

April 2012

Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

April 16, 2012

Issue 3

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§ 303(i) Involuntary Cases; Judgment upon Dismissal.

0412-071 **Petitioning creditors' assertion of reliance on advice of counsel defense to bad faith dismissal of involuntary case resulted in waiver of attorney client privilege from pre-filing period through hearing date.** (*Bankr. D.N.J.*)
(Commercial)

PROCEDURAL POSTURE: At issue in this involuntary bankruptcy was to what extent the attorney-client privilege was waived as to attorney-client communications between the petitioning creditors and predecessor counsel if the petitioning creditors raised a reliance on advice of counsel defense to a bad faith filing charge under 11 U.S.C.S. § 303(i).

OVERVIEW: Petitioning creditors filed an involuntary bankruptcy petition. The petition was later dismissed. The purported debtor requested damages under 11 U.S.C.S. § 303(i). At issue here was the extent to which the attorney-client privilege was waived as to attorney-client communications between the petitioning creditors and predecessor counsel. Petitioning creditors argued that waiver should be limited to their communications with predecessor counsel that occurred prior to the filing of the involuntary petition. On the other hand, the debtor contended that, if the advice of counsel defense was employed, the court must direct that the attorney-client privilege was waived as to all communications by the petitioning creditors with predecessor counsel for the additional time period from the petition date through the date of dismissal. The court adopted a middle position and ruled that the privilege was waived as to all attorney-client communications between the petitioning creditors and predecessor counsel for the pre-filing period and the post-filing period through the eve of the dismissal hearing.

In re Apollo Health St., Inc., 2012 *Bankr. LEXIS* 1252 (*Bankr. D.N.J. March 23, 2012*) (*Winfield, B.J.*).
Collier on Bankruptcy, 303.33

0412-072 **Involuntary debtor's state law claims against petitioning creditors were preempted by § 303(i).**
(Consumer) (*Bankr. S.D. Fla.*)

PROCEDURAL POSTURE: Plaintiff putative chapter 7 debtor filed a complaint against defendants, petitioning creditors and banks, for attorney's fees, costs, and damages pursuant to 11 U.S.C.S. §§ 303(i) and 105. In addition, he sought to recover damages based on state law claims of abuse of process and malicious prosecution and state law theories of recovery such as respondeat superior. The petitioning creditors and banks moved to dismiss the complaint.

OVERVIEW: Initially, the court determined that the word "petitioner" in 11 U.S.C.S. § 303(i) included those agents and/or principals who signed the involuntary petition for or on behalf of the petitioning creditors under principles of agency law and the doctrine of respondeat superior. The court rejected the putative debtor's attempt to impose liability on parties other than the petitioning creditors based on 11 U.S.C.S. § 105(a) or to use § 105(a) in conjunction with 11 U.S.C.S. § 303(i). Thus, his claims against the bank defendants under 11 U.S.C.S. § 105(a) were dismissed. With respect to the petitioning creditors, the court did not need to rely on § 105(a), as 11 U.S.C.S. § 303(i) provided authority for those claims. The putative debtor's state law claims for malicious prosecution and abuse of process were preempted by § 303(i). His claims based on aiding and abetting liability were dismissed, as there was no cause of action under § 303(i) for aiding and abetting liability. The motions to dismiss claims of joint and several liability and the claim for appellate attorneys fees were denied.

Rosenberg v. DVI Receivables, XIV, LLC (In re Rosenberg), 2012 *Bankr. LEXIS* 1253 (*Bankr. S.D. Fla. March 23, 2012*) (*Cristol, B.J.*).

Collier on Bankruptcy, 303.33

0412-073 **Involuntary debtor not entitled to seek fees and costs from petitioning creditors for filing case that was dismissed.** (*Bankr. S.D. Fla.*)
(Consumer)

PROCEDURAL POSTURE: Defendants, an attorney and a law firm (law firm defendants), filed a motion to dismiss plaintiff alleged debtor's complaint, which sought fees and costs pursuant to 11 U.S.C.S. § 303(i)(1), damages and punitive damages for the alleged bad faith filing of any involuntary petition

pursuant to § 303(i)(2), and damages for alleged malicious prosecution and abuse of process pursuant to state law.

OVERVIEW: The law firm defendants represented petitioners which filed an involuntary petition against the debtor. The court granted the debtor's motion to dismiss, after which the debtor brought the instant action against the petitioners and the law firm defendants. The court held that neither § 303(i)(1) nor § 303(i)(2) permitted shifting a successful alleged debtor's fees to the losing petitioners' attorneys. The court also held that making a claim under 11 U.S.C.S. § 105 and Fed. R. Bankr. P. 9011 did not provide the debtor with a basis for relief because rights available under § 303(i), Rule 9011, and § 105 were separate and independent, and § 105 did not permit a court to create substantive rights that did not otherwise exist under the Bankruptcy Code. To the extent the debtor had any claims under Rule 9011 or § 105, he failed to preserve them because the debtor's motion to dismiss did not assert a claim under Rule 9011 and his motion to award fees and costs likewise did not seek sanctions under Rule 9011. The court also held that the Bankruptcy Code preempted the debtor's state law malicious prosecution and abuse of process claims.

Rosenberg v. DVI Receivables, XIV, LLC (In re Rosenberg), 2012 Bankr. LEXIS 1254 (Bankr. S.D. Fla. March 23, 2012) (Cristol, B.J.).

Collier on Bankruptcy, 303.33

§ 350(b) Closing and Reopening Cases; When to Reopen.

0412-074 **Motion to reopen to add claim for lease payments vacated in light of equitable concerns and questions regarding original omissions from schedules.** (Bankr. D. Mass.)
(Consumer)

PROCEDURAL POSTURE: The debtor previously filed a chapter 7 case and received a discharge. Later, the debtor moved to reopen his case under 11 U.S.C.S. § 350(b) to add plaintiff creditors' claim for lease payments, which the court allowed. Here, plaintiff creditors objected to discharge based on their contention that the debt was post-petition, and both parties filed cross-motions for summary judgment.

OVERVIEW: The debtor previously received a discharge in his chapter 7 case. The debtor later filed a motion to reopen, which the court granted, and listed the creditors' claim for lease payments, taxes, fees, and deposit. The creditors maintained that the obligation arising out of a lease termination agreement was a post-petition debt not affected by the debtor's discharge. The debtor argued that the debt arose from a personal guaranty, which was an obligation that he incurred well before he filed for bankruptcy protection. The court found that the debtor concealed vital information from the creditors that affected their negotiating position with respect to the lease termination agreement and also withheld vital information from the chapter 7 trustee. Based upon the record, the court stated that it was incapable of concluding that the debtor's omission of the creditors from his initial schedules was innocent. But even if his omissions were innocent, the court found that the equities compelled the entry of an order vacating the motion to reopen. In view of the court's decision to reconsider its order reopening the debtor's case, the court did not reach the merits of the cross-motions.

