

Collier Bankruptcy Case Update

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January 4, 2010

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Kent K.B. Hanson, Esq.1-800-306-5230 (ext. 673-3368)
James F. Muh1-800-306-5230 (ext. 673-3378)
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11 U.S.C. (Post-2005 Act)**§ 105 Power of Court.**

0110-001 **Preliminary injunction barring debtor from using funds from misappropriated escrow denied.**
(Commercial) (*Bankr. S.D.N.Y.*)

PROCEDURAL POSTURE: Plaintiff California corporations filed an adversary proceeding against defendants, a chapter 11 corporate debtor and a realty corporation, claiming that the debtor misappropriated \$ 13 million which one of the corporations placed in an escrow account to fund a transaction it was negotiating with the debtor. Plaintiffs filed a motion for a preliminary injunction that barred the debtor from using funds that were traceable to the deposit.

OVERVIEW: Before it declared bankruptcy, the debtor obtained a loan from a realty corporation so it could purchase shopping center properties. The debtor needed additional financing, and a California corporation agreed to provide \$ 13 million and placed that money in an escrow account and informed the debtor's principal that the money could not be released without the consent of a named individual or counsel who represented the California corporation. However, the funds were released after the named individual's son authorized release. Counsel for the California corporation demanded that the funds be returned, and when they were not returned and the debtor declared bankruptcy, the California corporation filed an adversary proceeding against the debtor and the realty corporation and sought a preliminary injunction barring the debtor from using the funds. The court denied the corporation's request for a preliminary injunction. The corporation waited six months before it filed its action and even if the named individual's son did not have authority to authorize the release, the corporation acted as though it had ratified the son's decision.

Amusement Indus. v. Citigroup Global Markets Realty Corp. (In re First Republic Group Realty, LLC), 2009 Bankr. LEXIS 3941 (*Bankr. S.D.N.Y. December 15, 2009*) (Glenn, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 2:105.01

§ 326(a) Limitation on Compensation of Trustee; Compensation for Services Under Chapter 7 or 11.

0110-002 **Debtor's lawyer from prior chapter 11 case lacked standing to object to chapter 7 trustee's final**
(Commercial) **report.** (*Bankr. D.N.M.*)

PROCEDURAL POSTURE: Before the court was the chapter 7 Trustee's Final Report (TFR) and application for compensation in the amount of \$ 81,976 pursuant to 11 U.S.C.S. § 326(a). A law firm that previously represented the debtor in its chapter 11 case (chapter 11 law firm) filed an objection to the TFR and application for compensation.

OVERVIEW: The debtor initially filed for bankruptcy under chapter 11. At that time, the chapter 11 law firm represented the debtor as a debtor in possession. Later, the case was converted to chapter 7. The chapter 7 Trustee applied to employ her law firm as attorney for the chapter 7 Trustee, which the court approved. The chapter 11 law firm had an administrative claim for attorneys' fees incurred during its representation. However, due to the priority of claims and the estate's depleted funds, the chapter 11 law firm could not receive a distribution from the assets of the estate regardless of whether the Trustee's application for compensation was approved. The court held that because there was no possible outcome under which the chapter 11 firm could be paid on its chapter 11 administrative claim, and because that law firm had not articulated any other legally protected interest, the chapter 11 law firm lacked standing to object. The court went on to find that both the rate and amount of hours charged by the chapter 7 Trustee's firm were reasonable and approved the application for compensation.

In re Runnels Broad. Sys., LLC, 2009 Bankr. LEXIS 3946 (*Bankr. D.N.M. December 1, 2009*) (Jacobovitz, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:326.02

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

0110-003 **Transaction fee and final monthly fees of advisor to committee of unsecured creditors granted over objection.** (*Bankr. E.D. Ky.*)

PROCEDURAL POSTURE: A financial advisor to a committee of bankruptcy debtors' unsecured creditors submitted its final application for payment of fees, and a company through which preexisting senior lenders acquired the debtors' stock and assets objected to payment of a transaction fee and the final monthly fees.

OVERVIEW: The company contended that payment of the transaction fee was not warranted since it was payable only upon payment in full to the senior lenders which did not occur, and that the pre-approved transaction fee was inequitable and improvident. The company also argued that payment of the advisor's monthly fees would exceed the fee cap set out in an order authorizing the use of cash collateral. The bankruptcy court first held that payment of the transaction fee was appropriate since payment in full to senior lenders was required only if payment was in cash, and the unanimous consent to the debtors' plan indicated that the lenders were satisfied with the consideration received. Further, the collapse of the coal market and its effects on the debtors' mining operations was insufficient to establish that the transaction fee was improvident. Also, the fee cap in the cash collateral order was not intended to include the advisor's fees and expenses, and the advisor's fees were treated separately under prior cash collateral orders.

In re Black Diamond Mining Co., LLC, 2009 Bankr. LEXIS 3926 (*Bankr. E.D. Ky. December 11, 2009*) (Howard, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:328.02[1]

§ 362 Automatic Stay.

0110-004 **Creditor's declaration of force majeure violated stay, entitling the debtor to damages.** (*Bankr. E.D. Ky.*)

PROCEDURAL POSTURE: Plaintiff, one of the jointly administered debtors, was awarded a judgment for breach of coal mining agreement against defendant, the purchaser of the coal, which occurred when the purchaser declared force majeure. Before the court was the determination of damages for the debtor's lost profits.

OVERVIEW: Pursuant to the terms of the agreement the debtor undertook to mine coal by the surface and highwall methods, and it complied with its obligations. The agreement included a force majeure provision. After the price of coal dropped, the purchaser filed an emergency motion for relief from the automatic stay seeking, "in an abundance of caution to eliminate any doubt of its ability to avail itself of its force majeure right." The purchaser was never granted relief from the stay. After trial, the court found that the events cited by the purchaser constituted normal market risks, not force majeure events. The purchasers wrongful declaration of force majeure constituted a breach and effective repudiation of the agreement, entitling the debtor to damages. The damages award was substantially reduced by offsets, a fifteen percent discount rate, a partial settlement resulting in a \$ 1,561,063 reduction in reclamation costs, and further adjustments for surface mining losses that would not be incurred.

Miller Bros. Coal, LLC v. Consol of Ky., Inc. (In re Clearwater Natural Res., LP.), 2009 Bankr. LEXIS 3934 (*Bankr. E.D. Ky. December 11, 2009*) (Howard, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 3:362.01

§ 362(a) Automatic Stay; Scope.

0110-005 **Automatic stay did not prevent district court from vacating default judgment and dismissing case against debtor employer with prejudice.** (*M.D. Fla.*)

PROCEDURAL POSTURE: Plaintiffs, employees, sued defendants, employers, for violation of the Fair Labor Standards Act, 29 U.S.C.S. § 216(b). The court entered a default judgment against two employers, one of which filed for bankruptcy protection. The remaining parties entered into a settlement. The parties filed a renewed motion for approval of the settlement, stipulation of dismissal with prejudice, and to vacate the default judgment against the debtor employer.

