CASE REVIEW 2002
RECENT CASES OF INTEREST

Presented by the Honorable Donald E. Cordova
Chief Judge, United States Bankruptcy Court for the District of Colorado
and Steven Rider, Esq., Block, Markus, Williams, LLC

COLORADO BANKRUPTCY COURT DECISIONS:

In re Alling, Case No. 01-18412 ABC, Order entered December 24, 2001 (Judge Campbell).

The Debtors sought confirmation of a Chapter 13 plan. The Debtor husband's debts included $3,500 in child support arrearages owing to his former spouse. The Debtor proposed to pay these arrearages in full "outside the plan." He had not obtained his ex-wife's express agreement to this treatment. The Chapter 13 Trustee objected to the confirmation of the plan, on the grounds that it was not accompanied by a written agreement of Mr. Alling's ex-wife agreeing to her treatment by the plan.

The Court noted that the requirement of a written consent of a former spouse follows the 1987 decision ***In re Davidson***, 72 B.R. 384 (Bankr. D. Colo. 1987), which held that treating support arrearages "outside the plan" precluded a finding of feasibility under 11 U.S.C. §1325(a)(6), and that any treatment of support arrearages must be in good faith, implementing a strong policy both by Congress and the State of Colorado in favor of child support creditors and against the Bankruptcy Court's adjudicating matters more properly handled by the state courts. In 1994, the policy favoring child support claimants was codified by an amendment to the Code, 11 U.S.C. §507(a)(7). This section provides that child support obligees shall be accorded priority status. The Court pointed out that Congress' enacting of this amendment overrides the good-faith analysis of Davidson, and condones deferred full payment of support arrearages by a Chapter 13 plan. Section 1322(a)(2) directs that Chapter 13 plans "shall provide for the full payment, in deferred cash payments," of all section 507 priority claims, unless the claim holder agrees to different treatment. Therefore, the Court found that, in this case, where the Debtors' plan provided for full, deferred payment of support arrearages, neither the good faith requirement of §1325(a)(3) nor the feasibility requirement of §1325(a)(6) precludes confirmation, and specific approval of the ex-spouse was not necessary.

Baroway & Dawson, P.C. v. Euell (In re Euell), 271 B.R. 388 (Bankr. D. Colo., January 2, 2002) (Judge Brown).

Prior to the Debtor's Chapter 7 filing, the law firm of Baroway & Dawson had acted as guardian ad litem for the Debtor's children in connection with the Debtor's divorce proceeding. Following the bankruptcy filing, the law firm filed an adversary proceeding seeking to have its guardian ad litem fees declared nondischargeable under 11 U.S.C. §523(a)(15). The Court, *sua* *sponte*, raised the issue of the law firm's standing to bring such an action, and concluded that it did not. The Court pointed out that §523(a)(15) excepts from discharge any debt related to a separation or divorce which is not of the kind described in §523(a)(5)**,** unless:

> *(A) the debtor does not have the ability to pay such debt from income or property of the debt not reasonably necessary to be expended for the maintenance or support of the debtor or a dependant of the debtor. . . ; or*
> *(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor. . .*

The Court recognized that the legislative history which stated that the exception applies only to debts owed to a spouse or former spouse, and can be asserted only by the other party to a divorce or separation, was written when subsections (A) and (B) were joined by the conjunctive "and," rather than the disjunctive "or," before the final draft was passed. 140 Cong. Rec. H10752, H10770 (daily ed. Oct. 4, 1994). However, the Court went on to analyze the cases dealing with the issue, and found that, although no Tenth Circuit cases addressed it, standing for third parties under 11 U.S.C. §523(a)(15) had been rejected by the Ninth Circuit Bankruptcy Appellate Panel and numerous bankruptcy courts. The only decision permitting such standing, ***In re Soderlund***, 197 B.R. 742 (Bankr. D. Mass 1996), did not consider the legislative history on the basis that the plain language of the statute permitted standing. Judge Brown rejected the reasoning in the ***Soderlund*** opinion, stating that a fundamental premise of statutory interpretation is to ascertain legislative intent**,** which requires a Court to look first at the language of the statute itself. Another fundamental rule of statutory construction prohibits construing statutes so as to render any of their provisions superfluous. Although subsection (A) requires no "cost-benefit" analysis between spouses, subsection (B) does require such an analysis. Since, if a debtor establishes an exception to the presumption against discharge under either of the subsections, the debt is dischargeable, allowing a third party creditor standing under §523(a)(15) would render subsection (B) superfluous. Further, the Court stated that the use of "or" between subsections (A) and (B) reflects legislative intent to broaden the exception or to create greater dischargeability, not to narrow the exceptions or to provide standing to third party creditors. Accordingly, the Court dismissed the law firm's complaint for lack of standing.