Rodney v. Arias (In re Arias), 2012 Bankr. LEXIS 1140 (Bankr. D. Mass. March 16, 2012) (Feeney, B.J.).

Collier on Bankruptcy, 350.03

§ 362 Automatic Stay.

0412-075 **Stay did not apply to action seeking to enjoin allegedly unlawful postpetition conduct by debtor.** (Bankr. D. Colo.)
(Commercial)

PROCEDURAL POSTURE: Movant, the assignee of all of debtor's right, title and interest in certain intellectual property including certain patents, asked the court to clarify an earlier order granting relief from stay per 11 U.S.C.S. § 362 and allowing movant to seek injunctive and monetary relief for debtor's alleged postpetition infringement of movant's rights. Debtor did not file papers in opposition to the motion for clarification.

OVERVIEW: Disputes between movant and debtor as to ownership of the intellectual property were litigated earlier in the case, and culminated in a state court order ruling that debtor was divested of any such interests and that all such interests were vested in movant. Claiming, however, that debtor had engaged in postpetition conduct that infringed on movant's rights, movant obtained relief from stay allowing him to proceed against debtor in state court for equitable and monetary relief, conditioned on

the proviso that movant would be required to obtain an additional order before taking any steps to enforce any resulting money judgment. Only later did debtor argue that the only relief that movant could pursue without violating the stay was declaratory relief. On movant's request for clarification, the court rejected debtor's claim. First, as § 362(a)(1) applied only to prepetition conduct, it did not apply here. Next, because the estate had no interest in the property, it having been assigned to movant, § 362(a)(3) did not apply. Finally, since the automatic stay would not apply to an action to enjoin postpetition conduct that was allegedly unlawful in any event, movant had not violated it.

In re Colorado Altitude Training LLC, 2012 Bankr. LEXIS 1276 (Bankr. D. Colo. March 23, 2012) (Brown, B.J.). Collier on Bankruptcy, 362.01

0412-076 **Stay could not be extended to cover lawsuits and foreclosures against non-debtors.** (Bankr. (Commercial) E.D.N.C.)

PROCEDURAL POSTURE: Chapter 11 debtors filed a motion to extend the automatic stay to lawsuits and foreclosures filed against non-debtors, contending that there was sufficient identity of interest between the non-debtors and the debtors that the actions would distract the non-debtors from reorganizing, which would irreparably harm the bankruptcy estate.

OVERVIEW: The creditor contended that 11 U.S.C.S. § 362 did not protect the non-debtors individually because they were non-bankrupt guarantors of the debtors, and the court agreed. The lawsuits did not subject the debtors to any additional liability. The guarantor relationship at issue did not present any unusual circumstances justifying the extension of the stay. The non-debtors, as an inducement to the creditor to lend to the debtors, offered their absolute and unconditional personal guaranties. This was a common practice in financing transactions and did not present an unusual circumstance in which there was such identity between the debtor and the non-debtors that the debtors might be said to be the real party defendants. The non-debtors were not without a remedy. They retained the ability to file an individual bankruptcy petition under the appropriate chapter should they determine that it was in their interest to do so to gain the benefit of the automatic stay.

In re Robert F. Youngblood Constr. Co., 2012 Bankr. LEXIS 1214 (Bankr. E.D.N.C. March 22, 2012) (Doub, B.J.). Collier on Bankruptcy, 362.01

§ 362(d)(3) Automatic Stay; Relief from Stay; Acts Against Single Asset Real Estate by Secured Creditor.

0412-077 **Single asset real estate case dismissed due to inability to propose feasible plan.** (Bankr. N.D. (Commercial) Ill.)

PROCEDURAL POSTURE: A secured creditor of chapter 11 debtor filed a motion to modify the stay pursuant to 11 U.S.C.S. § 362(d)(3) or in the alternative to dismiss the debtor's chapter 11 single asset real estate case.

OVERVIEW: The debtor owned two parcels of choice real estate. The debtor executed a promissory note for a loan from the creditor secured by the real estate. The debtor's plan required payment from the reorganized debtor of at least \$65 million and possibly up to \$79 million (if the creditor's figures were accepted) within three years of the plan's effective date. The creditor argued inter alia that the debtor's latest plan was not financially feasible and that it also had legal defects for a number of reasons. It sought dismissal on the basis that the debtor had been unable to present a confirmable plan despite having had ample opportunity to do so. The court held that, even if the debtor's projection of \$65 million to be paid was accurate, whether it could make that payment was highly speculative. An offer letter from an investor did not legally obligate the investor to any amount beyond \$6 million, and reliance on its vague statement as to a possible funding increase could not show feasibility. In addition, it appeared that the debtor did not expect any significant cash flow from operations before the creditor would be entitled to its payment.

In re Olde Prairie Block Owner, LLC, 2012 Bankr. LEXIS 1128 (Bankr. N.D. Ill. March 14, 2012) (Schmetterer, B.J.). Collier on Bankruptcy, 362.07[5]

§ 365(a) Executory Contracts and Unexpired Leases; Trustee's Right to Assume or Reject.

0412-078 **Non-compete agreement was not an executory contract and could not be rejected.** (Bankr. N.D.

(Commercial) *Ohio*

PROCEDURAL POSTURE: A chapter 13 debtor sought confirmation of his plan over the objection of the debtor's former employer. The employer objected to the plan to the extent that it provided for the rejecting of a non-compete agreement under 11 U.S.C.S. § 365(a).

OVERVIEW: The issue was whether the non-compete agreement was an executory contract such that it could be rejected under § 365(a). The court concluded that the contract was not executory under either the Countryman definition or the functional approach. The debtor did not dispute the fact that he engaged in competitive activities that were proscribed by the agreement and that his employment was terminated for this reason. Because the debtor's failure to refrain from engaging in competitive activities was a material breach, the employer had no continuing obligation under the agreement. Rejection of the agreement did not relieve the debtor of the obligation not to engage in competitive activities, and because the debtor had already breached the agreement, rejection was not necessary to accomplish the purpose of making the employer a creditor with a claim in the case.

In re Spooner, 2012 Bankr. LEXIS 1151 (Bankr. N.D. Ohio March 16, 2012) (*Whipple, B.J.*).
Collier on Bankruptcy, 365.02[1]

§ 502(b)(9) Allowance of Claims or Interests; Disallowance; Proof of Claim not Timely Filed.

0412-079 **General unsecured portion of late filed amended proof of claim that did not relate back to original proof of claim disallowed.** (*Bankr. S.D.N.Y.*)
 (Consumer)

PROCEDURAL POSTURE: Before the court was debtors' motion pursuant to 11 U.S.C.S. § 502 and Fed. R. Bankr. P. 3007, seeking to expunge the late-filed general unsecured portion of Claim No. 10 filed by claimants.