OVERVIEW: The parties sought to vacate the prior default judgment entered against the two employers and to dismiss the case with prejudice against both parties despite the debtor employer's pending bankruptcy proceeding. The question before the court was therefore whether, in the presence of an automatic stay of a bankruptcy proceeding, a district court retained jurisdiction to vacate a prior default judgment and to dismiss the case against the debtor employer with prejudice. The court found that entry of an order vacating the debtor employer's default judgment and dismissing the case against him with prejudice was not inconsistent with the purposes of the bankruptcy code because it would not have incurred any additional cost or risk to the debtor employer or his creditors. In fact, the entry of the requested order would have actually improved the position of the debtor employer and his creditors by removing a significant financial liability. Accordingly, the court retained jurisdiction to vacate the prior default judgment and dismiss the case against the debtor employer with prejudice because the entry of such an order did not violate the automatic stay of the bankruptcy court.

Souza v. Reliable Pers. Servs. (Unpublished), 2009 U.S. Dist. LEXIS 116713 (M.D. Fla. December 15, 2009) (Fawsett, D.J.).

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

§ 502 Allowance of Claims or Interests.

0110-006 **Claim of LLC that provided debtor petroleum company with investment advisory services (Commercial) disallowed.** (*Bankr. S.D. Tex.*)

PROCEDURAL POSTURE: Debtors, a petroleum company and related entities, filed petitions under chapter 11 of the Bankruptcy Code, and an LLC that provided investment advisory services to the debtor's president filed a claim against the debtors' bankruptcy estate. A trustee who was appointed to administer a trust that was created to liquidate the debtors' assets filed an objection to the LLC's claim.

OVERVIEW: A petroleum company and the company's president entered into an investment advisory services agreement to obtain advice from an LLC about a management-led buyout which provided, inter alia, that the petroleum company would guarantee payment of amounts the president owed the LLC. The petroleum company declared bankruptcy in 2006 and was sold, and a company that bought the petroleum company refused to pay \$ 800,000 the LLC demanded but settled the LLC's demand by paying the LLC \$ 300,000. After the settlement, the LLC filed a claim in the amount of \$ 500,000 against the petroleum company's bankruptcy estate. The bankruptcy court denied the claim. California law governed the investment advisory services agreement and the petroleum company was released from its obligations as a surety under the agreement, pursuant to Cal. Civ. Code §§ 2810 and 2819, when the LLC accepted \$ 300,000 from the company that bought the petroleum company and gave that company a release. The petroleum company was also released from its obligations as a guarantor when the LLC stopped providing investment advisory services in October 2005 so it could join other parties who wanted to acquire the company.

In re Davis Petroleum Company, 2009 Bankr. LEXIS 3878 (*Bankr. S.D. Tex. November 13, 2009*) (Schmidt, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:502.01

0110-007 **Trustee's pre- and post-petition claims against debtor's law firm dismissed.** (*Bankr. N.D. Ala.*) (Commercial)

PROCEDURAL POSTURE: Defendant law firm filed a motion to dismiss plaintiff trustee's second amended complaint, which charged the law firm with claims related to the firm's representation of the debtor during the debtor's acquisition of a financially troubled company in 2004. The law firm contended that the claims were time barred by the Alabama Legal Service Liability Act (ALSLA), Ala. Code § 6-5-574.

OVERVIEW: The debtor acquired a company in 2004 that proved to be financially troubled and contributed to the debtor's insolvency. The bankruptcy trustee contended that the law firm that represented the debtor at the time, and later in the bankruptcy, breached its fiduciary duty and committed malpractice. The law firm argued that the claims were time barred under the ALSLA. The Court found that, even though the law firm was located outside of Alabama and the attorneys who represented the debtor were not licensed in Alabama, because the firm included members who were licensed in Alabama and the firm provided legal services in Alabama resulting in the alleged injury in the state, the ALSLA applied and the pre-petition claims against the firm were time-barred under the

ALSLA's four-year statute of repose. Tolling did not apply in this case to provide the trustee with additional time to bring the pre-petition claims. The court further held that the post-petition claims also had to be dismissed as the trustee failed to allege any new or independent injury as a result of the firm's alleged post-petition malpractice which occurred inside the statutory period for filing an action.

Laddin v. Beldin (In re Verilink Corp.), 2009 Bankr. LEXIS 3938 (Bankr. N.D. Ala. December 3, 2009) (Caddell, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:502.01

0110-008 **Debtor and father did not violate fiduciary duty while acting on behalf of creditor corporation.**
(Consumer) (Bankr. N.D. Ala.)

PROCEDURAL POSTURE: Plaintiffs, a real estate investment corporation and its sole shareholder, brought an action against defendants, a bankruptcy debtor and the estate of the debtor's deceased father who were formerly officers and shareholders of the corporation, alleging that the debtor and his father engaged in misconduct with regard to the corporation after the debtor filed his bankruptcy petition. The debtor and the estate moved for summary judgment.

OVERVIEW: The corporation and the shareholder contended that the debtor and his father breached fiduciary duties to the corporation, failed to vindicate rights of the corporation, converted corporate assets, and engaged in corporate oppression. The bankruptcy court first held that neither the corporation nor the shareholder could properly pursue the derivative stockholder claim since no action of the debtor or the father precluded the corporation from vindicating its own rights, and the shareholder was not a minority shareholder which could be oppressed by the debtor or the father. Further, there was no showing of breach of fiduciary duties since the father properly acquired notes and mortgages in his personal name to obtain favorable interest rates prior to transfer to a land trust, and the debtor preserved all corporate property and records and provided all information requested by the shareholder and the corporation. Also, foreclosures against corporate properties were not caused by any conversion of the debtor since the debtor merely held corporate property as a custodian, and the corporation and the shareholder took no action to obtain the property or prevent the foreclosures.

WBRE, Inc. v. Estate of Dalton (In re Dalton), 2009 Bankr. LEXIS 3942 (Bankr. N.D. Ala. December 2, 2009) (Mitchell, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:502.01

0110-009 **Creditor did not establish right to recover the amount of checks issued by the debtor which**
(Commercial) **were dishonored by the bank after the debtor's bankruptcy.** (Bankr. E.D. Tenn.)

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bank which held funds in a bankruptcy debtor's operating account, seeking to recover the amount of checks issued by the debtor which were dishonored by the bank after the debtor's bankruptcy. The creditor moved for summary judgment.

OVERVIEW: In accordance with a security agreement between the debtor and the creditor, the debtor deposited proceeds of vehicle sales and issued the checks to the creditor. The creditor contended that, as a holder in due course, it owned the funds in the account and had priority over all other interests in the funds. The bankruptcy court held, however, that the creditor's alleged status as a holder in due course was irrelevant since it neither conferred ownership over the debtor's funds in the account nor trumped security interests held in those funds. The creditor owned the checks but the checks did not operate as an assignment of funds in the hands of the bank available for its payment since the bank had not accepted the checks. Further, although the creditor might ultimately have a right to the funds based on a security interest that was superior to other security interests in the funds, any such interest did not derive from the checks drawn against those funds.