In re Murphy, 272 B.R. 483 (Bankr. D. Colo., January 9, 2002) (Judge Campbell).

After the Debtor's Chapter 7 case was converted to a Chapter 13 case, the Chapter 7 Trustee moved for allowance of an administrative priority claim of $420 in fees and $8.50 in costs. The Court recognized that any award of trustee's fees requires evaluation under both 11 U.S.C. §330 and 11 U.S.C. §326. The Court noted that the majority of courts which have addressed the question of whether a Chapter 7 trustee is precluded from a fee award if a case converts to Chapter 13 (thus depriving the Chapter 7 trustee of the ability to make disbursements from the estate), have used various rationales to permit such fee awards. Such rationales include the unfairness to a hardworking trustee to be deprived of compensation, a fear that denying the chapter 7 trustee compensation creates a disincentive for the trustee to discharge diligently his or her fiduciary responsibilities, and a *quantum meruit* theory. However, the Court rejected these rationales as contradicting the clear language of the statute, and adopted the minority position, exemplified by In re Fischer, 210 B.R. 467 (Bankr. D. Minn. 1997) that, despite a request's reasonableness under §330(a), Chapter 7 trustee's fees are limited by section 326(a) to a percentage of monies Chapter 7 trustees disburse, even in cases that convert to Chapter 13. The Court went on to state that the funding of the Chapter 7 trustee system with a percentage of monies actually collected and disbursed, rather than with appropriations, supports this conclusion. However, the Court did award the Chapter 7 Trustee his request for $8.50 in expenses.

In re Patterson, 2002 WL 519500 (Bankr. D. Colo., January 10, 2002) (Not Reported in B.R.) (Judge Brooks).

Judge Brooks found that, although an attorney's fee disclosure statement under Bankruptcy Rule 2016 facially complied with the Rule, it was nonetheless incomplete, vague, and confusing, and did not reflect accurately the terms of the separate fee agreement between the Debtors and their attorney. In addition, the fee agreement itself contained provisions which were ambiguous, including 1) the fee was estimated between $1,000 and $2,500, a vague, imprecise range; 2) the fee charged and disclosed did not include such important legal services as consultation after plan confirmation, contested matters, and any amendments to the plan. Such services fall within the definition of "basic services" pursuant to the Court's General Order 2001-1. Further, the fee disclosure statement provided for $2,500 in total fees, of which $600 was paid prepetition, leaving $1,900 to be paid through the Chapter 13 plan. The plan provided for this $1,900 to be paid through the plan. The fee application filed by the Debtor's attorney, however, only requested $1,500 in total fees. This arrangement was designed to create a "fee reserve" to be held by the Chapter 13 Trustee to pay the Debtors' attorney if the fees rose to the level of $1,500. Otherwise, the reserve would be available for disbursal to unsecured creditors. Difficulties regarding the disclosure of the fee agreement terms were illustrated by the fact that the Debtors requested their attorney to represent them in a relief from stay matter, a matter normally designated as a "basic service" under General Order 2001-1. However, the attorney demanded an additional $300 to be paid by the Debtors personally, which they could not afford, so they were forced to proceed *pro se.* The attorney did not look to the fee reserve in the plan for this additional fee. Therefore, the "fee reserve" arrangement did not benefit the Debtors, placed an increased and unexpected financial burden on the Debtors, and jeopardized the Debtors' plan because their budget did not provide for additional, unexpected, post-confirmation attorneys' fees "outside the plan." Although the attorney may have been acting within the provisions of the fee agreement, these provisions were not disclosed to the Court and created serious problems and a risk to the Debtors' plan and fresh start. The Court found that, while creation of a "fee reserve" in a Chapter 13 plan is not *per se* improper, it is a practice that is ripe for "abuse, surprise, or imposition of an undue and unfair burden on the debtor, resulting in failure of the plan. The Court therefore ordered the Debtors' attorney, in future cases, to disclose all material variations from General Order 2001-1 in his attorneys fee disclosure statement, or attach a copy of the fee agreement to the disclosure statement. Such disclosure shall be required of all fee applications submitted to Judge Brooks after February 1, 2002.