OVERVIEW: The claimants asserted that the claim related back to, and merely amended, a timely-filed claim, and should therefore be allowed. The real question before the court was whether a secured \$204,309 bonded-mechanics lien claim could morph into a wholly different \$992,420 claim, filed 20 months after expiration of the Bar Date and substantially after conclusion of the disclosure statement hearing. The court did not believe it could. Under 11 U.S.C.S. § 502(b)(9), a claim had to be disallowed, with narrow exceptions not applicable to the instant motion, if proof of such claim was not timely filed. Late-filed amendments to proofs of claim were freely allowed where it would not prejudice other parties. These amendments, however, had to be closely scrutinized to ensure that the amended claim was not an attempt to file a new claim under the guise of amendment. In the instant case, the claimant filed its Third Proof of Claim (POC) on October 20, 2011, over a year and a half after the Bar Date of January 6, 2010. The Third POC would therefore be allowed only if the Second POC gave notice of it, and if it related back to the Second POC. Neither of these requirements was satisfied.

In re Uvino, 2012 Bankr. LEXIS 1089 (Bankr. S.D.N.Y. March 14, 2012) (*Lifland, B.J.*).
Collier on Bankruptcy, 502.03[10]

§ 521(a)(2)(B) Debtor's Duties; Required Acts; Where Individual Debtor's Debt is Secured by Property of the Estate; Performance.

0412-080 **Repossession did not violate stay where debtor failed to timely specify intention to reaffirm on original contract terms.** (*Bankr. M.D.N.C.*)
 (Consumer)

PROCEDURAL POSTURE: A chapter 7 debtor filed a motion for sanctions against a creditor alleging that its repossession of her vehicle violated the automatic stay under 11 U.S.C.S. § 362(a). The debtor requested sanctions for damages incurred and an order directing the creditor to return the vehicle. The creditor alleged that the debtor's motion was filed in violation of Fed. R. Bankr. P. 9011 and requested reimbursement of its reasonable attorney's fees.

OVERVIEW: The debtor filed a statement of intention indicating her intent to retain her vehicle and to reaffirm the debt with the creditor. The creditor sent the debtor's counsel a reaffirmation agreement, but her counsel responded by indicating that he could not recommend the agreement as proposed and that the debtor was interested in negotiating. The creditor did not respond. The issue before the court was whether the debtor performed her intention as required by 11 U.S.C.S. § 521(a)(2)(B) and satisfied 11 U.S.C.S. § 362(h)(1)(B) such that the automatic stay did not terminate, despite the fact that she did not

enter into a reaffirmation agreement. The debtor contended that she performed her intention, within the meaning of § 521(a)(2)(B), by stating her intention to reaffirm and expressing interest in negotiating payment terms. The court held that these steps, taken together, were not sufficient to constitute performance. The debtor was not entitled to a safe harbor, as she did not specify her intention to reaffirm on the original contract terms. The creditor's request for attorney's fees was denied, as the debtor's motion was not frivolous and not filed for an improper purpose.

In re Beard, 2012 Bankr. LEXIS 1095 (Bankr. M.D.N.C. March 14, 2012) (Aron, B.J.).
Collier on Bankruptcy, 521.14

§ 522 Exemptions.

0412-081 **Judicial lien avoided as impairing debtor's exemption except to the extent securing additional fee award that was a domestic support obligation.** (Bankr. D. Del.)
 (Consumer)

PROCEDURAL POSTURE: During child custody proceedings, a bankruptcy debtor was ordered by a state court to pay attorney fees to the debtor's former spouse, was subsequently assessed penalty interest for failing to pay the fees, and was thereafter ordered to pay additional fees to the spouse. The debtor moved to avoid the spouse's judicial lien based on the fee and interest awards as impairing the debtor's exemptions under 11 U.S.C.S. § 522.

OVERVIEW: The husband contended that the fee awards were in the nature of domestic support obligations which were nondischargeable, and thus the spouse's judicial lien based on the awards was not subject to avoidance. The bankruptcy court first held that, while it was likely that the initial fee award was intended to reimburse the spouse for being required to make court appearances to obtain relief already granted, the record did not expressly make such a finding and it would be speculative to find that the award was a domestic support obligation. Further, the penalty interest award was intended to penalize the debtor for alleged abuse of the judicial system and could not be deemed a domestic support obligation. However, the award of additional attorney fees was intended to reimburse the spouse for attending court hearings which should have been unnecessary in view of prior state-court rulings, and thus the fees were in the nature of a domestic support obligation. Thus, the debtor had nonexempt personal property which remained subject to the judicial lien to the extent of the additional fee award.

In re Coleman, 2012 Bankr. LEXIS 1114 (Bankr. D. Del. March 16, 2012) (Sontchi, B.J.).
Collier on Bankruptcy, 522.01

§ 522(d)(1) Exemptions; Types of Exempt Property; Interest in Residential Property or Burial Plot.

0412-082 **Debtor not entitled to exemption in farm property he could not establish was his residence.**
 (Consumer) (Bankr. W.D. Ky.)

PROCEDURAL POSTURE: A debtor owned a residential property and a farm property, and the debtor claimed the farm property as exempt under 11 U.S.C.S. § 522(d)(1) as the debtor's residence. A creditor secured by the farm property objected to the exemption.

OVERVIEW: The debtor contended that he stayed at both of the properties and sometimes with a son for health reasons, but the residential property was uninhabitable and the debtor wanted to live at the farm property. The bankruptcy court held that the debtor failed to show that the farm property was his residence, and thus the debtor could not claim an exemption in the farm property. The debtor's residential property was indicated as his residence in his bankruptcy schedules and driver's license, the debtor's health problems permitted only occasional stays at the farm property which had minimal amenities, and the debtor had no intent or ability to use the farm property as a permanent residence.

In re Kaplan, 2012 Bankr. LEXIS 1255 (Bankr. W.D. Ky. March 26, 2012) (Stout, B.J.).
Collier on Bankruptcy, 522.09[1]

§ 523 Exceptions to Discharge.

0412-083 **Debt was nondischargeable where evidence showed debtors did not intend to repay loan and fabricated testimony.** (Bankr. D. Hawaii)
 (Consumer)

PROCEDURAL POSTURE: The Chapter 7 trustee for a mortgage company sued for a determination that a debt owed to the mortgage company by debtors, the daughter and son-in-law of the mortgage

company's ex-president, was nondischargeable per 11 U.S.C.S. § 523. At issue was whether debtors obtained a loan from the company without any intention to repay the same.

OVERVIEW: Though debtors had modest income, they repeatedly used credit cards to pay for items that they could not afford. When, by 2008, they had \$75,000 in credit card debt, debtors obtained a \$90,000 line of credit through the wife's father. They apparently agreed to pay interest monthly and to pay the balance on demand, but did neither. By the time that the company filed chapter 7, debtors owed it about \$90,000. Debtors then filed chapter 7, presumably seeking discharge thereof. Plaintiff sued on claims that debtors' obligation to the company was nondischargeable. The court so held. It disbelieved debtor husband's testimony that he intended to repay the debt by starting a landscaping business or that they had an oral agreement with the ex-president to provide landscaping at his home as a form of repayment, finding that such testimony was inconsistent with the evidence and that the testimony reflected a recent fabrication. It also found that debtors knew that they could not repay the loan and that in fact when they accepted it, they had no present intent to repay it. As the evidence established all of the elements of a § 523(a)(2)(A) claim, plaintiff was entitled to the requested ruling.