Hitachi Capital Am. Corp. v. Farinash (In re Prebul Jeep, Inc.), 2009 Bankr. LEXIS 3900 (Bankr. E.D. Tenn. November 24, 2009) (Cook, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:502.01

0110-010 **Creditor LLC's proofs of claim disallowed due to insufficient reporting information.** (Bankr.
(Consumer) S.D. Tex.)

PROCEDURAL POSTURE: Debtors filed a petition under chapter 13 of the Bankruptcy Code and an LLC filed claims against the debtor's bankruptcy estate, seeking payment of unsecured credit card debt the debtors allegedly owed. The debtors filed objections to the LLC's claims.

OVERVIEW: The LLC filed proofs of claim that contained the last four digits of an account number and the amount due on each account, and stated that the LLC was the assignee of debts the debtors incurred using credit cards. The debtors filed objections to the LLC's claims, and the court scheduled a hearing to determine if the claims should be allowed. Before the hearing was held, the LLC filed additional documentation in support of its proofs of claim, including affidavits signed by its personal representative and bills of sale showing transfers of the accounts to the LLC. The court found that proofs of claim the LLC filed before the debtors filed their objections did not meet the requirements of Fed. R. Bankr. P. 3001 and Official Form 10, and they were not prima facie evidence of the validity and amount of each claim. The LLC also failed to obtain permission from the court or the debtors, pursuant to Fed. R. Civ. P. 15(a)(2), before it filed additional documentation in support of its claims, and the court refused to allow the amendments. Even if the amendments had been allowed, they were not sufficient to show that the claims were based on contracts that were enforceable under Texas law.

In re Gilbreath, 2009 Bankr. LEXIS 3909 (Bankr. S.D. Tex. November 19, 2009) (Bohm, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:502.01

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

0110-011 **Debtor's objections to mortgagee's claim overruled.** (Bankr. S.D. Tex.)
 (Consumer)

PROCEDURAL POSTURE: Plaintiff bankruptcy debtor brought an adversary proceeding against defendants, a putative holder of the debtor's mortgage loan and the loan servicer, alleging that the servicer lacked standing to file a proof of claim based on the mortgage note, that the alleged postpetition assignment of the note was invalid, and that the debtor was fraudulently induced into executing the note. The defendants moved to dismiss the complaint.

OVERVIEW: The defendants' proof of claim included documentation indicating that the deed of trust securing the mortgage loan was assigned to the servicer by the original mortgage lender. The bankruptcy court first held that the debtor properly alleged a lack of standing to file the proof of claim since the assignment of the deed of trust did not establish an assignment of the mortgage note which was the basis for the proof of claim. However, even if the note and deed of trust were assigned after the debtor filed its bankruptcy petition, the assignment was not invalid since it did not involve a transfer of property of the bankruptcy estate and the security interest was created and perfected prior to the debtor's petition. Further, the debtor failed to allege fraudulent inducement with the requisite particularity since the debtor failed to identify the mortgage broker who allegedly stated that the debtor was not qualified for a fixed-rate mortgage, and failed to allege when and where the alleged misrepresentation was made.

Hernandez v. Argent Sec. Inc. (In re Hernandez), 2009 Bankr. LEXIS 3913 (Bankr. S.D. Tex. December 7, 2009) (Bohm, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:502.02

§ 502(b)(1) Allowance of Claims or Interests; Disallowance; Unenforceable Claim.

0110-012 **Creditor's counterclaim in proceeding to avoid liens dismissed for lack of standing.** (Bankr. D. Minn.)
 (Commercial)

PROCEDURAL POSTURE: Debtor brought an adversary proceeding to avoid the claims of defendant creditors, which claimed security interests in proceeds of certain of the debtor's trademark rights that had been sold postpetition. The creditors filed counterclaims asserting their alleged security interests and lien rights, which the debtor moved to dismiss for failure to state a claim or to strike.

OVERVIEW: The creditors obtained their liens by making loans to the CEO of the debtor shortly before his arrest and prosecution on numerous fraud charges. The debtor's main theory was that the creditors' taking of the security interests constituted fraudulent transfers as to other creditors under Minnesota law and federal bankruptcy law. The debtor requested other forms of relief: the disallowance of the claims in their bankruptcy cases, the avoidance of the creditors' liens against proceeds of trademarks, in consequence of any such disallowance; the equitable subordination, recharacterization, or the nullification of their liens under general equitable principles. There was no basis for dismissal or to strike the creditors' first counterclaim, as it was not clearly redundant of the complaint. The claim was not disallowed under 11 U.S.C.S. § 502(b)(1). However, the second counterclaim, for liens, did not arise out of

a debtor-creditor relationship, and did not concern assets of their bankruptcy estates. It was not a compulsory counterclaim, and the creditors lacked direct standing to sue on the issue, as they did not currently hold the liens.

Polaroid Corp. v. Ritchie Capital Mgmt., LLC (In re Polaroid Corp.), 2009 Bankr. LEXIS 3873 (Bankr. D. Minn. December 4, 2009) (Kishel, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:502.03[2]

§ 507(a)(8)(A) Priorities; Order of Priorities; Unsecured Governmental Claims; Tax on Income or Gross Receipts.

0110-013 **Bankruptcy court did not err in holding that confirmed plan in prior case did not toll three-**
(Consumer) **year lookback period for postpetition state tax.** (B.A.P. 9th Cir.)

PROCEDURAL POSTURE: Appellant, state taxing authority, sought review of an order of the bankruptcy court for the Northern District of California, that denied its motion to hold the taxpayer-debtor's state tax obligation was nondischargeable under 11 U.S.C.S. § 507(a)(8)(A)(i).

OVERVIEW: At issue was whether the bankruptcy court erred when it held that the debtor's prior confirmed chapter 13 plan in a prior case did not toll the three-year look back period of 11 U.S.C.S. § 507(a)(8) for her postpetition tax. The three-year period from the chapter 13 filing had expired prior to the tax obligation becoming due on October 15, 2003, the date her 2002 return was due. The debtor had then filed the present petition for relief under chapter 7, and received her chapter 7 discharge. Three years prior to her chapter 7 filing commenced on October 5, 2004, so the tax obligation was thus not within that three year period. The court found that the state was not disabled from protecting its claim during the pendency of the prior chapter 13 case. The appellate panel agreed with the bankruptcy court's interpretation, and adopt the estate termination approach in interpreting 11 U.S.C.S. § 1327(b).

Cal. Franchise Tax Bd. V. Jones (In re Jones), 2009 Bankr. LEXIS 3880 (B.A.P. 9th Cir. November 24, 2009) (Baum, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:507.11

§ 522 Exemptions.

0110-014 **Debtor's homestead exemption allowed provided debtor paid trustee for nonexempt portion of**
(Consumer) **debt.** (Bankr. W.D. Ark.)