In re Fager, 2002 WL 334922 (Bankr. D. Colo., February 28, 2002) (Judge Brown)

The Debtors in a Chapter 13 case claimed as exempt a claim for negligence against a construction company for the loss of household goods that were destroyed in a fire caused by the construction company. The Debtors asserted their exemption under C.R.S. §13-54-102(1)(e), which covers "household goods owned and used by the debtor or the debtor's dependents to the extent of three thousand dollars in value." The Chapter 13 Trustee objected to the claimed exemption. Judge Brown held that the Debtors were not entitled to exempt proceeds of the household goods, i.e., the negligence claim or any recovery therefrom, because the C.R.S. §13-53-102(1)(e) specifically restricts the exemption to goods "owned and used" and does not cover "proceeds." Citing ***In re Gillespie***, 41 B.R. 810 (Bankr. D. Colo. 1984), the Court noted that the fact that the legislature included proceeds in some sections of the exemption statute but not in others supports a conclusion that when exempt property is transformed into another form or property, it does not necessarily retain it exempt status. Further, Judge Brown pointed out that another section of the exemption statute, C.R.S. §13-54-102(1)(m), offers protection for damage to otherwise exempt property.

BankOne Colorado, N.A. v. Steffens (In re Steffens), Case No.01-25624 SBB, Order entered March 22, 2002 (Judge Brooks).

Creditor Bank One filed a motion for relief from stay, seeking to foreclose its deed of trust on two parcels of the Debtors' real property. The Debtors claimed that all three of the parcels of property they owned were necessary to their Chapter 11 plan of reorganization, and so objected to the Bank's being granted relief from stay as to two of the parcels. The Debtors also alleged that the property has substantial equity for the estate, and that it should be treated as a whole for purposes of determining whether relief from stay should be granted.

The Court found that the Bank was not entitled to relief from stay pursuant to 11 U.S.C §362(d)(1) because its interest in the property was adequately protected. The Court noted that there are no reported cases on the issue of whether separate parcels should be treated as a single property for purposes of relief from stay, but concluded that only those parcels subject to the Bank's lien should be considered in evaluating adequate protection. Each party's appraiser had indicated that the Bank was protected by an equity cushion, at least for the present time, rendering the Bank adequately protected.

However, pursuant to 11 U.S.C. §362(d)(2), the Court concluded that the Debtors had no equity in the property, based upon all of the liens against the property, regardless of whether the three parcels were treated as a single property. In addition, the Debtors' proposed plan, using all three properties, was nebulous and would most likely result in no return to the estate. Therefore, the Court granted relief from stay based on the Debtors' lack of equity, and the fact that the property was not necessary to an effective reorganization, pursuant to 11 U.S.C. §362(d)(2).

In re Moore, Case No. 01-22864 SBB, Order Entered March 28, 2002 (Judge Brooks).

The Debtor's Amended Chapter 13 Plan provided that upon being paid the secured portion of its claim, Ford Motor Credit would release its lien and forward the title to the Debtors' vehicle to the Debtors. Ford Motor Credit objected, and the Court addressed the issue of whether a Chapter 13 plan may provide for the release of an under-secured creditor's lien upon full payment of the allowed secured claim before the completion of the Chapter 13 plan and entry of a discharge.

