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Collier Bankruptcy Case Update

CURRENT BANKRUPTCY CASES ANALYZED

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Cases of Particular Interest in This Issue

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CASES IN THIS ISSUE

10th Cir.

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§ 106 WAIVER OF SOVEREIGN IMMUNITY.

021001 **Debtor's adversary proceeding against state health department dismissed as section 106 is an unconstitutional abrogation of the state's sovereign immunity.** *Bankr. S.D. Fla.* **PROCEDURAL POSTURE:** Plaintiff debtor filed a chapter 7 petition under the Bankruptcy Code and received a discharge. Defendant state health department was a creditor that was not listed on the debtor's bankruptcy schedules. The department commenced a state action against the debtor. The debtor filed a motion to reopen his case to add the omitted creditor and an action against the department. The department filed a motion to dismiss, which the debtor opposed. **OVERVIEW:** The department's motion to dismiss asserted that: (1) it did not have notice of the debtor's bankruptcy; and (2) the debtor's adversary action was barred by the Eleventh Amendment's sovereign immunity. The debtor claimed the Eleventh Amendment did not bar the action. The debtor's action sought the court's determination that a prepetition claim had been discharged. The court noted the existence of several remedies available to a debtor seeking to discharge a non-listed debt owed to a state. The debtor was free to remove the pending state court litigation to federal court pursuant to 28 U.S.C. § 1452(a), but waited too long. The court found that the debt in question was excepted from discharge, if at all, under 11 U.S.C. § 523(a)(3)(A), and the dischargeability of the debt in question could be determined by either the bankruptcy court or the appropriate state court. The court noted that a conflict between the doctrine of sovereign immunity and Fed. R. Bankr. P. 7001 precluded the debtor from prosecuting his adversary proceeding and discharging a debt which presumably would have been discharged if properly listed on his bankruptcy schedule. ***Levin v. New York Dep't of Health (In re Levin),*** *2002 Bankr. LEXIS 1147, 284 B.R. 308 (Bankr. S.D. Fla. September 23, 2002) (Hyman, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 2:106.01**

§ 328 LIMITATION ON COMPENSATION OF PROFESSIONAL PERSONS.

§ 328(c) Limitation on Compensation of Professional Persons; Grounds for Denial of Compensation.

021002 **Consultant that knowingly and intentionally misrepresented status as "disinterested person" denied compensation other than that already paid by debtor.** *Bankr. W.D. Pa.* **PROCEDURAL POSTURE:** The chapter 11 debtor's accountant and consultant applied for compensation and reimbursement of expenses under 11 U.S.C. § 330(a)(1), which included the interim payments he had previously received while he was employed. The debtor objected, arguing that the amount was excessive and the consultant was not "disinterested" when he was retained under 11 U.S.C. § 327(a), and thus under 11 U.S.C. § 328(c) compensation should be denied. **OVERVIEW:** The application to employ the consultant made no mention that he was a prepetition creditor. After the debtor's principal died, the new principal fired the consultant, at which point the consultant stated the debtor only owed him $1,500, for which he was paid. Had the court known that the consultant was not a "disinterested person" under 11 U.S.C. § 327(a), his employment would not have been approved. The court had discretion under 11 U.S.C. § 328(c) to award compensation even though his appointment was improper from the start. But the consultant was no novice to the court, leading the court to conclude that the failure of disclosure was knowing and intentional. And, employees with whom the consultant claimed to have met credibly testified that such meetings never occurred. Some of debtor's most lucrative accounts left when the consultant fired a manager, resulting in a substantial and permanent loss of revenue. The statement that the consultant was only owed $1,500 when he was fired seriously undermined the application's request for $28,000. The consultant was only entitled to the amounts he had previously been paid. ***In re Authorized Factory Serv., Inc.,*** *2002 Bankr. LEXIS 1116, 283 B.R. 684 (Bankr. W.D. Pa. October 8, 2002) (Markovitz, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:328.05**

§ 362 AUTOMATIC STAY.

021003 **Bankruptcy court order lifting stay to allow completion of foreclosure vacated due to fact that debtor still held interest in the property under state law on date of filing.** *Bankr. E.D.N.C.* **PROCEDURAL POSTURE:** On remand from the district court, the debtor moved for reconsideration of an order granting the secured creditors relief from stay as to a foreclosure of the debtor's property, arguing that under N.C. Gen. Stat. §§ 103-4(3a), 45-21.27 (2001), the upset bid period had not expired when the bankruptcy was filed. The debtor also moved for relief from an order denying a request for sanctions. **OVERVIEW:** The court had previously found that the foreclosure sale was final before the bankruptcy was filed after the state court's close of business on March 25. The court had concluded that the debtor retained some interest in the property until the deed was delivered, holding that a trustee's deed was void because it was delivered and recorded by a substitute trustee under the deed of trust in violation of the stay, but denied sanctions because there was no basis for holding the creditors responsible for the

violation. The court had also lifted the stay to allow the foreclosure to be completed, assuming the debtor had no remaining interest in the property. The issue of a holiday was only raised on appeal. Using its discretion to consider the new issue, the court found that because March 25, Greek Independence Day, was a holiday under N.C. Gen. Stat. § 103-4(3a) (2001), under the plain language of N.C. Gen. Stat. § 45-21.27(a) (2001) the 10-day period expired on March 26, after the bankruptcy was filed. The property was part of the estate. The new finding on the expiration of the upset bid period provided no new grounds on which to find that the creditors should be subject to sanctions. ***In re Country Lake Enters., Inc.,*** *2002 Bankr. LEXIS 1161, 284 B.R. 223 (Bankr. E.D.N.C. September 26, 2002) (Small, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

021004 **Relief from stay denied where agreements between debtor and moving creditor were not true leases but security agreements.** *Bankr. D.N.M.* **PROCEDURAL POSTURE:** The debtor filed a chapter 11 petition under the Bankruptcy Code. A creditor filed a motion for relief from the automatic stay. The debtor opposed the motion and claimed that the lease agreements in issue were really security agreements. **OVERVIEW:** The dispute involved agreements between the debtor and the creditor. The creditor asserted that the agreements in issue were lease agreements and sought relief to proceed on its rights as a lessor. The debtor disagreed and claimed that the agreements were disguised security agreements. The court applied N.M. Stat. Ann. § 55-1-201 (Cum. Supp. 2001) and found that the two agreements met the first prong of the economic realities test. The court also found that under either agreement, the cost to renew the lease was greater than if the debtor purchased the property. If the cost to renew the lease was greater than the cost to buy the equipment, then the latter sum was nominal consideration. Because the debtor could become the owner of the goods for nominal consideration at the end of the lease terms in both agreements, factor (d) of the second prong of the test was met as to both agreements. Both parts of the economic realities test were satisfied, and the two agreements were security agreements and not leases. ***In re Our Secret, Ltd.,*** *2002 Bankr. LEXIS 1137, 282 B.R. 697 (Bankr. D.N.M. August 28, 2002) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.01**

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

021005 **Relief from stay appropriate for limited purpose of determining debtor's liability from among several defendants in state court action.** *B.A.P. 8th Cir.* **PROCEDURAL POSTURE:** Appellees sought relief from the automatic stay to continue a state court action in which debtor and the appellees were co-defendants. Appellees sought relief from the automatic stay in anticipation of filing counter-claims against the debtor. The bankruptcy court granted appellees relief from the automatic stay for the limited purpose of determining debtor's liability. Debtor appealed. **OVERVIEW:** The bankruptcy court determined that the claims in state court were being made by several plaintiffs against several defendants, that cross-claims and counter-claims were probable, and that some of the various theories being pursued by the plaintiffs would include matters better left to the jurisdiction and expertise of the state court. The bankruptcy court also determined that judicial economy would best be served by allowing the state court to determine issues of liability and damages as to the debtor, but limited the grant of relief to only those issues. The appellate court found that the bankruptcy court properly balanced the potential prejudice to the debtor and the bankruptcy estate against the hardship to the appellees and the other parties if they were not allowed to proceed in state court. By allowing the state court to determine liability and damages, a determination that would otherwise require a trial in the bankruptcy court, but limiting the ability of the appellees to enforce the judgment, the bankruptcy court substantially reduced the potential harm to the debtor. The bankruptcy court did not abuse its discretion in granting the appellees relief. ***Loudon v. Amogio Foods, Inc. (In re Loudon),*** *2002 Bankr. LEXIS 1139, 284 B.R. 106 (B.A.P. 8th Cir. October 16, 2002) (Dreher, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.07[3]**

§ 362(h) Automatic Stay; Remedies for Willful Violation.