PROCEDURAL POSTURE: Bankruptcy debtors claimed as exempt a portion of their homestead property, which was subject to a restrictive covenant against division of the property, and the debtors offered to purchase the nonexempt portion of the property. Creditors objected to the claimed exemption.

OVERVIEW: The creditors contended that the claimed exemption was not authorized by law because the debtors' property exceeded one-quarter of an acre in size and \$ 2500.00 in value, and that any exemption should be limited to \$ 2500.00. The bankruptcy court held that, under Ark. Const. art. 9, § 5, even though the property exceeded a quarter of an acre in area, the debtors were in any event entitled to select a tract for exemption not exceeding the constitutional minimum of a quarter of an acre, without regard to value. Further, the nonexempt portion of the property did not contain the debtors residence and likely had little value to anyone but the debtors, and a formulaic determination of the bankruptcy trustee's share of proceeds upon a sale of the entire property indicated that allowing the debtors to purchase the nonexempt portion would provide the greatest benefit to the estate.

In re Weathers, 2009 Bankr. LEXIS 3922 (Bankr. W.D. Ark. December 4, 2009) (Barry, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:522.01

§ 522(f)(1) Exemptions; Liens Impairing Exempt Property; Avoidance.

0110-015 **Debtor could not avoid judicial lien as impairing exemption while title to the property was**
(Consumer) **held by fraudulent transferee.** (Bankr. D. Ariz.)

PROCEDURAL POSTURE: A creditor obtained a judgment against a bankruptcy debtor after the debtor fraudulently transferred real property, as determined by a state court, and the debtor claimed an exemption in the property which was subsequently reconveyed to the debtor. The debtor moved to avoid the creditor's judicial lien as impairing the exemption under 11 U.S.C.S. § 522(f)(1).

OVERVIEW: The debtor contended that the state court finding that the debtor's transfer of the property was fraudulent completely unwound the transfer, and thus the debtor had an interest in the property when the creditor's lien attached which permitted avoidance of the lien. The bankruptcy court held, however, that the fraudulent transfer was voidable rather than void, and thus the debtor could not avoid the judgment lien which attached to the property while the title was held by the transferee.

In re Tescione, 2009 Bankr. LEXIS 3876 (Bankr. D. Ariz. November 16, 2009) (Hollowell, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:522.11

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

0110-016 **State court finding that debtor breached fiduciary duty and fraud satisfied necessary elements (Consumer) and was nondischargeable.** (Bankr. S.D. Tex.)

PROCEDURAL POSTURE: A creditor obtained a state-court judgment against a bankruptcy debtor based on the debtor's breach of fiduciary duty and fraud, and the creditor objected to discharge of the judgment debt in the debtor's bankruptcy case pursuant to 11 U.S.C.S. § 523(a)(2)(A), (a)(4).

OVERVIEW: The state court found as a matter of law that the debtor breached fiduciary duties, and a jury found that the debtor's check-kiting scheme constituted fraud. The bankruptcy court held that the judgment debt to the creditor was not dischargeable since the final judgment, the jury instructions, and the unanimous findings and verdict of the jury established all of the elements for nondischargeability of the debt based on fiduciary defalcation and fraud.

In re Woodard, 2009 Bankr. LEXIS 3921 (Bankr. S.D. Tex. December 7, 2009) (Schmidt, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.07

§ 523(a)(1) Exceptions to Discharge; Types of Debt Excepted; Taxes.

0110-017 **Bankruptcy court's finding that debtor did not willfully evade taxes was not clearly erroneous (Consumer) and debt was dischargeable.** (M.D. Ga.)

PROCEDURAL POSTURE: Plaintiff challenged the bankruptcy court's finding that defendant debtor's federal tax liabilities for 1998 through 2002 were not excepted from discharge pursuant to 11 U.S.C.S. § 523(a)(1)(C). The bankruptcy court found that the debtor did not willfully evade his income taxes and, therefore, did not satisfy the 11 U.S.C.S. § 523(a)(1)(C) exception to 11 U.S.C.S. § 727(b)'s general discharge of debts in bankruptcy.

OVERVIEW: The conduct requirement of 11 U.S.C.S. § 523(a)(1)(C) may consist of affirmative acts or omissions to avoid payment or collection of taxes. Mere nonpayment of taxes was not sufficient to satisfy the conduct requirement. However, nonpayment in conjunction with failure to file returns could constitute evasive conduct. In the instant case, the debtor's failure to pay his tax obligations, coupled with his failure to file tax returns from 1998 through 2002, satisfied 11 U.S.C.S. § 523(a)(1)(C)'s conduct requirement. The bankruptcy court did not clearly err in finding that nothing in the evidence mitigated that conduct. Thus, the Internal Revenue Service carried its burden of establishing the conduct element. Having thoroughly reviewed the record, the appellate court found that sufficient evidence existed from which the bankruptcy judge, having considered the badges of fraud, the debtor's discretionary expenses, and the various forces impacting the debtor's financial situation, could have concluded that the government failed to carry its burden of proving that the debtor willfully attempted to evade his taxes. Accordingly, that finding was not clearly erroneous.

United States v. Mitchell, 2009 U.S. Dist. LEXIS 114894 (M.D. Ga. December 9, 2009) (Land, D.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.07

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

0110-018 **Debtor's overcharging of creditor was not grounds for nondischargeability where creditors (Consumer) never paid in full and could not establish damages.** (Bankr. E.D. Tex.)

PROCEDURAL POSTURE: Plaintiff property owners brought an adversary proceeding against defendant bankruptcy debtor who built the owners' residence, seeking a determination that a debt to the owners for alleged overcharges by the debtor was nondischargeable under 11 U.S.C.S. § 523(a)(2)(A) based on the debtors' misrepresentations.

OVERVIEW: The owners contended that the debtor overcharged them for the costs of construction of their residence by submitting inflated or duplicate invoices with draw requests, and the owners withheld funds by paying the debtor less than the draw requests. The bankruptcy court held that the owners failed to show that they suffered a loss, since a detailed and credible analysis by an accountant indicated that the debtor was not paid the full amount due under the construction contract. Thus, while it was troubling that the debtor appeared to have submitted erroneous invoices to the owners, the owners failed to establish any damages arising from the debtor's alleged misrepresentations or, consequently, a debt owing by the debtor to them.

Randazzo v. Fox (In re Fox), 2009 Bankr. LEXIS 3929 (Bankr. E.D. Tex. December 1, 2009) (Rhoades, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.08

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

0110-019 **Damages for debtor's infringement of creditor's seed patent was nondischargeable.** (Bankr. (Consumer) *N.D. Iowa*)

PROCEDURAL POSTURE: Plaintiff seed producer sought a determination that defendant debtor's liability for patent infringement was a nondischargeable debt for willful and malicious injury within the meaning of 11 U.S.C.S. § 523(a)(6). The seed producer also asked for damages and attorney fees calculated pursuant to 35 U.S.C.S. §§ 284 and 285, and a permanent injunction under 35 U.S.C.S. § 283.