The Court noted that there is a split of authority over whether the common practice of Chapter 13 "lien stripping" requires the release of the lien prior to the completion of a Chapter 13 plan, and that the matter has not been addressed specifically by the Tenth Circuit. The Court concluded that such a requirement was not permissible and denied the Debtors' motion to confirm the Chapter 13 plan.

The Court pointed out that 11 U.S.C. §1307(b) gives debtors an absolute right to dismiss their case at any time, and that, after such a dismissal, 11 U.S.C. §349 would reinstate any lien avoided under 11 U.S.C. §506. Permitting a plan to require early release of a lien, however, would render §349 moot, because reinstatement of a released lien would not be possible. Therefore, the Court found that, in order to obtain the benefit of the modification of a secured creditor's rights and the release of the lien without full payment of the debt, the Debtors would have to complete all their Chapter 13 plan payments and obtain a discharge.

In re Patterson, ___B.R. ___, 2002 WL 484895 (Bankr. D. Colo., March 28, 2002) (Judge Brown).

The Debtors moved to void the lien of an agency of the City of Colorado Springs. The City objected, stating that the property for which the Debtor's claimed that the lien impaired their homestead exemption was not their homestead and had been abandoned. The Court found that the City was not time-barred from objecting to the claimed homestead exemption, because the objection occurred in the context of a defense to a lien avoidance action.

However, the Court went on to hold that, although the Debtors admitted they were not living in the subject property at the time of their bankruptcy filing, the Debtors did not intend to abandon their homestead, based on evidence that the Debtors owned the home on the date of filing and continuously thereafter, and that Debtors' absences from the homestead were short-term and for the specific purposes of renovating the home and temporarily avoiding proximity to the Debtor husband's ex-spouse.

Lewis v. Hare (In re Richards), **___**B.R.**___**, 2002 WL 519668 (Bankr. D. Colo., April 3, 2002) (Judge Brown).

The Debtor purchased an automobile with funds borrowed from a friend, James Hare. The parties intended that the loan would be secured by the vehicle, but Mr. Hare failed to perfect his lien on the certificate of title before the Debtor's April 13, 2001 Chapter 7 filing. The Debtor claimed the vehicle as exempt and informed the Chapter 7 Trustee that Mr. Hare had a lien on it. The Trustee filed a motion for turnover, claiming that the vehicle was property of the estate and that the creditor's lien was subject to avoidance. He also objected to the Debtor's claim of exemption. In addition, the Trustee filed an adversary proceeding against Mr. Hare, seeking to avoid the unperfected lien. The Debtor filed an answer in that proceeding, but Mr. Hare did not.

The Court consolidated the turnover and the lien avoidance actions, noting that the Tenth Circuit has not ruled directly on the issue of whether an equitable lien can be avoided under 11 U.S. C. §544, and become an asset of the estate, or whether 11 U.S.C. §541(d) prevents property in which a third party claims an equitable interest from becoming estate property. The Court adopted the position taken by the majority of courts, holding that §541(d) does not prevent the Trustee from exercising his avoidance powers. Since, on the date of the bankruptcy filing, Mr. Hare's lien was unperfected, under Colorado law, the Trustee, as a hypothetical lien creditor, took precedence over the unperfected lien of Mr. Hare, and could avoid his equitable lien.

In addition, the Court found that the Debtor's claimed exemption for the vehicle was subject to the Trustee's preserved lien position, unless the preserved lien would be otherwise avoidable pursuant to 11 U.S.C. §522. No such avoidance under §522 was applicable to the vehicle in this case, and the Court therefore denied the Debtor's claim of exemption.

TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL DECISIONS:

In re Midkiff, 271 B.R. 383 (10^{th} Cir. B.A.P., January 7, 2002) (Wyoming).

The Debtors filed their Chapter 13 petition on January 8, 1998. The Section 341meeting was held on February 9, 1998. On May 6, 1998, the Debtor’s second amended plan was confirmed. It provided that, for purposes of determining disposable income, tax refunds to which the Debtors are entitled during the first three years of the plan constitute disposable income to be submitted to the

Chapter 13 trustee. The order confirming the plan also contained this provision.