Field v. Baldwin (In re Baldwin), 2012 Bankr. LEXIS 1110 (Bankr. D. Hawaii March 15, 2012) (Faris, B.J.).
Collier on Bankruptcy, 523.01

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

0412-084 **Restitution settlement was nondischargeable due to debtor's fraud and misrepresentation.**
(Consumer) (Bankr. D.N.M.)

PROCEDURAL POSTURE: Creditor sought rulings that an obligation owed to it under a settlement agreement with defendant debtor was nondischargeable under numerous provisions in 11 U.S.C.S. § 523.

OVERVIEW: When debtor's LLC failed to make any payments on an equipment lease with plaintiff involving a trackhoe and disputes arose, the parties ultimately entered into a settlement agreement. Soon after debtor's chapter 7 filing, the trackhoe vanished. Debtor was charged criminally with theft but entered into a plea agreement requiring him to pay \$125,000 in restitution. Plaintiff then filed the within complaint seeking to recover damages of \$632,088 less certain credits, a debt claimed by it to be nondischargeable. The court found that plaintiff had proven all of the elements of § 523(a)(2)(A) but that all of its other claims were deficient. First, § 523(a)(2)(B) did not apply because plaintiff did not satisfy the "statement in writing" element. Section 523(a)(4) did not apply because debtor was not acting in a fiduciary capacity and did not commit either embezzlement or larceny. Nor was relief warranted under § 523(a)(6) as there was no showing of a willful and malicious injury to plaintiff's property. Finally, there was no merit to plaintiff's § 523(a)(11) claim, which required proof of fraud or defalcation in a fiduciary capacity relating to certain financial institutions.

CAGO, Inc. v. Slade (In re Slade), 2012 Bankr. LEXIS 1127 (Bankr. D.N.M. March 15, 2012) (Jacobovitz, B.J.).
Collier on Bankruptcy, 523.08[1]

0412-085 **Judgment debt based on debtor's execution of false affidavit was nondischargeable.** (Bankr.
(Consumer) N.D. Ohio)

PROCEDURAL POSTURE: Judgment creditor filed an adversary complaint alleging that a judgment debt owed to it by defendant debtor should be excepted from his discharge under 11 U.S.C.S. § 523(a)(2)(A). Plaintiff filed a motion for summary judgment.

OVERVIEW: A state court found that debtor, owner of a construction company, contracted with creditor for the installation of an infrastructure on the creditor's property. The parties' contract included a payment procedure whereby debtor provided an "Affidavit of Contractor" representing that all subcontractors and materialmen had been paid in full. The state court found that debtor executed such an affidavit falsely, which resulted in creditor having to pay twice for the same materials. A final judgment was entered by the state court against debtor. In this proceeding, creditor sought a nondischargeability determination under § 523(a)(2)(A) with respect to the debt owed by debtor pursuant to the state court judgment. It relied on the collateral estoppel effect of the state court judgment in arguing that it was entitled to judgment as a matter of law. The court held that the state court findings satisfied the elements of § 523(a)(2)(A) and the requirements of collateral estoppel. While there was not a specific state court

finding on justifiable reliance, the court concluded that there was no genuine dispute that creditor's reliance on debtor's misrepresentation was justified.

Sloan Dev., LLC v. Gill (In re Gill), 2012 Bankr. LEXIS 1133 (Bankr. N.D. Ohio March 15, 2012) (Whipple, B.J.).
Collier on Bankruptcy, 523.08[1]

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

0412-086 Judgment debt was nondischargeable due to debtor's embezzlement, on which state court did (Consumer) not rule. (*Bankr. S.D. Tex.*)

PROCEDURAL POSTURE: Plaintiff judgment creditor filed an adversary proceeding against chapter 7 debtor, seeking a determination that the debtor owed him a debt in the amount of \$576,785 that was nondischargeable under 11 U.S.C.S. § 523(a)(2), (4), and (6). The court granted the debtor's motion for summary judgment on the creditor's claim under § 523(a)(2) and tried the creditor's claims under § 523(a)(4) and (6).

OVERVIEW: The creditor filed suit in a Texas court, alleging that the debtor and another person who owned a construction company breached promises they made to share net profits the company earning on projects the creditor managed, and the Texas court entered judgment after a jury trial which awarded the creditor \$576,785 in damages and attorney's fees. The debtor declared bankruptcy in August 2009, and the creditor filed an adversary proceeding in the bankruptcy court, seeking a determination that the judgment he obtained in state court created a debt that was nondischargeable under 11 U.S.C.S. § 523(a)(2), (4) and (6). The court found that the creditor was estopped from claiming that the debt was nondischargeable under § 523(a)(2)(A) because the requirements for proving fraud under § 523(a)(2)(A) and Texas law were the same and the Texas court found that the creditor did not prove that the debtor committed fraud. However, the state court was not asked to consider the creditor's claims that the debtor committed embezzlement and willfully and maliciously injured the creditor, and the state court's judgment was nondischargeable because the creditor proved both claims.

Williams v. Laughlin (In re Laughlin), 2012 Bankr. LEXIS 1268 (Bankr. S.D. Tex. March 23, 2012) (Bohm, B.J.).
Collier on Bankruptcy, 523.10

§ 523(a)(8) Exceptions to Discharge; Types of Debt Excepted; Educational Loans.

0412-087 Student loan debt was dischargeable where debtor suffered from serious mental illness. (Consumer) (*Bankr. N.D. Ala.*)

PROCEDURAL POSTURE: Debtor filed a complaint against defendant student loan creditor to determine the dischargeability of his student loan debt under 11 U.S.C.S. § 523(a)(8).

OVERVIEW: The debtor was diagnosed with paranoid schizophrenia, anxiety disorder, and depression and adjudicated disabled by the Social Security Administration (SSA). The court applied the three-part Brunner test in determining that it would be an undue hardship to except the student loan debt from discharge. The debtor had shown that he could not maintain a minimal standard of living even if not forced to repay his student loan debt. The debtor's income was slight and his expenses were reasonable. Despite that fact, the debtor was still unable to meet all of his monthly obligations without using the proceeds from a retroactive award given to him by the SSA. The debtor suffered from a serious, ongoing, incurable mental illness which would likely continue to interfere with his ability to work. The court rejected the creditor's argument that the debtor had not made good faith efforts to repay the loans owed to it because he had not maximized his income or minimized his rental expense because the debtor had shown that he maximized his income to the best of his ability and he had sacrificed his entertainment budget in order to live in a more expensive apartment that better suited his needs.