OVERVIEW: The debtor was a farmer and a seed dealer. He admitted to misusing saved seeds and that his conduct constituted patent infringement. The court previously ruled that the debtor's patent infringement was willful. The matters left for trial were the issue of malicious injury and determination of damages. The court concluded that the debtor's conduct was malicious. He knew not only that his use of soybeans was an infringement of the producer's patent but also that the producer was certain to suffer financial harm as a result of his conduct. While the debtor attempted to characterize his actions as merely an unsuccessful effort to save his farming operation, the court noted that he maintained the infringing conduct for three years, and during this period he significantly expanded his grain operation. According to the court, while there was no doubt that the debtor wanted to continue farming, his plan was to do so at the seed producer's expense. To calculate damages, the court conducted a reasonable royalty analysis, including a benefits/risk capture, and then doubled that amount as an enhancement. The court also found exceptional circumstances warranting the award of attorneys' fees.

Monsanto Co. v. Roeder (In re Roeder), 2009 Bankr. LEXIS 3949 (Bankr. N.D. Iowa December 14, 2009) (Edmonds, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 4:523.12

§ 541(a)(5) Property of the Estate; Creation and Composition of the Estate; Interests in Certain Property Acquired within 180 Days Postpetition.

0110-020 **Property obtained by debtor spouse following father's postpetition death was properly held not to be property of the estate.** (B.A.P. 10th Cir.) (Consumer)

PROCEDURAL POSTURE: Plaintiff trustee appealed from an order of the bankruptcy court for the District of Kansas, arguing that court erred in determining that the debtors could each elect to exempt as a homestead a residence occupied by the family of one debtor but not by him personally on the date of filing; and that bank accounts on which the other debtor was a named beneficiary on the death of her father was not property of the bankruptcy estate.

OVERVIEW: The debtors were separated and the husband moved into a mobile home on the same parcel. Although he could legally have returned to the family residence, he still lived in the mobile home on the date of the filing of the bankruptcy petition. The husband testified that he claimed a homestead in the mobile home and the wife claimed a homestead exemption on the House and real property. The debtors could not seek an exemption in both the mobile home and the house. However, the bankruptcy court held that each could exempt a one-half interest in either house, since one family member lived in one, and the remainder of the family lived in the other. The panel affirmed. The personal property obtained by the wife following her father's postpetition death was not property of the estate, with the

exception of certain life insurance proceeds. Her claim based on the pay on death provision of the bank accounts was more akin to a mere expectancy rather than an actual property interest.

Williamson v. Hall (In re Hall), 2009 Bankr. LEXIS 3868 (B.A.P. 10th Cir. December 4, 2009) (Romero, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 5:541.16

§ 544(b)(1) Trustee as Lien Creditor and as Successor to Certain Creditors and

0110-021 **Purchasers; Extent of Trustee's Avoidance Powers; Trustee's Avoidance Powers as Unsecured (Commercial) Creditor. (Formerly 11 U.S.C. § 544(b)).** (Bankr. E.D. Tenn.)

PROCEDURAL POSTURE: This adversary proceeding was before the court upon the complaint filed by plaintiff debtor seeking to nullify and/or set aside four quit claim deeds transferring real property from the debtor to defendant, a creditor trustee, as an avoidable transfer under 11 U.S.C.S. § 544(b).

OVERVIEW: In 2005, the debtor had purchased 1,865 acres of mountain property for approximately \$28 million, with approximately \$26 million financed through promissory notes with the creditor. When the debtor fell behind in payments, the parties executed an agreement providing for four quit claim deeds on approximately 1,445 acres of property that secured the outstanding balance on the notes. The debtor filed for bankruptcy and, during a gap period when the bankruptcy petition had been dismissed, the quit claim deeds were recorded, resulting in a transfer of the property and extinguishment of the debtor's obligation. The bankruptcy case was reinstated and the debtor sought to avoid the transfer that occurred upon the recordation of the quit claim deeds. The court held that, because the transfer occurred during the gap period in the bankruptcy case, the transfer fell within the purview of 11 U.S.C.S. § 544(b). However, because the debt owed on the property was greater than its value, the debtor received reasonably equivalent value for the transfer and the transfer was not constructively fraudulent under either Tenn. Code Ann. § 66-3-305 or § 66-3-306(a).

Webb Mtn., LLC v. Exec. Realty P'ship, L.P. (In re Webb Mtn., LLC), 2009 Bankr. LEXIS 3897 (Bankr. E.D. Tenn. November 25, 2009) (Stair, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:544.LH[2]

§ 547(c)(2)(A) Preferences; Exceptions to Avoidance; Payments in Ordinary Course of Business; Made in Ordinary Course of Business.

0110-022 **Payments to creditor that differed in timing and amount from usual practice were not covered (Commercial) by ordinary course of business defense to avoidance.** (Bankr. E.D. Pa.)

PROCEDURAL POSTURE: Chapter 7 Trustee filed this adversary proceeding pursuant to 11 U.S.C.S. § 547(b) and § 550(a) to avoid and recover two payments which the debtor made to defendant television station during the 90 day preference period before the debtor filed its Chapter 7 bankruptcy case. The station filed a motion for summary judgment asserting that both transfers fell within the "ordinary course of business" exception of 11 U.S.C.S. § 547(c)(2)(A).

OVERVIEW: The debtor made two payments to the television station within the 90-day period before it filed for bankruptcy. The debtor and the television station had an ongoing business relationship for three years prior to the payments in question. The first payment was for the same amount as an invoice. The second payment was not and was applied to more than one invoice. The television station argued that both payments were made in the ordinary course of business pursuant to 11 U.S.C.S. § 547(c)(2)(A). The court noted that the first transfer payment was made 94 days after invoice, while the vast majority of pre-preference payments were made in a 64 to 75 day range. The court concluded that a reasonable trier of fact could infer from the record that the first transfer's payment time of 94 days was not consistent with the debtor's payments in the pre-preference period. As a consequence, the court could not conclude that the first payment was made in the ordinary course of business. As to the second payment, certain evidence clearly indicated that it was not, in fact, made in the ordinary course of the business, particularly given that the amount exceeded the amount of any outstanding invoice.

Liebersohn v. WTAE-TV (In re Pure Weight Loss, Inc.), 2009 Bankr. LEXIS 3956 (Bankr. E.D. Pa. November 10, 2009) (Raslavich, C.B.J.).

Collier on Bankruptcy, 15th Ed. Revised 5:547.04

§ 727(a) Discharge; Grounds for Denial.

0110-023 **Omissions and lack of record-keeping by struggling, substance abusing artist were not grounds for denial of discharge.** (Bankr. M.D. Fla.)
(Consumer)

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bankruptcy debtor seeking a denial of the debtor's discharge under 11 U.S.C.S. § 727(a) based upon the debtor's alleged concealment of assets, failure to keep records, false statements, and failure to explain loss of assets. The debtor objected to the creditor's proof of claim and the objection was consolidated with the proceeding.