On May 6, 2001, the Chapter 13 trustee informed the Debtors that $285.92 was needed to complete their plan. The Debtors made this final payment, and the Trustee filed her certificate of completion on April 4, 2001. On April 20, 2001, the Trustee filed her Final Account and Petition for Final Decree. The Court entered the Debtors' discharge on April 24, 2001. However, on that same date, the Trustee filed a revocation of her certificate of completion, alleging that, after the filing of the certificate, she had received the Debtors' 2000 tax refund. The Debtors, in turn, filed a traverse to the revocation and a motion to obtain the tax refund from the Trustee. The Bankruptcy Court, following a telephonic hearing, found that the tax refund resulted from the income of the Debtors during the three years following the Section 341 meeting, and was therefore disposable income under the terms of the plan. The Bankruptcy Court denied the Debtors' motion, and granted the Trustee's request to vacate the Debtors' discharge to allow the Trustee to collect and disburse the tax refund in accordance with the terms of the confirmed plan.

On appeal, the Panel found that the Bankruptcy Court had the power to vacate the discharge upon the Trustee's motion, without the necessity of an adversary proceeding, finding that the entry of the discharge was tantamount to a clerical error or mistake because the Court did not have all the facts, i.e. that the Debtors were entitled to a tax refund for 2000 when the discharge was entered. Further, the Panel determined that since the work performed which gave rise to the taxes, and hence the tax refund, was performed during the first three years of the plan, the refund constituted "disposable income" under the terms of the plan and must be available for distribution by the Chapter 13 Trustee, even though the tax refund was not received until after the first three years of the plan had elapsed.

Cobb v. Lewis (In re Lewis), 271 B.R. 877 (10th Cir. B.A. P., January 8, 2002) (Kansas).

The Plaintiffs, Russell and Laura Cobb, held a state court judgment against the Debtor in the amount of $2,273,333.33, stemming from a default judgment entered on April 22, 1997 in a civil action for negligent malpractice, breach of contract, and loss of consortium.

The Debtor, an attorney, had convinced the Cobbs to terminate the attorney who was representing them in a personal injury action arising from an automobile accident in which Mr. Cobb was injured. Although he promised the Debtors a $1,000,000 recovery, the Debtor simply collected the personal injury settlement from the insurance company, in the amount of $100,000, and charged the Cobbs $34,000. He did not pursue the products liability claim, based on the crash-worthiness of the Cobb's vehicle, which had been proposed by the former attorney. The Cobbs filed suit against the Debtor in the state court. Although the Debtor filed an answer, he did not respond to discovery nor appear at hearings. On March 20, 1997, the court granted default judgment against the Debtor, awarding $740,000 for medical bills, $1,000,000 for loss of income and related loss of benefits, $250,000 for pain and suffering for Mr. Cobb, $250,000 for loss of consortium for Mrs. Cobb, and $33,333.33 for legal fees the Debtor had collected from the Cobbs. These damages totaled

$2,373,333.33.

In 1998, the Kansas Supreme Court suspended the Debtor from the practice of law, based on eight complaints, among them a complaint filed by the Cobbs. The Kansas Supreme Court's opinion, issued July 10, 1998, adopted the previous findings of the disciplinary panel, that the Debtor had failed to communicate with clients, had failed to cooperate with the disciplinary investigation, and had "pirated" clients from other attorneys and then had failed adequately to represent those clients. In addition, the Court noted several aggravating factors, including a finding that the Debtor's handling of the Cobbs' case evidenced dishonest and selfish motives.

On August 27, 1999, the Debtor filed his Chapter 7 petition. The same day, the Cobbs filed a Complaint for Determination Excepting Debt from Dischargeability, alleging that the $2,273,333.33 was nondischargeable under 11 U.S.C. §§523(a)(4) and (a)(6). On June 16, 2000, the Cobbs filed a Motion for Leave to File Amended Complaint. The Bankruptcy Court granted the Motion on August 4, 2000, and the Amended Complaint was filed on August 7, 2000, adding a claim that the debt was nondischargeable under 11 U.S.C. §523(a)(2)(A). On January 10, 2001, the Cobbs moved for summary judgment. They asserted that the facts alleged in their amended complaint had been established by the state district court or the disciplinary proceeding, collaterally estopping the Bankruptcy Court from making factual findings. The Bankruptcy Court granted their motion on May 4, 2001, based on the 11 U.S.C. §523(a)(2)(A) claim, finding that it was precluded from making factual findings by the disciplinary court proceeding.