021006 **Significant punitive damages assessed for creditor's flagrant, repeated and threatening attempts to collect from debtors despite notice of stay.** *Bankr. N.D. Ohio* **PROCEDURAL POSTURE:** The chapter 7 debtors filed a motion for sanctions for repeated violations of the automatic stay of 11 U.S.C. § 362(a)(6) against a creditor who had held a second mortgage on the debtor's former residence. No representative from the creditor appeared for the hearing. The debtors alleged that the creditor had contacted them on approximately 15 occasions postpetition to demand payment despite the fact that the creditor knew of the bankruptcy. **OVERVIEW:** The case was the most egregious stay violation case to come before the court. The creditor willfully and flagrantly violated section 362(a)(6). The stress to the debtor wife's heart condition may have caused her to remain out of the workforce longer than otherwise necessary. The tactics, threatening garnishments and the debtor husband's loss of job, were intolerable. The creditor's agents stated they did not care about the bankruptcy, did not contact the debtors' counsel, called the debtors repeatedly at home and work, and did not attend the hearing. After notices from the court and being told many times of the bankruptcy, the creditor continued to harass and threaten the debtors. Even after being served with the motion, the violations continued. Under 11 U.S.C. §§ 105 and 362(h), significant punitive damages were warranted. Because the creditor was attempting to prefer itself over other creditors by seeking payment that would have violated 11 U.S.C. § 549(a), 50 percent of the

punitive damages were assessed to the trustee for distribution to unsecured creditors. Under 11 U.S.C. § 510(c), due to the gross misconduct, equitable subordination of the creditor's claim was appropriate. ***In re Kortz,*** *2002 Bankr. LEXIS 1105, 283 B.R. 706 (Bankr. N.D. Ohio September 27, 2002) (Shea-Stonum, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 3:362.11[3]**

§ 502 ALLOWANCE OF CLAIMS OR INTERESTS.

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

021007 **Landlord creditor's claim for accelerated rent and liquidated damages was excessive as actual damages were easily ascertainable.** *Bankr. D. Mass.* **PROCEDURAL POSTURE:** Plaintiff creditor filed a summary process proceeding against defendant debtor regarding a lease agreement. The debtor filed a voluntary chapter 7 petition under the Bankruptcy Code and the trustee removed the proceeding to the bankruptcy court. Both parties filed motions for summary judgment. **OVERVIEW:** The creditor claimed that it should be allowed to pursue a breach of lease claim to the extent permitted by 11 U.S.C. § 502(b)(6). The trustee disagreed and claimed that the rent acceleration clause was unenforceable because the damages under the clause were disproportionate to a reasonable estimate of actual damages made at the time of the contract formation. The creditor argued that state law applied in determining the actual amount of its claim subject to the cap, and because its claim exceeded the cap, the claim should be allowed in the full amount permitted by section 502(b)(6). The trustee asserted that: (1) the accelerated rent and liquidated damages provision was unenforceable; (2) the enforcement of the provision would be contrary to public policy; and (3) the creditor was not entitled to recover any damages in a summary process proceeding other than unpaid rent. The court found that the creditor failed to submit sufficient evidence to rebut the trustee's position that its damages were not difficult to ascertain at the time the lease was executed, and that the accelerated rent and liquidated damages clause constituted an unreasonable estimate of its actual damages. ***Cummings Props., LLC v. Dwyer (In re Admetric Biochem, Inc.),*** *2002 Bankr. LEXIS 1110, 284 B.R. 1 (Bankr. D. Mass. September 30, 2002) (Feeney, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[7][b]**

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

021008 **As informal proof of claim doctrine remains valid, bankruptcy court did not err in holding that creditor's adversary proceeding was an amendable, informal proof of claim.** *D. Md.* **PROCEDURAL POSTURE:** Appellant debtor sought review of an order of the bankruptcy court granting appellee creditor's motion to amend informal proof of claim, or in the alternative, for leave to file out of time claim. The bankruptcy court determined that the creditor's adversary proceeding in the bankruptcy court against the debtor constituted an informal proof of claim and allowed the amendment of that informal proof of claim. **OVERVIEW:** The debtor argued that the bankruptcy court erred in allowing the informal proof of claim because 11 U.S.C. § 502(b)(9) abrogated the informal proof of claim doctrine. Therefore, according to the debtor, the bankruptcy court erred in applying the doctrine to allow the creditor's adversarial proceeding in the debtor's chapter 7 case to constitute a claim in the current chapter 13 case. Section 502(b)(9) did not abrogate the informal proof of claim doctrine. The bankruptcy court therefore did not err when it found the same and properly applied the doctrine to the creditor's motion. The debtor's chapter 7 case was converted to a chapter 13 case when he filed his second bankruptcy petition. This chapter 13 case proceeded with the same parties, involving the same underlying facts, and before the same bankruptcy court and judge as the case did when it was filed under chapter 7. The creditor's filing in the chapter 7 case necessarily provided all parties with proper notice of its claim throughout this case. Thus, the bankruptcy court did not err in finding that it would be equitable to allow the creditor's adversary proceeding to constitute an informal proof of claim in this case. ***Uwimana v. Government of Rwanda (In re Uwimana),*** *2002 U.S. Dist. LEXIS 19446, 284 B.R. 218 (D. Md. October 7, 2002) (Chasanow, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:502.03[10][c]**

§ 503 ALLOWANCE OF ADMINISTRATIVE EXPENSES.

§ 503(b)(1)(A) Allowance of Administrative Expenses; Preservation of the Estate

021009 **Debtor not entitled to a salary for performing services required of every debtor filing a petition.** *Bankr. D.N.M.* **PROCEDURAL POSTURE:** The debtor filed a chapter 11 petition under the Bankruptcy Code. The debtor filed a motion for salary, or alternatively, medical reimbursement pursuant to 11 U.S.C. § 503(b)(1)(A). **OVERVIEW:** The debtor asserted that he was due a salary for the services he provided to the estate in: (1) preparing bankruptcy schedules; (2) ascertaining the validity of various creditor claims; and (3) assisting in litigation. The court rejected the debtor's claim where the debtor did not establish that he performed any services under 11 U.S.C. § 503(b)(1)(A). The services that the debtor claimed he provided were required of every debtor that filed a bankruptcy petition, pursuant to 11 U.S.C. § 521. The court found that no Bankruptcy Code provision authorized a salary for these services, and the debtor failed to show any other statutory or case law authority that

would allow a salary for these type of fiduciary obligations. The court also noted that since the petition was filed, there had been little business activity and the debtor failed to show his involvement in that activity. The debtor's claim for a salary as an administrative expense failed, as did his claim for a medical expense claim because the claim was not the result of a transaction between a creditor and the debtor in possession or the trustee. The claim also did not directly benefit the estate. ***In re Franklin,*** *2002 Bankr. LEXIS 1136, 284 B.R. 739 (Bankr. D.N.M. October 8, 2002) (McFeeley, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:503.06[2]**

§ 510 SUBORDINATION.