OVERVIEW: The debtor was a struggling artist who suffered from drug and alcohol addictions to the extent that a divorce decree placed the debtor's former spouse in complete control of the debtor's financial affairs. The creditor contended that the debtor failed to disclose sales and transfers of his paintings and details of his financial condition, and that the debtor breached an agreement whereby the creditor's art gallery was designated as the exclusive outlet for the debtor's paintings. The bankruptcy court first held that the creditor failed to show any basis for denial of the debtor's discharge. The debtor disclosed his financial circumstances to the best of his abilities, and any omissions were inadvertent oversights which were promptly corrected. Further, the debtor's lack of recordkeeping was justified based upon his circumstances, any misstatements in the debtor's submissions were neither intentional nor material, and all of the debtor's paintings were properly accounted for and were, or would be, liquidated by the bankruptcy trustee. Also, even assuming the debtor was competent to enter the exclusivity agreement, the agreement did not have the necessary approval of the spouse.

Patina, Inc. v. Banks (In re Banks), 2009 Bankr. LEXIS 3947 (Bankr. M.D. Fla. December 17, 2009) (Briskman, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:727.01

0110-024 **Failure to file individual tax returns could be grounds for denial of discharge.** (Bankr. E.D. Va.)
(Consumer)

PROCEDURAL POSTURE: Plaintiff United States Trustee brought an adversary proceeding against defendant bankruptcy debtor seeking a denial of the debtor's discharge under 11 U.S.C.S. § 727(a) based on the debtor's failure to maintain adequate records, both individually and as an insider of a company which was also in bankruptcy. The Trustee moved for summary judgment.

OVERVIEW: The trustee contended that the debtor's failure to file income tax returns, both personally and on behalf of the company, constituted a failure to keep or preserve recorded information from which the financial condition or business transactions of the debtor and the company could be ascertained. The bankruptcy court held that, while failing to file tax returns did not by itself constitute failing to maintain adequate records, denial of the debtor's discharge was warranted since the failure to prepare and file the returns reasonably supported an inference that the debtor did not keep or preserve the financial records that would enable a return to be prepared. Further, the debtor provided no explanation not filing the returns, and the debtor's schedules and statement of financial affairs did not establish that the information provided by the debtor was accurate. However, while the debtor could be denied a discharge based on commission of an act as an insider of the company, it was unclear whether the debtor's failure to keep records was an act which could be committed, and when any such act was committed.

McDow v. Korfonta (In re Korfonta), 2009 Bankr. LEXIS 3930 (Bankr. E.D. Va. December 2, 2009) (Mitchell, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 6:727.01

§ 1102 Creditors' and Equity Security Holders' Committees.

0110-025 **Motion for appointment of Ad Hoc Committee of Equity Security Holders denied due to inability to demonstrate a meaningful distribution would result or that a formal committee was not necessary.** (Bankr. D. Del.)
(Commercial)

PROCEDURAL POSTURE: Debtors filed separate petitions under chapter 11 of the Bankruptcy Code, and their cases were consolidated for joint administration. An Ad Hoc Committee of Equity Security Holders filed a motion seeking appointment of an Official Committee of Equity Security Holders pursuant to 11 U.S.C.S. § 1102. The motion was opposed by the debtors, an Official Committee of Unsecured Creditors, other creditors, and the U.S. Trustee.

OVERVIEW: The debtors were engaged in the business of designing, manufacturing, and selling flash memory products and solutions at the time they declared bankruptcy in March 2009, and they were

allowed to continue operating their businesses as debtors in possession. The debtors filed a disclosure statement and a plan for reorganizing their businesses which proposed to make no distributions to common equity holders, and an Ad Hoc Committee of Equity Security Holders filed a motion seeking appointment of an Official Committee of Equity Security Holders to represent their interests. The court denied the motion. To meet the requirements for appointment of an official committee under 11 U.S.C.S. § 1102, the Ad Hoc Committee had to show that its members would receive a meaningful distribution from the debtors' bankruptcy estates under a strict application of the absolute priority rule found in 11 U.S.C.S. § 1129(b)(2)(B), and that they were unable to represent their interests in the debtors' cases without an official committee, and they failed to meet that burden. The equity security holders were adequately represented without the need for an official committee.

In re Spansion, Inc., 2009 Bankr. LEXIS 3958 (Bankr. D. Del. December 18, 2009) (Carey, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 7:1102.02

§ 1106(a)(3) Duties of Trustee and Examiner; Duties of Trustee; Investigation of Debtor.

0110-026 **Chapter 11 trustee not liable for allegedly defamatory statements regarding debtor's president.**
 (Commercial) (B.A.P. 9th Cir.)

PROCEDURAL POSTURE: Appellant, the president of a company that declared chapter 11 bankruptcy, filed an action in Monterey County Superior Court (California), claiming that appellee, a trustee who was appointed to administer the company's bankruptcy estate, made defamatory statements. The trustee removed the case to the bankruptcy court for the Northern District of California, and that court dismissed the founder's claims. The president appealed.

OVERVIEW: Investors sued the president of a company that was engaged in the mortgage lending business, and the president placed the company into chapter 11 bankruptcy. The bankruptcy court appointed a trustee to administer the company's bankruptcy estate, and the trustee made statements about the president during a meeting of creditors and in a response he wrote to a letter the president sent to investors which accused the president, inter alia, of operating a Ponzi scheme. The president sued the trustee in state court, claiming that he committed libel and slander, and the trustee removed the case to the bankruptcy court. The bankruptcy court found that statements the trustee made were privileged under Cal. Civ. Code § 47(b), and it dismissed the president's action. The bankruptcy appellate panel agreed that statements the trustee made were privileged under California law but also found that the trustee was entitled to quasi-judicial immunity under federal law because he made the statements while performing functions within the scope of his duties as trustee.

Nilsen v. Neilson (In re Cedar Funding, Inc.), 2009 Bankr. LEXIS 3877 (B.A.P. 9th Cir. November 16, 2009) (Jury, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 7:1106.03[10][a]

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

0110-027 **Objection to inclusion of costs of title insurance premium incurred in the pre-petition state foreclosure action overruled.** (Bankr. S.D. Ohio)
 (Consumer)

PROCEDURAL POSTURE: The debtors, whose real property was subject to a foreclosure action initiated by movant lender, objected to a charge for the costs of a title insurance premium incurred in the pre-petition state foreclosure action as part of the creditor's allowed claim in the chapter 13 bankruptcy case, pursuant to 11 U.S.C.S. § 1322(e).