On appeal, the Bankruptcy Appellate Panel held that summary judgment was inappropriate because the disciplinary court proceeding had not afforded the Debtor a full and fair opportunity to litigate the issue of misrepresentation, precluding the application of collateral estoppel. The Panel noted that collateral estoppel applies in bankruptcy actions, and when used to evaluate a state court judgment, is governed by the 28 U.S.C. §1738, the Full Faith and Credit Statute. Therefore, the Panel looked to Kansas law of collateral estoppel, which holds that the doctrine applies when 1) there was a prior judgment on the merits which determined the rights of the parties on the issue based upon ultimate facts appearing in the pleadings and the judgment; 2) the parties were the same or were in privity; and 3) the issue litigated must have been determined and necessary to support the judgment. ***Jackson Trak Group, Inc. ex rel. Jackson Jordon, Inc v. Mid States Port Authority***, 242 Kan. 683, 751 P.2d 122 (1988).

In this case, the Panel found that the third element had not been met because there was nothing in the record of the disciplinary proceeding to indicate that the Kansas Supreme Court made findings that representations made to the Cobbs were made with the intent to deceive, nor was there such a finding tied to the Court's judgment that the Debtor had violated the Kansas Rules of Professional Conduct. Therefore, the Cobbs could not show the element of intent necessary under 11 U.S.C. §523(a)(2)(A), and summary judgment was not proper.

The Panel also found that the Bankruptcy Court did not abuse its discretion in allowing the Cobbs to amend their complaint. The Court found that it had jurisdiction over that issue as an interlocutory appeal, because the question of the amendment of the complaint was a controlling question of law which may materially advance the ultimate termination of the litigation. The Panel ruled that the Cobbs' amendment was based on the same facts and transactions which formed the basis for the original complaint, and that the Debtor was not prejudiced by allowing the amendment.

For these reasons, the Panel reversed the Bankruptcy Court's award of summary judgment, and remanded the matter for further proceedings, and affirmed the Bankruptcy Court's order granting the Cobbs leave to amend their complaint.

In re Morgan, 2002 WL 191995 (10th Cir. B.A.P., February 7, 2002) (Oklahoma) (Unpublished Disposition).

The Debtors filed their Chapter 7 petition in October, 2000, but did not file their first set of schedules until six weeks later. Their Schedule B of personal property stated that they had no machinery, fixtures, equipment, or supplies. The did not list any such property on their Schedule C of exempt property. On March 2, 2001, the Debtors filed a motion to avoid the nonpossessory, non-purchase money security interest of Washita State Bank in personal property they identified as "Tools of Trade $5,000.00." The Bank's response stated that the Debtors had listed no tools of trade on their schedules, and that the motion failed to identify or describe any such tools or specify a value for them. On April 24, 2001, the Debtors filed amended Schedules B and C to list fifty-one items or groups of items described as "machinery, fixtures, and supplies." They provided dollar values and descriptions of each item or group, for a total value of $3,574.09. On May 23, 2001, the Bank filed an objection to the claimed exemption, alleging that the Debtors had refused to disclose the location of the property and that the property was worth more than stated in the amended Schedules.

However, before the Bank filed its objection to the claimed exemption, the Bankruptcy Court, at a hearing on May 1, 2001, granted the Debtor's motion to void the Bank's lien. The Court issued a written order to that effect on May 30, 2001, stating that the Bank's lien on the exempt property listed in amended Schedule B was avoided. On June 7, 2001, the Bank filed a motion to alter or amend this order, stating that it had filed a timely objection to the claimed exemptions. At the hearing on the motion to alter or amend, held August 21, 2001, the Debtor's counsel appeared, but the Bank did not appear. The Bankruptcy Court denied the motion to alter or amend for failure to prosecute, and entered a written order to that effect on September 5, 2001. On August 30, 2001, the Bank filed its notice of appeal of the order voiding its lien.