§ 510(c) Subordination; Equitable Subordination.

021010 **Creditor's flagrant, repeated and threatening attempts to collect from debtors despite notice of stay warranted equitable subordination of claim.** *Bankr. N.D. Ohio* **PROCEDURAL POSTURE:** The chapter 7 debtors filed a motion for sanctions for repeated violations of the automatic stay of 11 U.S.C. § 362(a)(6) against a creditor who had held a second mortgage on the debtor's former residence. No representative from the creditor appeared for the hearing. The debtors alleged that the creditor had contacted them on approximately 15 occasions postpetition to demand payment despite the fact that the creditor knew of the bankruptcy. **OVERVIEW:** The case was the most egregious stay violation case to come before the court. The creditor willfully and flagrantly violated section 362(a)(6). The stress to the debtor wife's heart condition may have caused her to remain out of the workforce longer than otherwise necessary. The tactics, threatening garnishments and the debtor husband's loss of job, were intolerable. The creditor's agents stated they did not care about the bankruptcy, did not contact the debtors' counsel, called the debtors repeatedly at home and work, and did not attend the hearing. After notices from the court and being told many times of the bankruptcy, the creditor continued to harass and threaten the debtors. Even after being served with the motion, the violations continued. Under 11 U.S.C. §§ 105 and 362(h), significant punitive damages were warranted. Because the creditor was attempting to prefer itself over other creditors by seeking payment that would have violated 11 U.S.C. § 549(a), 50 percent of the punitive damages were assessed to the trustee for distribution to unsecured creditors. Under 11 U.S.C. § 510(c), due to the gross misconduct, equitable subordination of the creditor's claim was appropriate. ***In re Kotz,*** *2002 Bankr. LEXIS 1105, 283 B.R. 706 (Bankr. N.D. Ohio September 27, 2002) (Shea-Stonum, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:510.05**

§ 523 EXCEPTIONS TO DISCHARGE.

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

021011 **Creditor's claim was dischargeable absent establishment of acquisition, conduct, reliance and financial condition or fiduciary relationship.** *Bankr. D. Conn.* **PROCEDURAL POSTURE:** In an adversary proceeding, plaintiff creditor sought to have declared nondischargeable a debt allegedly owed to it by defendant debtor. The creditor moved for summary judgment. **OVERVIEW:** The creditor set forth two alternative grounds for nondischargeability of all or part of the relevant debt, 11 U.S.C. §§ 523(a)(2)(A) and (a)(4). The court found that the summary judgment record left genuine issues on at least four elements of a cause of action under section 523(a)(2) — acquisition, conduct, reliance, and financial condition. As to acquisition, the offending representational conduct occurred well after the debtor might have personally obtained the money at issue; thus, the record did not support a conduct-acquisition cause-and-effect as required by section 523(a)(2). As to conduct, the record did not establish, beyond genuine issue, inter alia, that the debtor's full disclosure was undertaken with any specific design of perpetrating a known deception. As to reliance, the record did not establish that the creditor's reliance on a Nevada court ruling was justifiable. As to financial condition, the only communications established by the record were non-written, while such communications were not within the contemplation of section 523(a)(2). Finally, as to section 523(a)(4), the record did not reference an express or technical trust or establish the existence of a fiduciary relationship. ***Peregrine Falcons Jet Team v. Miller (In re Miller),*** *2002 Bankr. LEXIS 970, 282 B.R. 569 (Bankr. D. Conn. September 6, 2002) (Dabrowski, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

021012 **IRS claim for gap interest on taxes owed (postpetition but preconfirmation) was nondischargeable.** *N.D. Cal.* **PROCEDURAL POSTURE:** The bankruptcy court denied debtor's claim that defendant Internal Revenue Service ("IRS") could not claim interest arising after debtor petitioned for bankruptcy but before his reorganization plan was approved. Debtor appealed the decision. **OVERVIEW:** Debtor petitioned for relief under chapter 11 of the Bankruptcy Code. He later submitted a reorganization plan, and the bankruptcy court entered an order confirming the amended plan as modified. The IRS had asserted a claim against debtor for unpaid trust fund taxes. Following confirmation, debtor made payments to the IRS according to his plan. Afterward, debtor wrote to the IRS seeking release from any liens it had against him. The IRS responded that debtor still owed interest for the period between his petition for bankruptcy and confirmation of the reorganization plan, or gap interest. Plaintiff argued that confirmation of the plan discharged any such claims. Because the reorganization plan was

ambiguous with respect to gap interest, the doctrine of res judicata did not apply, and the IRS was free to assert its claim. Moreover, the court concluded that the Eleventh Circuit offered a better reading of the Bankruptcy Code, and that the claim of the IRS was nondischargeable regardless of whether it was secured or unsecured. ***Miller v. United States (In re Miller),*** *2002 U.S. Dist. LEXIS 18827, 284 B.R. 121 (N.D. Cal. October 1, 2002) (Conti, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.01**

§ 523(a)(1) Exceptions to Discharge; Taxes.

021013 **Debtor's late mailing of tax return without using certified or registered mail did not render debt to IRS nondischargeable for failure to file.** *Bankr. N.D. Ill.* **PROCEDURAL POSTURE:** Plaintiff debtor filed a chapter 7 petition under the Bankruptcy Code and received a discharge. The debtor was granted permission to reopen his case and he filed an adversary action against defendant, federal government, to determine the dischargeability of an alleged tax debt. The government filed a motion for summary judgment. **OVERVIEW:** The government claimed that 11 U.S.C. § 523(a)(1)(B)(i) excepted from discharge any tax for which the required return was not filed, and asserted this was the situation with the debtor's case. The court found that the Internal Revenue Service ("IRS") had never filed a claim against the debtor's estate, nor had it filed an adversary proceeding to determine the dischargeability of any of the income taxes the debtor owed. The IRS had no record that the return was received, although it acknowledged receipt of other returns. Under 26 U.S.C. § 7502, a document was deemed delivered on the date it was postmarked if the document was: (1) properly placed in the U.S. mail prior to the filing deadline; and (2) delivered to the IRS after the deadline. The taxpayer admitted he mailed the return after the tax-filing deadline, and the court found that the safe harbor provision of section 7502 was unavailable to avoid penalties. The court rejected the government's claim that the taxpayer never filed his return and could not get the tax debt discharged because he did not send the return by certified or registered mail. That position was not supported by the Bankruptcy Code or 26 U.S.C. § 7502(c). ***Payne v. United States (In re Payne),*** *2002 Bankr. LEXIS 1107, 283 B.R. 719 (Bankr. N.D. Ill. October 3, 2002) (Schmetterer, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.07**

§ 523(a)(2) Exceptions To Discharge; Types Of Debt Excepted; Fraud.