Fields v. Education Credit Mgmt. Corp. (In re Fields), 2012 Bankr. LEXIS 1280 (Bankr. N.D. Ala. March 23, 2012) (Stilson, B.J.).
Collier on Bankruptcy, 523.14

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

0412-088 Bank violated discharged injunction by contacting debtors to collect debt owed to predecessor

(Consumer) **lender.** (*Bankr. M.D. Fla.*)

PROCEDURAL POSTURE: Chapter 7 debtors filed a motion to reopen their bankruptcy case and a motion seeking sanctions against a bank national association ("bank"), claiming that the bank violated 11 U.S.C.S. § 524(a) when its agents contacted the debtors after a debt they owed the bank's predecessor was discharged pursuant to 11 U.S.C.S. § 727 and demanded that the debtors pay the debt. The court held a hearing on the debtors' motion for sanctions.

OVERVIEW: The debtors declared bankruptcy in October 2010, that they listed a home loan servicing business as a secured creditor that was owed \$153,598. The court sent notice of the debtors' bankruptcy case to the business; however, the business did not seek relief from the automatic stay or otherwise make an appearance in the debtors' case, and the debtors received a discharge pursuant to 11 U.S.C.S. § 727 in January 2011. A bank acquired the mortgage on the debtors' property and its agents contacted the debtors on 38 occasions after they received their discharge, demanding payment. The court found that the bank violated the discharge injunction that was imposed pursuant to 11 U.S.C.S. § 524(a) and caused the debtors emotional distress, and it awarded the debtors \$10,000 in damages and 2,500 in attorney's fees. The bank's agents continued to contact the debtors after the bank was informed by the debtors and their attorney that the debt was discharged, and in doing so they willfully and intentionally violated the discharge injunction and acted in bad faith. The debtors' damages included significant aggravation, emotional distress, inconvenience, and attorney's fees.

In re Humphrey, 2012 Bankr. LEXIS 1113 (*Bankr. M.D. Fla. March 14, 2012*) (*Briskman, B.J.*).
Collier on Bankruptcy, 524.02

§ 541(a)(1) Property of the Estate; Creation and Composition of the Estate; All Legal or Equitable Interests.

0412-089 **Debtor could not avoid lien as to tenancy by the entireties property against both debtor and non-debtor spouse as only debtor's interest was property of the estate.** (*Bankr. D. Md.*)
(Consumer)

PROCEDURAL POSTURE: A chapter 13 debtor filed a motion for valuation of collateral and to avoid the security interest of a creditor. He asked the court to bifurcate the creditor's claim under 11 U.S.C.S. § 506(a) into secured and unsecured claims.

OVERVIEW: The debtor and his spouse owned the property, which was investment property and not the debtor's principal residence, as tenants by the entirety. By asking the Court to void the deed of trust lien against both his and his spouse's interest in the property, the debtor sought to void the lien to the extent it secured a claim against the debtor and his non-debtor spouse. The Court declined to do so, finding that 11 U.S.C.S. § 506(d) voided the lien only to the extent it secured a claim against the debtor. Only the debtor's interest in tenants by the entireties property became property of the estate, at under 11 U.S.C.S. § 541(a)(1).

Gottron v. OneWest Bank (In re Gottron), 2012 Bankr. LEXIS 1142 (*Bankr. D. Md. March 16, 2012*) (*Catliota, B.J.*).
Collier on Bankruptcy, 541.03

§ 548(a) Fraudulent Transfers and Obligations; Elements Of Fraudulent Transfers.

0412-090 **Fraudulent transfer claim failed where debtor received reasonably equivalent value.** (*Bankr. S.D. Fla.*)
(Commercial)

PROCEDURAL POSTURE: Adversary plaintiff debtor in possession brought a claim against defendant creditors, alleging fraudulent transfers in violation of 11 U.S.C.S. § 548(a) and Fla. Stat. Ann. § 726.105(1)(b). The creditors moved for summary judgment on that cause of action. Various creditors had loaned the debtor \$4,247,150 to be secured by the debtor's real property.

OVERVIEW: Debtor's real property had been sold, and the dispute concerned the proceeds. Creditors asserted that the loan documents, including a promissory note and mortgage, could not be avoided under applicable federal or state law because the transaction involved the exchange of reasonably equivalent value. The court found that debtor's valuation of the collateral at the time of the loan was irrelevant, as the debtor received reasonably equivalent value when it secured the \$4,247,150.00 loan, because that loan amount equaled or exceeded the value of the debtor's property. If the loan was held avoidable, the effect would be to permit the debtor to be awarded damages based upon a loan which was no longer held by

the creditor, and secured by collateral which the debtor no longer owned. The court determined that the fraudulent transfers claim was also time-barred, as any transfer occurred outside the one year statutory period.

8699 Biscayne, LLC v. Indigo Real Estate LLC (In re 8699 Biscayne, LLC), 2012 Bankr. LEXIS 1244 (Bankr. S.D. Fla. March 22, 2012) (Cristol, B.J.).

Collier on Bankruptcy, 548.03

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

0412-091 **Case ordered converted or dismissed given debtors' reasonably stable incomes and ability to (Consumer) fund plan.** (Bankr. N.D. Ohio)

PROCEDURAL POSTURE: Above-median-income debtors filed a petition under chapter 7 of the Bankruptcy Code, and the United States Trustee ("UST") filed a motion to dismiss the debtors' case for abuse under 11 U.S.C.S. § 707(b). The court held a hearing on the UST's motion.

OVERVIEW: At the time the debtors declared bankruptcy, they were married, were supporting two minor children, and were helping support two adult daughters who were in college. The male debtor was 41 years old and worked for a company that collected refuse for the City of Toledo, Ohio, and the female debtor was 38 years old and was employed as a registered nurse case manager. The bankruptcy court found that it would have been an abuse of chapter 7 to discharge the debtors' unsecured debts because the debtors had reasonably stable incomes and were able to pay a meaningful portion of their unsecured debts out of their future income without being deprived of adequate housing, food, clothing, or other necessities for themselves or their dependents. Four hundred dollars the debtors budgeted each month to repay student loans had to be applied to a ratable distribution among all unsecured creditors, and when that amount was added to the debtors' net monthly income they could afford to pay at least \$800 per month into a chapter 13 bankruptcy plan, which if paid over 60 months would have provided unsecured creditors with \$43,700 or 16% of the nonpriority unsecured debt the debtors owed.

In re Mathis, 2012 Bankr. LEXIS 1150 (Bankr. N.D. Ohio March 16, 2012) (Whipple, B.J.).

Collier on Bankruptcy, 707.04

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

0412-092 **Dismissal for presumption of abuse disallowing excessive parochial school tuition did not (Consumer) violate debtor's First Amendment rights.** (Bankr. E.D. Wis.)