The Bankruptcy Appellate Panel reversed and remanded the Bankruptcy Court order voiding the lien, because it has been entered before the creditor's time to object to the Debtor's claimed exemption had run. Fed. R. Bankr. P. provides that a party in interest may file an objection to claimed exemptions within 30 days afer the meeting of creditors held under §341 is concluded, or within 30 days after any amendment to the list of exempt property or supplemental schedules is filed, whichever is later. The Bank therefore filed its objection in a timely fashion, and the Court could not properly determine the motion to void lien on May 1, 2001, since the time to object had not yet run. The Panel also determined that the Bank did not waive its objection by failing to prosecute its motion to alter or amend, because such a motion is permissive, not mandatory, and is not required to preserve the right to appeal a ruling, and was not required here to preserve the Bank's right to appeal the order granting the motion to void lien.

Lowther v. Lowther (In re Lowther), 2002 WL 199836 (10th Cir. B.A.P., February 8, 2002) (Oklahoma) (Unpublished Disposition).

The Debtor, Paula Lowther, obtained a divorce from Neal Lowther in 1997. Pursuant to the divorce decree, the Debtor was awarded the couple's marital home, subject to her obtaining refinancing of the home by February 1, 2000, and paying Mr. Lowther the sum of $11,360 by that date. If she did not pay Mr. Lowther the $11,360 by that date, the divorce decree provided that the house was to be sold to satisfy the debt. The state court also ordered the Debtor to pay Mr. Lowther's attorney's fees incurred in connection with a custody dispute during the divorce.

In January, 2000, the Debtor filed her Chapter 7 petition. She had not refinanced the home, and had not paid Mr. Lowther the $11,360. She listed her home as an asset in her bankruptcy schedules, valuing it at $66,000, with a first mortgage of $48,000 held by BancOklahoma Mortgage Corporation. She also claimed a homestead exemption of $25,000. She did not list Mr. Lowther as a secured creditor, but as an unsecured creditor for both the home-related and the attorney's fees debts. Mr. Lowther did not file a proof of claim in the Debtor's case, nor did he object to her claimed exemption. Further, neither Mr. Lowther nor the Debtor filed an action to determine the dischargeability of the home-related debt under 11 U.S.C. §§523(a)(5) or (a)(15). The Debtor later reaffirmed her mortgage debt, and was granted a discharge in May, 2000.

Thereafter, Mr. Lowther filed a motion in state court requesting a sale of the residence to pay his $11,360. The Debtor's response alleged that the motion was a violation of the discharge injunction of 11 U.S.C. §524. She also filed in the Bankruptcy Court an application for a contempt citation against Mr. Lowther, asserting that the sale motion was in violation of her discharge. Before the Bankruptcy Court could rule on that application, the state court entered an order granting Mr. Lowther's motion for sale, stating that the judicial lien on the home created by the divorce decree was nondischargeable. The state court ordered the Debtor to make the required $11,360 payment by May 1, 2001, failing which the real property would be listed for sale. The Debtor then filed an amended application for a contempt citation in the Bankruptcy Court, alleging that the payment order was also a violation of her discharge. She also filed a motion for reconsideration of the payment order in the state court. The state court ruled that it would wait until the Bankruptcy Court's ruling on the amended application for contempt citation before issuing further orders.

The Bankruptcy Court denied the Debtor's amended application for contempt citation, holding that the discharge injunction of §524(a)(2) had not be violated because that section only enjoins the collection of debts against a debtor personally, not a secured creditors enforcement of an unavoided lien. The Bankruptcy Court stated that Mr. Lowther's lien was not avoidable, and was not affected by Mr. Lowther's failure to file a proof of claim.