021014 **Debtor's failure to answer improperly served request for admissions did not constitute an admission pursuant to which debt could be ruled nondischargeable.** *Bankr. M.D. Ga.* **PROCEDURAL POSTURE:** A creditor filed an adversary proceeding alleging the debtor's credit card obligation was nondischargeable under 11 U.S.C. § 523(a)(2)(A). The creditor moved for summary judgment arguing that its "unanswered" request for admissions deemed it admitted that the debtor had not intended to pay the debt. The debtor objected, arguing that the requests were served before the conference required under Fed. R. Bankr. P. 7026 and Fed. R. Civ. P. 26(f). **OVERVIEW:** It was noted that the creditor's request for admissions was served prior to the conference required under Fed. R. Bankr. P. 7026 and Fed. R. Civ. P. 26(f) and that the creditor's counsel had failed to appear at the pretrial conference. Summary judgment was a drastic measure. A motion for summary judgment based on an admission established by default should receive special scrutiny from the court. When considering a motion for summary judgment based on an admission, the court could consider such factors as whether the request for admission was properly served. The court was persuaded that the request for admissions was not served in accordance with the requirements of Rule 26(d) and that the debtor could not be deemed to have admitted any matters contained therein. Since the request for admissions was filed in violation of Rule 26(d), the request for admissions was stricken from the record. Furthermore, the creditor had to start over with all of its discovery. Without the deemed admissions, the court concluded that there are substantial material facts to be decided. ***Fleet Credit Card Servs., LP v. Harden (In re Harden),*** *2002 Bankr. LEXIS 1122, 282 B.R. 543 (Bankr. M.D. Ga. August 26, 2002) (Hershner, C.B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.08**

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

021015 **Debt properly held nondischargeable based on FBI evidence of debtor's collusion with spouse in defrauding creditors.** *E.D. Mich.* **PROCEDURAL POSTURE:** A debtor appealed an order of the bankruptcy court in favor of the creditors finding that a debt was nondischargeable under 11 U.S.C. § 523(a)(6), arguing it was error to admit the opinion testimony of a detective and a Federal Bureau of Investigation ("FBI") agent, to deny the production of FBI files, and to enter a judgment against the debtor as a joint tortfeasor with his nondebtor wife. **OVERVIEW:** The testimony was admissible under Fed. R. Evid. 701 as being based on the factual information available to them and lay witness inferences. The debtor had not sought production of the FBI documents before trial. The evidence supported denying the debtor's summary judgment. Witnesses testified of the debtor's knowledge and support of his wife's fraudulent activities. The debtor helped create his wife's false persona to mislead the creditors; he accompanied his wife and was instrumental in seeking out projects, knowing his agreements could not be fulfilled. It was correct to conclude that the debtor knew that injuries were certain, yet continued to promote his

wife's larcenous behavior. The finding of nondischargeability under 11 U.S.C. § 523(a)(6) was proper. The debtor's and his wife's mutual support of each other's fraudulent representations supported a finding that they acted in concert, under a common plan, creating an indivisible harm. Each were accountable for the whole loss. Apportionment was not applicable. The judgment was not affected by the wife's criminal restitution order, but the debtor was entitled to claim partial satisfaction for any amount paid by the wife. ***Myers v. Ostling,*** *2002 U.S. Dist. LEXIS 18902, 284 B.R. 614 (E.D. Mich. September 27, 2002) (Steeh, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.12[2]**

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

021016 **Permanently disabled debtor with little likelihood of future employment granted undue hardship discharge of student loans.** *Bankr. D.N.J.* **PROCEDURAL POSTURE:** The debtor filed an adversary complaint seeking a hardship discharge of his student loans owed to a creditor pursuant to 11 U.S.C. § 523(a)(8)(B), arguing that it would be an undue hardship for him to repay the loans. **OVERVIEW:** The debtor received disability income and food stamps. His disabilities were permanent and he was told not to work. He was not capable of taking care of himself. His friends or family paid his bills, walked and cared for his dog, and bought his car and paid all insurance, maintenance, and repairs. The debtor's net income was $21 per month. The monthly student loan payment was $66. He did not have enough income to make the student loan payments and maintain a minimal standard of living. He had no extra expenses to eliminate. The fact that he was on public assistance and was unable to work due to his disabilities suggested that even lower payments would cause undue hardship. He was unlikely to receive a future benefit from his education. The disabilities were likely to continue throughout the loan repayment term for reasons not within his control. The debtor began making his payments on time and made timely payments for 11 months, showing a good faith effort to repay the loan. He also had made good faith efforts to find and to maintain a job, but due to his disabilities he was unable to keep any job. The debtor met the "undue hardship" test under 11 U.S.C. § 523(a)(8). ***Rivera v. New Jersey Educ. Student Assistance Auth. (In re Rivera),*** *2002 Bankr. LEXIS 1118, 284 B.R. 88 (Bankr. D.N.J. October 8, 2002) (Gindin, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

021017 **Student loan discharged on grounds of undue hardship given good faith payment effort, insufficient household income and circumstances unlikely to change.** *D. Kan.* **PROCEDURAL POSTURE:** Appellee debtors filed a chapter 13 bankruptcy proceeding and then filed an adversary proceeding against appellants, the United States Department of Education, and other federal and state agencies and entities, seeking to obtain a hardship discharge of their student loan under 11 U.S.C. § 523(a)(8)(B). The bankruptcy court granted a hardship discharge which was appealed to the district court. **OVERVIEW:** The debtors, a husband and wife, had six children, with ages from 15 months to 17 years. The student loan went towards the husband's bachelors degree and some master's work. The husband, who had a prosthetic leg, was unemployed for a period, and then worked as a locksmith and maintenance man, while the wife worked at a retail store. Their combined income was under $60,000. The district court applied the *Brunner* test and other factors identified by the Sixth and Eighth Circuits to find that the husband was entitled to a hardship discharge as: (1) he carried his burden of proving that he and his dependents could not maintain a minimal standard of living if he had to repay his student loans; (2) the bankruptcy court properly considered all of the wife's disposable income and applied the proportionate share of her income to the family's essential living expenses; (3) even if the wife's entire income was available for paying the student loans, their combined net incomes did not exceed their projected reasonable expenses; (4) the circumstances were not likely to change for a significant period; and (5) the husband had made a good faith effort even though he had made no payments. ***Innes v. Kansas (In re Innes),*** *2002 U.S. Dist. LEXIS 19715, 284 B.R. 496 (D. Kan. August 27, 2002) (Crow, Sr. D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:523.14**

§ 524 EFFECT OF DISCHARGE.

021018 **Bankruptcy Code remedy for violations of discharge injunction is exclusive and precludes action under the Fair Debt Collection Practices Act.** *S.D. Ind.* **PROCEDURAL POSTURE:** Plaintiff debtor sued defendant debt collector and alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), in particular 15 U.S.C. §§ 1692e(2)(A), (2)(B), (5), (10), and section 1692(f), and Ind. Code § 35-43-5-3. The debt collector moved for summary judgment. The debtor moved to strike the affidavit of the debt collector submitted in support of the debtor's summary judgment motion. **OVERVIEW:** The debt collector was hired by a mortgage company to foreclose a mortgage on real estate owned by debtor which mortgage secured a note on which debtor had been indebted to the mortgage company. However, debtor's debt on the note had previously been discharged in bankruptcy. While acting on behalf of the mortgage company, the debt collector filed a complaint against debtor. At that time the debt collector was unaware that the debt with the mortgage company was discharged in bankruptcy. As for debtor's claim based on the debt collector's alleged overstatement of the amount of the debt, the court found that the debtor did not produce sufficient evidence to raise a genuine issue of material fact for trial. The mere fact that the amount of the final

judgment was different, that is, less than the amount requested in the demand for judgment did not prove a violation of 15 U.S.C. §§ 1692e(2)(A) or (B). Furthermore the court found that the reasoning and conclusions of decisions which held that the Bankruptcy Code precluded FDCPA claims based on violations of the Bankruptcy Code were more persuasive than those that held otherwise. ***Wehrheim v. Secrest,*** *2002 U.S. Dist. LEXIS 19020, — B.R. — (S.D. Ind. August 16, 2002) (Tinder, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.01**

§ 524(a) EFFECT OF DISCHARGE; AVOIDANCE AND INJUNCTIVE RELIEF.