OVERVIEW: The debtors objected to the amount of the arrearage asserted by the creditor, and questioned the appropriateness of certain costs, including the foreclosure costs. In response, the creditor provided documentation to support the amount of the arrearage. A preliminary title report charge of \$ 496 included: \$ 171 for a title insurance premium. Montgomery County (Ohio) local rules did not require title insurance, and the debtors argued it was unnecessary. The creditor asserted that the title insurance premium was allowable because it was part of the parties' original agreement and was allowed under applicable state law. The debtors did not dispute that title insurance is a common and acceptable form of title evidence in Ohio, and it benefitted the mortgagor as well. It was not unreasonable for the creditor to choose to use a title insurance.

In re Thompson, 2009 Bankr. LEXIS 3905 (Bankr. S.D. Ohio December 15, 2009) (Humphrey, B.J.).
Collier on Bankruptcy, 15th Ed. Revised 8:1322.18

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

0110-028 **Confirmation of second modified plan denied due to treatment of IRS claim.** (*Bankr. D. Minn.*)
(Consumer)

PROCEDURAL POSTURE: The chapter 13 debtor filed an objection to the proof of claim of the United States Internal Revenue Service (IRS) asserting that the Debtor owed it a total of \$ 18,827.21, and the IRS filed an objection to the confirmation of the debtor's second modified plan.

OVERVIEW: Debtor's counsel insisted that the IRS's submission was so defective as that its claim should be permanently deprived of all secured status for this case. The debtor had attempted to leave all her exempt personal possessions at an IRS office in protest. The court noted that the IRS's failure to fill in one blank space on a form did not require such terminal consequences under Fed. R. Bankr. P. 3001(a). None of the debtor's complaints make out a sustainable objection to the secured component of the IRS's claim, as it appeared on the face of its proof of claim. The IRS also sought language in the plan to the effect that the debtor would timely file tax returns and amounts due on her returns in the future, to which the debtor objected. The court noted that 11 U.S.C.S. § 521(j) required the duty to perform that duty anyway. The debtor could not satisfy 11 U.S.C.S. § 1325(a)(3) unless she included tax compliance language in any further modified plan. Based on the debtor's evidence, the court found that IRS had a secured claim in the amount of \$ 2,230.42. The balance of the claim traceable to the tax years in issue, \$ 7,869.58, was unsecured.

In re Rowell, 2009 Bankr. LEXIS 3931 (*Bankr. D. Minn. December 15, 2009*) (Kishel, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 8:1325.04

BANKRUPTCY RULES (Post-2005 Act)

Rule 4007(c) Determination of Dischargeability of a Debt; Time for Filing Complaint Under § 523(c) in a Chapter 7 Liquidation, Chapter 11 Reorganization, or Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case; Notice of Tim

0110-029 **Creditor's adversary proceeding, misdelivered to state court before being delivered to bankruptcy court after deadline dismissed as untimely where no extension had been obtained.**
(Consumer) (*Bankr. D.N.J.*)

PROCEDURAL POSTURE: Plaintiff creditor brought an adversary proceeding against defendant bankruptcy debtor seeking a determination that a debt to the creditor was not dischargeable under 11 U.S.C.S. § 523(a). The debtor moved to dismiss the complaint as untimely under Fed. R. Bankr. P. 4007(c).

OVERVIEW: The creditor employed a delivery service to file the complaint, but the complaint was mistakenly delivered to a state court which forwarded the complaint to the bankruptcy court after the period expired for objecting to discharge of a debt. The bankruptcy court held that no enlargement of time was available to render the creditor's complaint timely since Rule 4007(c) only allowed for an extension of the period for filing a complaint under § 523(a) if a motion seeking such extension was filed before the period expired. Further, relief based on excusable neglect under Fed. R. Bankr. P. 9006(b)(1) was precluded since Rule 9006(b)(3) expressly stated that Rule 4007(c) was the exclusive method for enlarging the period to file a § 523(a) complaint.

Saddle River Valley Bank v. Garsia (Unpublished), 2009 Bankr. LEXIS 3890 (*Bankr. D.N.J. October 22, 2009*) (Steckroth, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 9:4007.04

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

§ 101(5) Definitions; "Claim".

0110-030 **Possibility of pursuing equitable remedy of reinstatement did not remove Americans with Disabilities Act claim from scope of discharge injunction.** (1st Cir.)
(Commercial)

PROCEDURAL POSTURE: Plaintiff former employee filed a complaint alleging her termination violated Title I of the Americans with Disabilities Act (ADA), 42 U.S.C.S. §§ 12111-12117, and seeking reinstatement, damages, and attorney's fees. Defendant former employer moved to dismiss, asserting that the suit was barred by a bankruptcy court's permanent injunction. The district court for the District of Rhode Island granted the motion. The employee appealed.

OVERVIEW: The employee conceded that, to the extent her initial claims would have obligated the employer to pay money damages, they were barred by the bankruptcy court's injunction. She argued instead that because she could have sought relief in the form of reinstatement if she prevailed in her ADA claims, the equitable remedy removed her reinstatement claim from the definition of "claims" under 11 U.S.C.S. § 101(5). The court found that, because money damages were an alternative remedy for reinstatement following wrongful termination, the employee's claim was within the jurisdiction of the bankruptcy court and so disallowed and discharged. The employee could not have preserved her right to reinstatement by limiting her recovery to equitable relief. The employee had proper notice of her opportunity to pursue her employment discrimination claims through the bankruptcy proceeding. Having failed to do so, her claims were disallowed and discharged, and the injunction was effective to bar her claims. The district court did not err in rejecting the employee's contention that she nonetheless should have been able to litigate her claims based on the doctrines of judicial estoppel and unclean hands.

Rederford v. US Airways, Inc., 2009 U.S. App. LEXIS 27258 (1st Cir. December 14, 2009) (Lynch, C.C.J.).

Collier on Bankruptcy, 15th Ed. Revised 2:101.05

§ 330 Compensation of Officers.

0110-031 **Debtor's neglect in not filing objections to trustee's compensation request was not due to excusable neglect.** (Bankr. E.D. Pa.)
(Consumer)

PROCEDURAL POSTURE: On remand from the district court for the Eastern District of Pennsylvania, the issue before the court was the chapter 7 trustee's final report, and specifically his request for compensation under 11 U.S.C.S. §§ 326 and 330, and the debtor's untimely objection to the trustee's compensation request. The burden was upon the debtor to demonstrate her excusable neglect for an extension of time to file the late objection.

OVERVIEW: The court was required on remand to address the four factors for excusable neglect set forth in *Pioneer Inv. Serv. Co. v. Brunswick Associates L.P.*: (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. The debtor's only reason for her failure to file a timely objection to the trustee's compensation request, and to file a timely notice of appeal from the court order approving it, was her alleged lack of notice of the request and the issuing order. However, the notices thereof were all sent by first class mail to the address provided to the clerk of court by the debtor, which address was placed on the court docket. She now claimed that address was no longer valid. The court found that the better exercise of discretion was to conclude that the debtor's neglect in not filing a timely notice of appeal from the trustee's compensation order was not excusable. The debtor's late objections were foreseeable, easily preventable, and her own fault.