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

OVERVIEW: Because the presumption of abuse arose on the debtors' means test form, the debtors claimed further monthly expenses, including \$900 for parochial school tuition. The Trustee argued that the tuition amount was not reasonable and necessary and/or was excessive. The debtors argued that § 707(b)(2)(A)(ii)(IV), which allowed a debtor to deduct \$147.92 per month per child in educational expenses, was unconstitutional because it restricted their First Amendment right to the free exercise of religion. The court held that, although the debtors had the right to the free exercise of religion, that right was not independent of their personal economic limitations and choices. There was no duty of either the government or the debtors' creditors to fund their religious choices. Denial of a Chapter 7 discharge under the circumstances did not infringe upon the ability of the debtors to practice their religion, especially when Chapter 13 was an option. The means by which Congress regulated those competing rights of debtors and creditors in § 707(b)(2)(A)(ii)(IV) were not unnecessarily broad and were no more restrictive than necessary to achieve the compelling state interest of the means test.

In re Meyer, 2012 Bankr. LEXIS 1212 (Bankr. E.D. Wis. March 22, 2012) (McGarity, B.J.).

Collier on Bankruptcy, 707.04

§ 727 Discharge.

0412-093 **Discharge denied due to pattern of falsity demonstrating fraudulent intent.** (Bankr. D. Hawaii)

(Consumer)

PROCEDURAL POSTURE: Creditors commenced an adversary proceeding seeking denial of chapter 7 debtors' discharge under 11 U.S.C.S. § 727 and filed a motion for summary judgment.

OVERVIEW: The debtors were sophisticated individuals with financial and business experience along with experience in bankruptcy. The court concluded that the creditors were entitled to a denial of the discharge under 11 U.S.C.S. § 727(a)(2). The debtors' course of conduct in transferring money and concealing bank accounts within one year of the bankruptcy filed to evade a garnishment summons was evidence of their fraudulent intent. The debtors did not dispute the fact that they concealed bank accounts, other investment accounts containing property of the estate, and their interest in a trust. The creditors were also entitled to a denial of the discharge under 11 U.S.C.S. § 727(a)(4). The debtors made many false statements on their bankruptcy forms and at the meeting of creditors. The pattern of falsity in the case clearly demonstrated fraudulent intent, and their reckless indifference for the omissions and their failure to correct them in an appropriate time period was circumstantial evidence of their fraudulent intent.

Duncan v. Lum (In re Lum), 2012 Bankr. LEXIS 1138 (Bankr. D. Hawaii March 16, 2012) (Faris, B.J.).
Collier on Bankruptcy, 727.01

§ 727(a) Discharge; Grounds for Denial.

0412-094 Discharge denied due to debtor's false oath and accounts. (Bankr. D. Mass.)

(Consumer)

PROCEDURAL POSTURE: Trustee brought an adversary proceeding against debtor seeking denial of the debtor's discharge under 11 U.S.C.S. § 727(a) based on the debtor's failure to disclose financial transactions, failure to provide financial information, and transfer of property after filing his bankruptcy petition.

OVERVIEW: The trustee contended that the debtor failed to disclose a lawsuit, transfers of real property and condominium units, and business activities, and also asserted that the debtor failed to provide financial information requested by the trustee and transferred a horse for no consideration after filing the debtor's bankruptcy petition without authorization of the court. The bankruptcy court held that denial of the debtor's discharge was warranted based on the debtor's false statements in his schedules and statement of financial affairs. The debtor failed to disclose a recovery from a lawsuit, income from sales of real property and condominiums, and several business activities in which the debtor engaged, and the debtor's fraudulent intent could be inferred from the cumulative effect of the debtor's reckless indifference to the truth of the debtor's statements. However, the trustee's request for financial records was only provided to the debtor's counsel with no indication that the debtor possessed the records, and it was possible that the debtor gave away the horse believing it had little or no value and without realizing that the debtor required court approval for the transfer.

Nickless v. Fontaine (In re Fontaine), 2012 Bankr. LEXIS 1247 (Bankr. D. Mass. March 23, 2012) (Hoffman, B.J.).
Collier on Bankruptcy, 727.01

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

0412-095 Single asset real estate case dismissed where plans were unconfirmable and there was not reasonable likelihood of reorganization. (Bankr. D. Del.)

(Commercial)

PROCEDURAL POSTURE: The United States Trustee (UST) and a secured creditor of chapter 11 debtor filed motions to convert the debtor's case to chapter 7 or, alternatively, dismiss the case with prejudice pursuant to 11 U.S.C.S. § 349(a) and § 1112(b).

OVERVIEW: The debtor owned real property. The creditor held mortgages on the property. The court issued an order (SARE Order), determining that the property constituted single asset real estate subject to 11 U.S.C.S. § 362(d)(3). The court held that the UST and the creditor had met their burden and established that cause existed under § 1112(b)(4) to grant the motions to dismiss. The debtor failed to comply with § 362(d)(3) by not making the required interest payments and not filing a plan of reorganization within thirty days of the entry of the SARE Order. The court believed that dismissal, with prejudice, was in the best interest of creditors and the estate. The plans the debtor filed were patently unconfirmable, particularly in their treatment of the creditor's secured loans. Moreover, the debtor did not have a

reasonable likelihood of rehabilitation. The debtor had no other assets, and no operations or cash flow. The debtor had not presented the court with any other ready, willing, and financially capable purchasers for the property.

In re Riverbend Cmty., LLC, 2012 Bankr. LEXIS 1275 (Bankr. D. Del. March 23, 2012) (Gross, B.J.).
Collier on Bankruptcy, 1112.04

§ 1129(a)(11) Confirmation of Plan; Requirements; Subsequent Liquidation or Further Reorganization Not Anticipated.

0412-096 **Confirmation denied on feasibility grounds due to undervalued real property and inability to generate meaningful cash reserves.** (Bankr. N.D. Iowa)
(Consumer)

PROCEDURAL POSTURE: Four secured creditors filed objections to the confirmation of chapter 11 debtor's third amended plan of reorganization. The debtor operated a large hog confinement facility with three barns that could each house at least thirteen hundred head of hog, and several parcels of real property.

OVERVIEW: Debtor sought chapter 11 relief as a result of failed negotiations with her primary lender to restructure outstanding obligations. The plan before the court proposed to pay creditors from cash-on-hand, operating income, and future income. It also proposed to significantly reduce the secured portion of the secured creditor claims by using property valuations significantly lower than those proposed by the creditors. All unsecured claims were placed in a single class. Debtor would remain in possession of all property of the estate, and would continue to operate her hog facility and farming operation. The secured creditors argued in part that the plan was not feasible under 11 U.S.C.S. § 1129(a)(11) and not proposed in good faith. Because the plan was found not to be feasible, the court did not address the creditors' remaining objections. The plan was not feasible because debtor had undervalued real property values by a total of \$782,194, and her inability to generate meaningful cash reserves over the course of the case. The marginal monthly budget surplus presented in the plan and debtor's past history also indicated the plan would fail.