021019 **Prepetition judgment lien on debtor's earnings did not survive discharge of underlying judgment.** *Bankr. N.D. Ill.* **PROCEDURAL POSTURE:** Under a 735 Ill. Comp. Stat. Ann. 5/2-1402 (West Supp. 1996) wage deduction order entered more than 90 days before the debtor filed bankruptcy, the debtor's employer was required to withhold a portion of the debtor's wages until the creditor's judgment was paid. After the debtor's discharge entered under 11 U.S.C. § 727, the creditor filed an adversary complaint arguing that the citation lien survived the chapter 7. The debtor moved to dismiss. **OVERVIEW:** The court originally indicated orally that the motion to dismiss would be denied. But, the court sua sponte reconsidered its oral ruling. Since no final judgment had entered in the case, the court could reconsider its decision. The court held that the overriding bankruptcy "fresh start" policy controlled over state law on wage garnishments. The debtor could keep her postpetition wages because the lien's underlying debt was discharged. The lien did not survive the chapter 7 discharge. Future earnings were not "property" under the bankruptcy laws until those earnings were in existence, and a lien on subsequent earnings was extinguished upon discharge. The citation lien under 735 Ill. Comp. Stat. Ann. 5/2-1402 (West Supp. 1996) secured payment of the judgment and terminated when the judgment was satisfied. Once the judgment was voided under 11 U.S.C. § 524(a), it no longer supported a lien that attached to property acquired after the judgment was voided. The prepetition citation lien did not attach to wages earned after the judgment was voided by discharge. Any prepetition wages collected were not property of the estate. But, the lien did not attach to any postpetition wages. ***Johnson v. Chetto (In re Chetto),*** *2002 Bankr. LEXIS 1109, 282 B.R. 215 (Bankr. N.D. Ill. August 2, 2002) (Doyle, B.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:524.02**

§ 525 PROTECTION AGAINST DISCRIMINATORY TREATMENT.

§ 525(a) Protection Against Discriminatory Treatment; Discrimination Against Debtor or Former Debtor by Governmental Unit Prohibited.

021020 **FCC improperly revoked broadband communications licenses of debtor for nonpayment.** *U.S.* **PROCEDURAL POSTURE:** Respondent bankruptcy debtors asserted that petitioner Federal Communications Commission ("FCC") improperly cancelled the debtors' licenses for broadband personal communications services in violation of 11 U.S.C. § 525(a). Upon the grant of a writ of certiorari, the FCC appealed the judgment of the Court of Appeals for the District of Columbia Circuit which held that the license cancellations were unlawful. **OVERVIEW:** The debtors agreed to pay for their spectrum licenses through installment payments but suspended payments pending bankruptcy reorganization, and the licenses automatically cancelled for nonpayment. The FCC contended that the cancellations did not violate section 525(a) since it had a valid regulatory motive, the regulatory requirement for payment was not a debt dischargeable in bankruptcy, and application of section 525(a) to bar the cancellations would conflict with the Communications Act of 1934. The United States Supreme Court held, however, that the cancellations of the licenses violated section 525(a) as revocations of government licenses solely for nonpayment of the debtors' dischargeable debts. Regardless of the FCC's alleged regulatory motive, the cancellations were based solely on the debtors' nonpayment, and the regulatory payment obligations were clearly debts subject to discharge in bankruptcy. Further, no statutory conflict existed since the Communications Act did not require cancellation as a sanction for the debtors' failure to make the installment payments. ***FCC v. Nextwave Pers. Communications, Inc.,*** *2003 U.S. LEXIS 1059, — U.S. — (U.S. January 27, 2003) (Scalia, J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 4:525.02**

§ 541 PROPERTY OF THE ESTATE.

§ 541(a)(5)(B) Property of the Estate; Acquired Through Property Settlement or Divorce Decree.

021021 **Support payment paid in timely fashion by debtor's spouse pursuant to divorce order made within 180 days of filing were not estate property.** *D. Colo.* **PROCEDURAL POSTURE:** Chapter 7 trustee appealed the bankruptcy court's determination that maintenance payments received by the debtor during the 180-day postpetition period were not property of the bankruptcy estate by operation of 11 U.S.C. § 541(a)(5)(B). **OVERVIEW:** The trustee argued that spousal support payments paid to the debtor by her ex-husband pursuant to a state divorce order made within the 180-day period after filing of the debtor's chapter 7 bankruptcy case were property of the bankruptcy estate under 11 U.S.C. § 541(a)(5)(B) that must be turned

over to the trustee. The court found the trustee's argument unpersuasive. The court noted that, while due and unpaid payments could constitute causes of action to be included within a bankruptcy estate as property interests, here, however, it was undisputed that the debtor's ex-husband paid all alimony installments in a timely fashion. As such, those payments never ripened into enforceable judgments; they were not interests in property and therefore did not need to be turned over to the trustee by operation of section 541(a)(5)(B). ***Peters v. Wise (In re Wise),*** *2002 U.S. Dist. LEXIS 19664, 285 B.R. 8 (D. Colo. September 25, 2002) (Miller, D.J.).*
Collier on Bankruptcy, 15th Ed. Revised **5:541.16**

§ 549 POSTPETITION TRANSACTIONS.

021022 **Transfer of trailers, built by shell company with debtor's materials and employees and used by debtor, to corporation owned by son of principal was voidable.** *Bankr. C.D. Ill.* **PROCEDURAL POSTURE:** The trustee has filed an adversary complaint under 11 U.S.C. § 549 seeking to avoid the transfer of trailers by the debtor's principal to defendant, a corporation owned by the principal's son. The trustee sought to sell the trailers at an auction. The principal argued that the trailers were not property of the debtor's estate because they were built by another company owned by the principal. **OVERVIEW:** The principal argued that the trailer building business was separate from the debtor. The other company was not incorporated until eleven months after he began building trailers. The other company had no corporate books, records, by-laws, employees, of payroll records. The trailers were built by the debtor's employees with materials purchased by the debtor at the debtor's site, and were used by the debtor in the ordinary course of its business. The other company did not pay the principal, did not file anything with the Internal Revenue Service, made no purchases, and issued no invoices. It was a shell company. There were no vehicle identification numbers on the trailers and no agreements for the other company to reimburse the debtor for the materials and labor which the debtor expended in building the trailers. After the debtor's operation was shut down, much of the debtor's equipment was transferred to the son's corporation after the debtor knew that it was going to file bankruptcy. The trailers were owned by the debtor at the time the case was filed. The postpetition titling of the trailers in the name of the son's corporation was voidable under 11 U.S.C. § 549. ***Dunn v. Von Behren Elec., Inc. (In re Von Behren Elec., Inc.),*** *2002 Bankr. LEXIS 1126, — B.R. — (Bankr. C.D. Ill. October 10, 2002) (Lessen, B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **5:549.01**

§ 553 SETOFF.

021023 **Creditor allowed to set off amount owed by debtor against amount owed to debtor on secured claim.** *Bankr. S.D.N.Y.* **PROCEDURAL POSTURE:** In plaintiff trustee's action against defendant creditor to recover $600,000, both parties moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). **OVERVIEW:** The creditor, the debtor's former chief financial officer, owed the debtor $600,000, secured by a mortgage. The trustee sued the creditor to foreclose on the mortgage to recover the amount owed. The creditor sought summary judgment on his claim to setoff obligations the debtor owed him, and the trustee sought summary judgment on his foreclosure claim. The court granted the creditor summary judgment on his claim concerning the setoff of a stock agreement between himself and the debtor. The fact that the creditor, along with other directors of the debtor, voted in favor of the pledge of the creditor's shares in exchange for a loan, did not prevent him from setting off that amount he was owed from the amount he owed the debtor. The trustee was granted summary judgment on his claim that the amount the creditor was entitled to under the deferred compensation plan was $58,000, the present value on the bankruptcy petition date, rather than $500,000, the aggregate amount that would be paid to the creditor over 10 years after he reached the age of 65. ***Pereira v. Nelson (In re Trace Int'l Holdings, Inc.),*** *2002 Bankr. LEXIS 1138, 284 B.R. 32 (Bankr. S.D.N.Y. October 11, 2002) (Bernstein, C.B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **5:553.01**

§ 707 DISMISSAL.

