigation or discovery. The court concluded that the motion under Rule 9011 was not appropriate in light of the fact that the allegations at issue were not made in pleadings but instead only in interrogatory responses. However, even if the motion was appropriate, the court stated that it could not be disputed that the debtor did not comply with the notice-before-filing elements of Fed. R. Bankr. P. 9011(c)(1)(A), which alone would require that the motion fail.

In re Rowlands, 2009 Bankr. LEXIS 2878 (Bankr. D. Mass. September 16, 2009) (Hillman, B.J.).

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