In re Puff, 2012 Bankr. LEXIS 1266 (Bankr. N.D. Iowa March 23, 2012) (Collins, C.B.J.).
Collier on Bankruptcy, 1129.02[11]

§ 1307(c) Conversion or Dismissal; For Cause.

0412-097 **Case dismissed where debtor was in material default.** (Bankr. D.P.R.)
(Consumer)

PROCEDURAL POSTURE: A chapter 13 trustee filed a motion to dismiss pursuant to 11 U.S.C.S. § 1307(c), alleging that a debtor was in material default with respect to the terms of his confirmed plan.

OVERVIEW: The debtor did not dispute that he was in default, His explanation for his failure to make monthly payments, that he became unemployed, was devoid of any supporting evidence. Because there was no dispute that the debtor was deficient with respect to his monthly payments, no evidentiary hearing was warranted. Pursuant to 11 U.S.C.S. §§ 101(30) and 109(e), only individuals with sufficiently stable regular income were eligible to be debtors under Chapter 13. These statutory limitations were preserved by 11 U.S.C.S. § 1307(c)(6) by providing a mechanism for involuntary dismissal when a debtor could not satisfy the obligations of a confirmed plan. The debtor had been afforded several opportunities to cure his defaults. While the court was sympathetic to his alleged difficulty in securing employment, that hardship did not alter the undisputed fact that he had been and was still in material default. His proposal to cure the defaults with family help did not satisfy the income requirement in 11 U.S.C.S. § 109(e). As there were no assets available for distribution, it was in the best interests of creditors to dismiss the case rather than convert it.

In re Figueroa, 2012 Bankr. LEXIS 1306 (Bankr. D.P.R. March 26, 2012) (Lamoutte, B.J.).
Collier on Bankruptcy, 1307.04

0412-098 **Debtor's third case dismissed as it was filed under chapter 7 without legitimate bankruptcy purpose prior to conversion to chapter 13.** (Bankr. E.D. Mich.)
(Consumer)

PROCEDURAL POSTURE: A creditor of chapter 13 debtors filed a motion to dismiss the debtors' case for cause under 11 U.S.C.S. § 1307(c), for a filing bar, and for sanctions.

OVERVIEW: Prior to filing a chapter 7 case, the debtors filed a chapter 7 case, which was closed without debtors receiving a discharge, and a chapter 13 case, which was dismissed before confirmation of a plan. The debtors filed the instant case under chapter 7. They later converted the case to chapter 13. Debtors' current counsel conceded that there was no legitimate bankruptcy-related purpose for the debtors to have filed the case under chapter 7, rather than chapter 13. That was because all or virtually all of the debtors' debts, including their debt to the creditor, could not be discharged in a chapter 7 case. The court dismissed the case for cause under § 1307(c) because the debtors' filing of the instant case under chapter 7, rather than under chapter 13, clearly was a waste of time, and it caused undue and unnecessary delay of at least three months. In addition, when the debtors filed the instant case under chapter 7, they both understated their income by a substantial amount.

In re Mehlhose, 2012 Bankr. LEXIS 1207 (Bankr. E.D. Mich. March 22, 2012) (Tucker, B.J.).
Collier on Bankruptcy, 1307.04

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

0412-099 Debtor could not strip down lien on property owned with discharged debtor spouse as
 (Consumer) tenancy by the entirety where spouse was not eligible for discharge. (Bankr. M.D. Fla.)

PROCEDURAL POSTURE: A chapter 13 debtor filed a motion to value (or strip down) a creditor's lien under 11 U.S.C.S. §§ 506(a) and 1322(b)(2). The creditor objected on the grounds that the debtor's husband, who was a co-owner of the property, was not a debtor in the bankruptcy case and that he had recently received a discharge in a separate chapter 7 bankruptcy case.

OVERVIEW: The debtor and her non-debtor spouse owned the investment property at issue as tenants by the entirety (TBE). The spouse was discharged of his in personam liability to the creditor in his previous chapter 7 case and could not now receive a chapter 13 discharge. The debtor, however, remained fully liable to the creditor because she revoked her chapter 7 discharge. The court concluded that the debtor could not reduce or eliminate a mortgage encumbering real property she owned as TBE with the non-debtor spouse, unless he was a debtor in this chapter 13 case and he was entitled to also receive a chapter 13 discharge. Even if the spouse were a joint debtor, both debtors could not strip down the lien because the spouse, having received a Chapter 7 discharge within the applicable 4-year look-back period, could not receive a chapter 13 discharge under 11 U.S.C.S. § 1328(f).

In re Pierre, 2012 Bankr. LEXIS 1203 (Bankr. M.D. Fla. March 16, 2012) (Jennemann, C.B.J.).
Collier on Bankruptcy, 1322.06

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

0412-100 Cases filed under chapter 13 simply to avoid lump sum payment of attorneys' fees that would
 (Consumer) be owed under chapter 7 were not filed in good faith. (Bankr. N.D. Ala.)

PROCEDURAL POSTURE: Before the court was the confirmation of chapter 13 plans for two debtors.

OVERVIEW: The debtors filed for relief under chapter 13 and not chapter 7 because of their inability or unwillingness to prepay their attorney fees in one lump sum before their petitions for relief were filed. The court held that the debtors' cases were not filed, and their plans were not proposed, in good faith as required by 11 U.S.C.S. § 1325(a)(3) and (7). The court found that there was simply no meaningful or legitimate debt adjustment purpose to be found in the debtors' cases or plans. Rather, the thinly veiled purpose for both was to pay attorney fees on the installment plan, not to protect encumbered property from secured creditors or non-exempt assets from liquidation by a trustee. Even if their proposed chapter 13 plans were ultimately paid, everything that might have been accomplished over the next three years could have been achieved more quickly and cheaply, and with greater certainty--especially a discharge--under chapter 7.

In re Jackson, 2012 Bankr. LEXIS 1137 (Bankr. N.D. Ala. March 16, 2012) (Robinson, B.J.).
Collier on Bankruptcy, 1325.02

§ 1325(a)(4) Confirmation of Plan; Conditions for Confirmation; Value of Property Distributed No Less Than if Estate Were Liquidated.

0412-101 Confirmation denied where value of assets exceeded amount of proposed distribution.

(Consumer) (*Bankr. N.D. Ohio*)

PROCEDURAL POSTURE: The debtors sought confirmation of their proposed amended chapter 13 plan. A chapter 13 trustee objected to confirmation, arguing that the proposed plan did not meet the best interest of creditors test of 11 U.S.C.S. § 1325(a)(4).