In re Boyce, 2009 Bankr. LEXIS 3881 (Bankr. E.D. Pa. November 18, 2009) (Fox, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 3:330.01

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

0110-032 **Asbestos manufacturer was not covered by automatic stay in co-defendant's case.** (*S.D. Miss.*)
(Commercial)

PROCEDURAL POSTURE: Plaintiffs, who claimed injury from asbestos-containing products, entered into a settlement of their lawsuit with defendant asbestos manufacturer. They alleged the manufacturer breached the settlement agreement and brought an action demanding specific performance of the settlement agreement or damages for its breach. The defendant moved for summary judgment and defendant moved for summary judgment on the questions of contract validity and breach.

OVERVIEW: Granting summary judgment for the manufacturer, the court concluded that plaintiffs' claims were time-barred in part, and otherwise without merit. The court first concluded that the manufacturer and its codefendants entered into a settlement agreement with plaintiffs by which they agreed to pay a sum certain to each plaintiff who filed qualifying settlement documents. The manufacturer contended that any claim that it failed to make the first six \$ 200,000 payments was barred by the three-year statute of limitations of Miss. Code Ann. § 15-1-49, since plaintiffs' complaint was filed more than three years after those payments were due. The court ruled that the only reasonable interpretation of the agreement was to require that all claims for payment thereunder be submitted no later than May 1, 2003. This was not done. The manufacturer sought an order granting it the protection of the automatic stay from the bankruptcy court administering its codefendant's case, but its efforts were rejected. There was never a time when the automatic stay applied to the manufacturer. The bankruptcy did not render performance by plaintiffs or by the manufacturer impossible for any period of time.

Everitt v. Pneumo Abex, LLC, 2009 U.S. Dist. LEXIS 115837 (*S.D. Miss. December 10, 2009*) (*Lee, D.J.*).
Collier on Bankruptcy, 15th Ed. Revised 3:362.03[3]

0110-033 **Violation of stay not established where creditor's knowledge of filing was unclear.** (*Bankr.*)
(Consumer) *D.N.M.*)

PROCEDURAL POSTURE: Debtor filed an adversary proceeding against defendants, a bank and the bank's attorney, claiming that the bank and the attorney violated 11 U.S.C.S. § 362(a)(1), (3), (4), (5), and (6), and that the attorney violated N.M. Stat. Ann. § 36-2-17, when they prosecuted a foreclosure action against real property the debtor owned after the debtor declared bankruptcy. The parties filed cross-motions for summary judgment.

OVERVIEW: The bank filed an action state court on March 9, 2005, to foreclose a mortgage it held on property the debtor owned, and it filed an amended complaint on March 16, 2005. The bank served its original complaint before the debtor declared bankruptcy on March 21, 2005, and served its amended complaint after the debtor declared bankruptcy, and the debtor filed an adversary proceeding against the bank and its attorney, claiming, inter alia, that they violated 11 U.S.C.S. § 362. The bank and the attorney moved for summary judgment, claiming that the debtor's claims were barred by the doctrines of res judicata and collateral estoppel because they were considered and rejected by the state court after the bank was allowed to proceed with its foreclosure action. The court found that neither the bank nor its attorney established that the debtor's claims were considered by the state court, and there were issues of fact about whether the bank knew the debtor had declared bankruptcy at the time it served its amended complaint that precluded summary judgment. The court also found that it did not have jurisdiction to hear the debtor's claim that the attorney violated N.M. Stat. Ann. § 36-2-17.

Kline v. Deutsche Bank Nat'l Trust Co. (In re Kline), 2009 Bankr. LEXIS 3895 (*Bankr. D.N.M. November 25, 2009*) (*Jacobvitz, B.J.*).
Collier on Bankruptcy, 15th Ed. Revised 3:362.03[3]

§ 523(a)(4) **Exceptions to Discharge; Types of Debt Excepted; Fiduciary Fraud, Embezzlement, or Larceny.**

0110-034 **Debt to senior living facility was dischargeable where debtor owed fiduciary duty to mother but not to facility.** (*Bankr. D. Md.*)
(Consumer)

PROCEDURAL POSTURE: Plaintiff nursing care facility brought an adversary proceeding against defendant bankruptcy debtor seeking a determination that a debt to the facility for the care of the debtor's mother was nondischargeable under 11 U.S.C.S. § 523(a)(4) based on defalcation of the debtor in his fiduciary capacity.

OVERVIEW: Due to the mother's unstable mental condition, the agreement admitting the mother to the facility was executed by the debtor's brother and the debtor was appointed as the mother's attorney-in-fact. The facility contended that the debtor had control of funds of the mother after her death and failed to pay the facility the amount owed for the mother's care. The bankruptcy court held that nondischargeability of any debt to the facility was not warranted based on fiduciary defalcation since the debtor had no fiduciary duty to the facility. Regardless of the debtor's fiduciary obligations with regard to his mother, the debtor had no fiduciary relationship with the facility and thus the debtor committed no fiduciary defalcation with regard to the facility.

Charles County Nursing & Rehab. Ctr. v. Marbury (In re Marbury), 2009 Bankr. LEXIS 3920 (Bankr. D. Md. December 2, 2009) (Mannes, B.J.).

Collier on Bankruptcy, 15th Ed. Revised 4:523.10

§ 544 Trustee As Lien Creditor And As Successor To Certain Creditors And Purchasers.

0110-035 **Trustee's claim against law firm for aiding and abetting debtor in breaching fiduciary duty to (Commercial) creditors dismissed.** (*Bankr. D. Colo.*)

PROCEDURAL POSTURE: Plaintiff brought an adversary proceeding against defendant law firm, pre-petition counsel to the debtor, alleging it aided and abetted, and conspired with, the directors and officers of the debtor in breaching their fiduciary duties to general creditors. The parties consented to the bankruptcy judge entering final orders and a judgment on the claims tried before it.

OVERVIEW: The trustee sought money damages for the law firm's role in the breach of officers' and directors' fiduciary duties. The source of the trustee's authority to bring the claims was the strong-arm powers of 11 U.S.C.S. § 544. In March 2001, the debtor granted a security interest for a bridge loan to a creditor with close ties to management, although it was not deemed to be an insider for purposes of 11 U.S.C.S. §§ 547(b)(4)(B) and 101(31)(B). The trustee claimed that was an avoidable transfer and was a breach of the debtor's directors' fiduciary duties. The court considered only whether the law firm's conduct in drafting and closing the bridge loans and in the transition from its representation of the debtor to a new attorney amounted to aiding and abetting. The court distinguished between direct and derivative claims in the context. Applying Colorado choice of law rules, under the internal affairs doctrine, Delaware law governed the determination of the directors' liability to the creditors. Under either state's law, the pre-petition approval and consummation of the bridge loans was not a breach of fiduciary duty to other creditors, or any other party.

Hill v. Gibson Dunn & Crutche LLP (In re ms55, Inc.), 2009 Bankr. LEXIS 3884 (Bankr. D. Colo. December 4, 2009) (Campbell, B.J.).

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