§ 707(a) Dismissal; For Cause.

021024 **Filing of *pro se* petition by limited liability company was not void *ab initio.*** *Bankr. D. Conn.* **PROCEDURAL POSTURE:** A creditor moved to lift the stay under 11 U.S.C. § 362, arguing that the debtor limited liability company filed its petition *pro se* instead of through an attorney under 28 U.S.C. § 1654, Fed. R. Bankr. P. 9010, and Local Bankruptcy Rule 9010-1, that the petition was void *ab initio*. The court issued an order to show cause as to dismissal under 11 U.S.C. § 707(a). The debtor, the chapter 7 trustee, and the United States trustee objected. **OVERVIEW:** It was noted that neither 28 U.S.C. § 1654, Fed. R. Bankr. P. 9010, Local Bankruptcy Rule 9010-1, nor any other federal statute or rule provided that the filing of a *pro se* voluntary petition by an artificial entity was void *ab initio*. 11 U.S.C. § 109 defined who could be a debtor and did not mandate a "void *ab initio*" rule as to such a filing. The petition was not void *ab initio*. Any such defect was cured by an

appearance of counsel for the debtor. The appearance was reasonably prompt, and no one had argued that the administration of the case was substantially compromised by the passage of time before the appearance was filed. The debtor had filed its schedules and the meeting of creditors had taken place. Both trustees argued against dismissal. The interests of the creditors militated against dismissal, because of allegations of misconduct by the debtor's management. The trustee had questioned the validity of the creditor's security interest. The debtor alleged that there could be preferences against the creditor which would be time barred if the case was dismissed. The *pro se* chapter 7 filing was not "cause" to dismiss the case under 11 U.S.C. § 707(a) or to lift the stay. ***Orsini v. Interiors of Yesterday, LLC (In re Interiors of Yesterday, LLC),*** *2002 Bankr. LEXIS 1145, 284 B.R. 19 (Bankr. D. Conn. October 11, 2002) (Murphy Weil, B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **6:707.03**

021025 **Voluntary dismissal denied as misunderstanding of effect of bankruptcy was not appropriate cause and dismissal would result in "race to courthouse" by creditors.** *Bankr. C.D. Ill.* **PROCEDURAL POSTURE:** The issue before the court was whether the debtors should have been permitted to voluntarily dismiss their voluntary chapter 7 petition where the debtors had significant debt and no apparent ability to repay the debt other than through the successful prosecution of a personal injury action. **OVERVIEW:** The trustee opposed dismissal, noting that the debtors had significant debt, and the negative cash flow shown in their budget demonstrated that they did not have the ability to pay their debts. The debtors stated that they misunderstood the exempt status of the debtor wife's personal injury claim, and would not have filed for bankruptcy if they had known that the claim would have been exempt only to the extent of $7,500. Also the debtors were contemplating a divorce and the debtor wife did not want her award money going to pay the debtor husband's credit card debts. The court found that this was not a compelling reason for dismissal. The debtors claimed that the creditors would not have been prejudiced by the dismissal because the creditors' rights to pursue their claims against the debtors and to seek collection based upon the debtors' assets, including filing a lien against the pending tort suit, would have been reinstituted by the dismissal of the bankruptcy proceeding. The court found that that was exactly the kind of "race to the courthouse" that the Bankruptcy Code was designed to protect against. Bankruptcy courts uniformly denied dismissal under such circumstances. ***In re Stults,*** *2002 Bankr. LEXIS 1140, — B.R. — (Bankr. C.D. Ill. October 9, 2002) (Lessen, B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **6:707.03**

§ 707(b) Dismissal; Substantial Abuse Test.

021026 **Chapter 7 petition dismissed for substantial abuse where debtor would be able to fund a chapter 13 plan if nondebtor spouse paid fair share of household expenses.** *Bankr. D. Or.* **PROCEDURAL POSTURE:** The debtor filed a chapter 7 petition under the Bankruptcy Code and the debtor's spouse did not join in the petition. The trustee filed a motion to dismiss for substantial abuse. **OVERVIEW:** The trustee claimed that the debtor had the ability to repay a substantial portion of his debt to creditors in a chapter 13 case if his nondebtor spouse paid her proportionate share of the couple's joint household expenses. The debtor disagreed with the trustee's claim. The trustee asserted that the debtor paid most of the household expenses, even though the debtor's spouse was employed. The trustee also asserted that some of the claimed expenses were not reasonably necessary for the support of the debtor and his family, such as golf lessons and music lessons. The court agreed with the trustee and found that the debtor was paying all of the daily living expenses, while his wife contributed nothing from her earnings toward their joint expenses. The court found that the debtor had the ability to fund a chapter 13 plan. ***In re Falke,*** *2002 Bankr. LEXIS 1132, 284 B.R. 133 (Bankr. D. Or. October 7, 2002) (Brown, B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **6:707.04**

§ 727 DISCHARGE.

§ 727(d)(1) Discharge; Revocation; Fraud.

021027 **Debtor's fraudulent misrepresentation of social security number was sufficient grounds for revocation of discharge.** *C.D. Cal.* **PROCEDURAL POSTURE:** Appellant United States trustee (trustee) challenged the judgment of the bankruptcy court which denied the trustee's request to revoke the discharge of appellee debtor's debts under 11 U.S.C. § 727(d)(1). **OVERVIEW:** After the debtor was granted a discharge of her debts, the trustee learned that the debtor had listed two false social security numbers on her bankruptcy petition and had omitted her true social security number. The district court denied the trustee's request to revoke the discharge, holding that the debtor's actions were not material because an investigation of her valid social security number would not have revealed information that would have resulted in denying her a discharge. On appeal, the court reversed. The debtor's listing of false social security numbers and her failure to disclose her valid social security number was material to the trustee's ability to determine her eligibility for discharge, as the disclosure of accurate and complete information would have aided the trustee in understanding the debtor's financial affairs and transactions. The fraudulent misrepresentations and concealment would have been sufficient to preclude the debtor's discharge under 11 U.S.C. § 727(a)(4)(A) had they been revealed prior to the date of discharge. ***Tighe v. Valencia (In re Guadarrama),*** *2002 U.S. Dist.*

LEXIS 19256, 284 B.R. 463 (C.D. Cal. September 23, 2002) (Morrow, D.J.).
***Collier on Bankruptcy, 15th Ed. Revised* 6:727.15[2]**

§ 1141 EFFECT OF CONFIRMATION.