OVERVIEW: The trustee asserted that the plan did not satisfy § 1325(a)(4) because the value of the debtors' assets exceeded the amount proposed to be distributed under their plan. He asserted that a chapter 7 trustee could sell the debtor husband's limited liability company (LLC) membership units, while the debtors asserted that the LLC's operating agreement imposed restrictions on sale or assignment of membership units to third parties that lowered their liquidation value. Even assuming that the restriction would lower the value of the membership units if sold to a third party, the debtors presented no evidence of such lower value. The only evidence of value consisted of the debtors' own valuation on their Schedule B. Based on this value, the court did not find that their proposed plan satisfied the best interest of creditors test. The court also found that the proposed plan did not satisfy the projected disposable income test under § 1325(b)(1)(B), as the debtors' monthly disposable income was more than their proposed monthly plan payments.

In re Weilnau, 2012 *Bankr. LEXIS 1121* (*Bankr. N.D. Ohio March 14, 2012*) (*Whipple, B.J.*).
Collier on Bankruptcy, 1325.05

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

0412-102 **Plan commitment period is to be established based on facts existing on the date of**
(Consumer) **confirmation.** (*Bankr. D. Wyo.*)

PROCEDURAL POSTURE: The chapter 13 trustee objected to confirmation of an amended plan proposed by a chapter 13 debtor, challenging both the date on which debtor proposed to determine the applicable commitment period and the extent to which post-petition and pre-confirmation changes in household size affected that calculation. At issue was the import, on these issues, of 11 U.S.C.S. § 1325.

OVERVIEW: On the date of his chapter 13 filing, debtor identified that he and two children comprised a household of three. Debtor subsequently remarried, and his new wife and her two dependent children joined the household. Over the same period, one of debtor's children ceased to reside in his household. Debtor accordingly claimed a household consisting of five persons both for purposes of determining commitment period and disposable income. The trustee countered that the applicable commitment period was determined on the date of the original filing and that debtor's remarriage should not allow him to claim a larger household size. The court confirmed the plan. Noting that the trustee's objections presented issues of first impression, the court held that the phrase "as of the effective date of the plan" as used in § 1325(b)(1)(B) referred to the date on which the plan was confirmed. That rule, as applied here, meant that the commitment period was to be established based on the facts on the date of confirmation. As for household size, the court, citing the "dependent" approach, concluded that debtor might properly claim his new wife and her children as "dependents" for purposes of § 1325.

In re Hernandez, 2012 *Bankr. LEXIS 1248* (*Bankr. D. Wyo. March 23, 2012*) (*McNiff, B.J.*).
Collier on Bankruptcy, 1325.11

BANKRUPTCY RULES (Post-2005 Act)

Rule 7023 Class Proceedings.

0412-103 **Court declined to treat proof of claim as class claim at advanced stage of case.** (*Bankr. E.D. Va.*)
(Commercial)

PROCEDURAL POSTURE: Claimant asked the court to apply Fed. R. Bankr. P. 7023 to a proof of claim that he had filed purportedly on behalf of a class of former employees of debtors. Also before the court

was the objection of the liquidating trustee to that proof of claim. At issue was whether Rule 7023 was properly applied and whether the claim was entitled to a presumption of validity per Fed. R. Bankr. P. 3001(f).

OVERVIEW: Prior to debtors' chapter 11, claimant had sued debtors in state court on behalf of a class of persons who were entitled to wages, salary and compensation based on alleged state labor law violations. However, no class was ever certified and the case was stayed by the chapter 11 filing. Claimant then filed a proof of claim seeking the maximum amount allowable under state law for the claimed violations and attached a copy of the state court complaint. The trustee later objected to the claim as insufficiently documented. The court denied claimant's motion to apply Rule 7023, finding that given the advanced stage of the case, application of Rule 7023 would serve only to throw the administration of the case into chaos. As for the adequacy of the claim if construed as an individual claim, the court agreed that it was insufficiently documented because neither the claim nor the attachments identified the alleged labor law violations by date or circumstances as well as the amount of the total demand attributable thereto. It thus rejected claimant's argument that the claim was entitled to prima facie validity because a claim that was not properly completed was not entitled to such status.

In re Movie Gallery, Inc., 2012 Bankr. LEXIS 1099 (Bankr. E.D. Va. March 15, 2012) (Tice, C.B.J.).
Collier on Bankruptcy, 7023.RH

Rule 8002(a) Time for Filing Notice of Appeal; Fourteen-Day Period.

0412-104 **Dismissal of appeal vacated as Rule 8002 applied to all party appellants and appeal was timely**
 (Commercial) **filed.** (Bankr. S.D. Fla.)

PROCEDURAL POSTURE: After the court dismissed an appeal as untimely under Fed. R. Bankr. P. 8002, the dismissed appellant requested reconsideration of the dismissal.

OVERVIEW: The appellee objected to reconsideration, contending that the dismissal of the appeal was proper because the appellant was not a "party" to the litigation and the additional time permitted under Fed. R. Bankr. P. 8002 did not apply. The appellant argued that the time requirements of Rule 8002, including the term "party" applied to party appellants rather than parties to the underlying litigation and that its notice of appeal was timely filed. The court agreed that the notice of appeal was timely filed under Rule 8002(a). Pursuant to the "person aggrieved doctrine," the rule applied to all party appellants irrespective of whether they were parties to the underlying litigation. The court declined to address the issue of standing as one that would appropriately and necessarily be heard by the District Court.

In re Fisher Island Invs., Inc., 2012 Bankr. LEXIS 1159 (Bankr. S.D. Fla. March 16, 2012) (Cristol, B.J.).
Collier on Bankruptcy, 8002.02

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

0412-105 **Attorney sanctioned for electronically filing four petitions in the name of another attorney.**
 (Consumer) (Bankr. E.D.N.Y.)

PROCEDURAL POSTURE: A United States Trustee ("UST") filed an application for an order to show cause why an attorney who filed four chapter 7 bankruptcy petitions on behalf of unrelated debtors should not be sanctioned pursuant to Fed. R. Bankr. P. 9011 and 11 U.S.C.S. § 105. The court issued the order and held a hearing to determine if the attorney should be sanctioned.

OVERVIEW: The attorney was suspended from the practice of law by the Supreme Court of New York on January 9, 2012, and was subsequently served with an order issued by the U.S. District Court for the Eastern District of New York which suspended him from the practice of law in that district. Between the date the attorney was suspended by the state court and the date he was served with the district court's order, he used his password for the bankruptcy court's electronic filing system to file four bankruptcy petitions on behalf of unrelated clients, and falsely indicated in documents he filed electronically that another attorney was representing three of those clients. The court found that the attorney violated Fed. R. Bankr. P. 9011(b), Bankr. E.D.N.Y. R. 9011-1(b), and the court's procedures for electronically filed cases when he filed petitions and related documents bearing the other attorney's electronic signature, for which no original documents existed, and it imposed sanctions pursuant to Fed. R. Bankr. P. 9011(c). However,

the court denied the UST's request for a "suspended" or "conditional" sanction, to be imposed in the event of a future violation.

In re Flowers, 2012 Bankr. LEXIS 1239 (Bankr. E.D.N.Y. March 22, 2012) (Craig, C.B.J.).
***Collier on Bankruptcy*, 9011.01**