021028 **State law action by parties in interest, who did not object or appeal confirmation order, dismissed as collateral attack on binding plan.** *D. Del.* **PROCEDURAL POSTURE:** The debtor filed a chapter 11 bankruptcy petition. Appellants, who were holders of common stock and, therefore, parties in interest to the bankruptcy, filed an action in state court against appellees, that was transferred to federal court. Appellees moved the bankruptcy court to enforce the plan of reorganization and the confirmation order. The motion was granted, and appellants were ordered to dismiss their lawsuit. This appeal followed. **OVERVIEW:** The debtor's plan of reorganization was confirmed. Appellants neither objected to nor appealed the confirmation order. In their lawsuit, which was against appellee officers, directors, and noteholders of the debtor, appellants alleged numerous state law causes of action founded, primarily, upon appellees' massive undervaluation of the debtor by excluding significant assets, by excluding value relating to substantial components of the debtor's business operations and by intentionally failing to disclose information known to appellees which materially affected the debtor's value. The bankruptcy court found that the allegations in the action could and should have been raised in the course of the bankruptcy proceedings before confirmation of the plan of reorganization. The district court found no legal error in the bankruptcy court's reasoning. Appellants' lawsuit was a collateral attack on the plan of reorganization and confirmation order, as appellants essentially charged fraud in the bankruptcy process and on the bankruptcy court. ***Hunt Capital Group, LLC v. Nucentrix BroadbankNetworks, Inc. (In re Heartland Wireless Communications, Inc.),*** *2002 U.S. Dist. LEXIS 19710, — B.R. — (D. Del. September 23, 2002) (Robinson, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1141.01**

§ 1307 CONVERSION OR DISMISSAL.

021029 **Chapter 13 debtor had right to dismissal despite pending motion for conversion to chapter 7.** *D. Colo.* **PROCEDURAL POSTURE:** The bankruptcy court ordered dismissal of debtor's chapter 13 case, finding that the debtor requested dismissal pursuant to 11 U.S.C. § 1307(b). The trustee moved for reconsideration, arguing the equity of conversion given the case's age and the debtor's delay tactics. The bankruptcy denied the trustee's motion, concluding that a debtor had an absolute right to dismissal of a chapter 13 case following a motion to dismiss under section 1307(b). **OVERVIEW:** The issue on appeal was whether 11 U.S.C. § 1307(b) granted a debtor an absolute right to have a chapter 13 case dismissed or whether such right was modified when the debtor moved to dismiss in the face of a pending 11 U.S.C. § 1307(c) motion to convert to chapter 7. The trustee argued that the mandatory dismissal language of section 1307(b) was not controlling when there was a pending section 1307(c) motion to convert to chapter 7; in such instance, the trustee argued, a court must consider both motions and could not automatically grant the motion to dismiss. The trustee further suggested that, at the very least, section 1307(b) did not grant an absolute right to dismissal when the pending section 1307(c) motion to convert alleged bad faith, abuse of process or undue delay. The court found that the language, history and purpose of 11 U.S.C. § 1307(b) were clear: a chapter 13 debtor had the absolute right to the case's dismissal at any time unless the case had previously been converted from chapter 7 or 11. ***Zeman v. Dulaney (In re Dulaney),*** *2002 U.S. Dist. LEXIS 19667, 285 B.R. 10 (D. Colo. September 26, 2002) (Miller, D.J.).*
***Collier on Bankruptcy, 15th Ed. Revised* 8:1307.01**

28 U.S.C.

§ 157 PROCEDURES.

021030 **Malpractice action by debtor challenging payment of defendant law firm's fees from estate was a core proceeding.** *E.D. La.* **PROCEDURAL POSTURE:** While appellee debtor's confirmed bankruptcy plan was still under the bankruptcy court's administration, it and another appellee, a creditor, filed a malpractice suit against appellant law firm in state court. The law firm filed an adversary proceeding in bankruptcy court. The appellees' motion to dismiss was granted, and the law firm appealed the dismissal by the bankruptcy court. **OVERVIEW:** The law firm sought a declaratory judgment that the actions taken and legal services performed during the administration of the debtor's estate were valid and proper, including the receipt of the legal fees paid for those legal services rendered. The malpractice action was a collateral attack on the administration of the plan of reorganization during the pendency of the bankruptcy proceeding. The claims against the law firm clearly challenged the bankruptcy court's decisions relating to the administration of the debtor's confirmed plan, including its orders authorizing payment of the law firm's fees from the debtor's escrowed funds. The appellees sought to have the law firm disgorge the fees and pay other damages, resulting in enrichment to the debtor's estate and affecting the continuing distribution of debtor's assets. It clearly bore on the interpretation and execution of the debtor's confirmed plan. It was therefore a core proceeding within the

exclusive jurisdiction of the bankruptcy court. ***Slater Law Firm v. S. Parish Oil Co., Inc.,*** *2002 U.S. Dist. LEXIS 19245, — B.R. — (E.D. La. October 8, 2002) (Livaudais, Sr. D.J.).*
Collier on Bankruptcy, 15th Ed. Revised **1:3.02**

§ 1334 BANKRUPTCY CASES AND PROCEEDINGS.

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

021031 **Lawsuit brought by debtor's largest creditor against numerous defendants on state law grounds appropriate for exercise of permissive abstention and remand to state court.** *Bankr. S.D. Fla.* **PROCEDURAL POSTURE:** Adversary plaintiff, a commercial factor and creditor of debtor, sued multiple defendants, for more than $10 million damages in state court proceedings on state law claims, and demanded jury trials. The related parties removed to federal court as related to debtor's bankruptcy, pursuant to 28 U.S.C. § 1452. The factor and several defendants moved to remand the actions. **OVERVIEW:** The debtor listed the factor as its largest creditor, and the factor succeeded in converting the chapter 11 proceeding to a chapter 7. After the actions were removed, the factor and other remand movants raised several grounds for remand, including arguing that the court lacked subject matter jurisdiction under 28 U.S.C. § 1334(b), that the mandatory abstention provision of 28 U.S.C. § 1334(c)(2) required the court to abstain from hearing these proceedings, and that the court should be guided by the permissive abstention provision of 28 U.S.C. § 1334(c)(1), or remand the proceedings on equitable grounds pursuant to 28 U.S.C. § 1452(b). The court found the cases were barely related to the bankruptcy proceeding, but sufficiently so to find federal jurisdiction. However, the court agreed that permissive abstention applied to the case. The cases could be timely adjudicated in the state court, and there was no compelling evidence or argument that administration of the estate would be impaired by remanding the proceedings to that forum. ***E.S. Bankest, LLC v. United Beverage Fla., LLC (In re United Container LLC),*** *2002 Bankr. LEXIS 1143, 284 B.R. 162 (Bankr. S.D. Fla. October 8, 2002) (Mark, C.B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **1:3.01**

BANKRUPTCY RULES

RULE 7026 GENERAL PROVISIONS GOVERNING DISCOVERY.

021032 **Request for admissions served prior to the mandated pretrial conference by creditor who also failed to attend the conference was invalid.** *Bankr. M.D. Ga.* **PROCEDURAL POSTURE:** A creditor filed an adversary proceeding alleging the debtor's credit card obligation was nondischargeable under 11 U.S.C. § 523(a)(2)(A). The creditor moved for summary judgment arguing that its "unanswered" request for admissions deemed it admitted that the debtor had not intended to pay the debt. The debtor objected, arguing that the requests were served before the conference required under Fed. R. Bankr. P. 7026 and Fed. R. Civ. P. 26(f). **OVERVIEW:** It was noted that the creditor's request for admissions was served prior to the conference required under Fed. R. Bankr. P. 7026 and Fed. R. Civ. P. 26(f) and that the creditor's counsel had failed to appear at the pretrial conference. Summary judgment was a drastic measure. A motion for summary judgment based on an admission established by default should receive special scrutiny from the court. When considering a motion for summary judgment based on an admission, the court could consider such factors as whether the request for admission was properly served. The court was persuaded that the request for admissions was not served in accordance with the requirements of Rule 26(d) and that the debtor could not be deemed to have admitted any matters contained therein. Since the request for admissions was filed in violation of Rule 26(d), the request for admissions was stricken from the record. Furthermore, the creditor had to start over with all of its discovery. Without the deemed admissions, the court concluded that there are substantial material facts to be decided. ***Fleet Credit Card Servs., LP v. Harden (In re Harden),*** *2002 Bankr. LEXIS 1122, 282 B.R. 543 (Bankr. M.D. Ga. August 26, 2002) (Hershner, C.B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **10:7026.01**

RULE 8002 TIME FOR FILING NOTICE OF APPEAL.

Rule 8002(b) Time for Filing Notice of Appeal; Effect of Motion on Time for Appeal.

021033 **Request for extension of time to appeal, received by facsimile, after hours, on the tenth day after the court order and docketed on the eleventh, was untimely.** *B.A.P. 1st Cir.* **PROCEDURAL POSTURE:** Debtors filed a motion to avoid certain state and federal tax liens. The bankruptcy court denied debtors' avoidance motion by order dated April 18, 2002. Debtors' motion for an extension of time was filed after business hours on April 29, 2002, and docketed on April 30, 2002. The bankruptcy court granted the time extension and later denied debtors' motion to reconsider. Debtors appealed. **OVERVIEW:** Debtors moved for an extension of time either to take an appeal from the order or file a motion for reconsideration of the order. Debtors' motion was transmitted by electronic facsimile to the bankruptcy court after business hours on April 29, 2002, the last

day of the ten day appeal period under Fed. R. Bankr. P. 8002(a). It was entered on the docket on April 30, 2002, eleven days after the order denying the avoidance motion. The bankruptcy appellate panel held that, because the original ten day appeal period had lapsed before the bankruptcy court granted the motion to extend, the appellate court lacked jurisdiction to review the order of April 18, 2002. The panel noted that the timely filing of an appeal was mandatory and jurisdictional. Further, the time for filing a motion under Rule 8002(b) could not be extended by a bankruptcy court. The request for an extension was dated April 29, 2002, and transmitted to the bankruptcy court after regular business hours on that day. It was entered on the bankruptcy docket on April 30, 2002, eleven days after the entry of the order denying the lien avoidance motion. That entry was proper. ***Bradshaw v. United States (In re Bradshaw),*** *2002 Bankr. LEXIS 1146, 283 B.R. 814 (B.A.P. 1st Cir. August 30, 2002) (Haines, B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **10:8002.07**

RULE 8005 STAY PENDING APPEAL.

021034 **Debtor's tenants not entitled to stay pending appeal of order to vacate due to successful relocation and subsequent inability to demonstrate irreparable harm.** *S.D.N.Y.* **PROCEDURAL POSTURE:** The bankruptcy court ordered appellants to vacate certain premises leased to debtor. Appellants, in conjunction with noticing an appeal from that order, moved pursuant to Fed. R. Bankr. P. 8005 to stay the order pending appeal. The bankruptcy court denied the stay, and appellants appealed. **OVERVIEW:** The proper standard governing the strength-of-the-case component of a motion for a stay pending appeal of a bankruptcy court order was "substantial possibility" of success on the merits — i.e., the same standard utilized on a motion to stay a district court's order pending appeal to the court of appeals — rather than the "strong likelihood" of success standard the bankruptcy court applied in its order. Moreover, regardless of the applicable standard governing the strength of appellants' case, appellants had to, under any standard, also show that they would suffer irreparable harm if the stay of the bankruptcy court order was not granted. While previously appellants arguably made this showing by alleging that being forced to vacate the premises (where they had been situated for many years) would irreparably harm their business, debtors alleged, and appellants had not disputed, that appellants had since relocated to nearby premises and continued their business without material interruption. Consequently, they could no longer show that they would suffer irreparable injury absent a stay. ***In re General Credit Corp.,*** *2002 U.S. Dist. LEXIS 19092, 283 B.R. 658 (S.D.N.Y. October 8, 2002) (Rakoff, D.J.).*
Collier on Bankruptcy, 15th Ed. Revised **10:8005.01**

RULE 9010 REPRESENTATION AND APPEARANCES; POWERS OF ATTORNEY.

021035 **Filing of *pro se* petition by artificial entity was promptly cured by appearance of counsel.** *Bankr. D. Conn.* **PROCEDURAL POSTURE:** A creditor moved to lift the stay under 11 U.S.C. § 362, arguing that the debtor limited liability company filed its petition *pro se* instead of through an attorney under 28 U.S.C. § 1654, Fed. R. Bankr. P. 9010, and Local Bankruptcy Rule 9010-1, that the petition was void *ab initio*. The court issued an order to show cause as to dismissal under 11 U.S.C. § 707(a). The debtor, the chapter 7 trustee, and the United States trustee objected. **OVERVIEW:** It was noted that neither 28 U.S.C. § 1654, Fed. R. Bankr. P. 9010, Local Bankruptcy Rule 9010-1, nor any other federal statute or rule provided that the filing of a *pro se* voluntary petition by an artificial entity was void *ab initio*. 11 U.S.C. § 109 defined who could be a debtor and did not mandate a "void *ab initio*" rule as to such a filing. The petition was not void *ab initio*. Any such defect was cured by an appearance of counsel for the debtor. The appearance was reasonably prompt, and no one had argued that the administration of the case was substantially compromised by the passage of time before the appearance was filed. The debtor had filed its schedules and the meeting of creditors had taken place. Both trustees argued against dismissal. The interests of the creditors militated against dismissal, because of allegations of misconduct by the debtor's management. The trustee had questioned the validity of the creditor's security interest. The debtor alleged that there could be preferences against the creditor which would be time barred if the case was dismissed. The *pro se* chapter 7 filing was not "cause" to dismiss the case under 11 U.S.C. § 707(a) or to lift the stay. ***Orsini v. Interiors of Yesterday, LLC (In re Interiors of Yesterday, LLC),*** *2002 Bankr. LEXIS 1145, 284 B.R. 19 (Bankr. D. Conn. October 11, 2002) (Murphy Weil, B.J.).*
Collier on Bankruptcy, 15th Ed. Revised **10:9010.01**

RULE 9023 NEW TRIALS; AMENDMENT OF JUDGMENTS.

021036 **Court could not consider debtor's untimely motion for reconsideration of default despite attorney's negligence in failing to respond to objection to discharge.** *Bankr. M.D. Ga.* **PROCEDURAL POSTURE:** After the 10-day period under Fed. R. Civ. P. 59(e), the debtor asked for reconsideration of a default judgment that denied the debtor's discharge. The debtor alleged ineffective assistance of counsel. No answer had been filed on behalf of the debtor under Fed. R. Bankr. P. 7012(a).The debtor's counsel withdrew while entry of the default judgment was pending. **OVERVIEW:** The court noted that the debtor's counsel's motion to withdraw was filed in the main bankruptcy case, not in the adversary proceeding. The

debtor had originally objected to the withdrawal, then advised that she was attempting to find other counsel, and at a subsequent hearing the debtor agreed to the withdrawal. The debtor's motion was not timely filed under Fed. R. Civ. P. 59(e) because it was filed more than 10 days after entry of the order. The court was persuaded that counsel failed to advise the debtor as to the serious consequences of the complaint objecting to discharge and failed to ensure that an answer was timely filed while he was the attorney of record. But, attorney negligence did not warrant relief under Fed. R. Civ. P. 59 and Fed. R. Bankr. P. 9023. The Sixth Amendment standards for effective counsel in criminal cases did not apply in the civil context. The debtor did not have a right to a new trial due to inadequate counsel. The remedy was suit against the attorney for malpractice. While the court was very concerned with the legal representation that the debtor received, because the motion for reconsideration was untimely, the court could not consider the motion. ***Oconee State Bank v. Wilson (In re Wilson),*** *2002 Bankr. LEXIS 1125, 282 B.R. 278 (Bankr. M.D. Ga. July 3, 2002) (Hershner, B.J.).*

Collier on Bankruptcy, 15th Ed. Revised **10:9023.01**