Citing ***Johnson v. Home State Bank***, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991), the Bankruptcy Appellate Panel affirmed the Bankruptcy Court's ruling, holding that unless a lien has been avoided, it survives bankruptcy, even if a debtor claims as exempt the property securing the lien, and even though the debtor's personal liability for the debt has been discharged. The Panel rejected the Debtor's arguments that Mr. Lowther's failure to perfect the lien rendered it invalid, that his failure to object to being scheduled as an unsecured creditor or file a proof of claim caused the lien to be ineffective, that Mr. Lowther's attorney's statements that the debt was dischargeable as to the Debtor personally invalidated the lien, and that his failure to object to her claimed exemption rendered the lien invalid.

Sloan v. Tirey (In re Tirey), (10^{th} Cir. B.A.P., March 26, 2002) (Oklahoma) (Unpublished Disposition).

Following an earlier remand to the Bankruptcy Court for additional findings of fact and conclusions of law, Debtor Tirey again appealed the denial of his discharge under 11 U.S.C. §727(a)(7) for making a false oath in connection with the separate case of an insider, a corporation of which he was president. The Debtor was alleged to have signed schedules for the corporation which omitted assets owned by the corporation, specifically an antique beer truck and a flatbed trailer. The Bankruptcy Court had found such omissions material, since the truck was unencumbered and the trailer was a large asset.

In its supplemental decision, the Bankruptcy Court stated that it did not believe the Debtor's testimony that the omissions were merely inadvertent, not knowing and fraudulent. The Bankruptcy Court set forth facts pointing to the Debtor's awareness of the assets, his care of the assets and preservation of their value, and the difficulty of forgetting to list such major assets.

The Bankruptcy Appellate Panel noted that the Bankruptcy Court based its decision on 11 U.S.C. §727(a)(4), which denies a debtor a discharge if "the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account," and on 11 U.S.C. §727(a)(7), which states that a violation of §727(a)(4) in connection with an insider's case is also a basis for denying a debtor a discharge in his own case. It found that the Bankruptcy Court's rejection of the Debtor's defense of inadvertence and oversight was not clearly erroneous, and noted that the Bankruptcy Court, as the trial court, was in the position to hear the Debtor's testimony and observe his demeanor. Further, the Panel held that, even if the Debtor's assertion that the assets were encumbered so as to preclude recovery to creditors, the test for whether an omission is material is not whether the omitted assets would have provided value for creditors. *Citing*, *inter alia*, ***Job v. Calder (In re Calder)***, 907 F.2d 953, 955-56 (10^{th} Cir. 1990). Finally, the Panel stated that even if the value of the assets were relevant, the evidence suggests that the truck had value for creditors when the corporation's bankruptcy was filed. For these reasons, the Panel affirmed the Bankruptcy Court's decision.

Armstrong v. Potter (In re Potter), (10th Cir B.A.P., March 27, 2002) (Utah) (Unpublished Disposition).

Plaintiff Armstrong filed suit against Defendant Potter in Utah state court, and obtained a judgment against her on June 14, 1999 in the amount of $10,312.92, plus interest, costs, and attorneys' fees. On September 29, 1999, the state court issued a supplemental judgment increasing the amount owed by Potter to $18,123.45, plus interest, costs, and attorneys' fees. Potter filed a Chapter 7 petition on January 31, 2000. Armstrong filed a Chapter 11 petition on March 10, 2000.

On April 17, 2000, Armstrong filed an adversary proceeding in Potter's Chapter 7 case, seeking a determination that the state court judgment was nondischargeable under 11 U.S.C. §§523(a)(2)(A) and (a)(6). On June 5, 2000, Armstrong filed a motion to recuse the adversary judge. On July 26, 2000, following a scheduling conference at which Potter appeared through her attorney and Armstrong appeared *pro se*, the Bankruptcy Court denied the motion to recuse. It later issued a scheduling order directing the parties to file a proposed pretrial order by March 6, 2001, and to appear for a final pretrial conference on March 20, 2001.

Kenneth Rushton was appointed Chapter 11 Trustee in Armstrong's case on September 8, 2000, and he and Armstrong negotiated the sale of certain claims, including the claim against Potter. Neither Armstrong nor Rushton appeared at the March 20, 2001 pretrial conference in the adversary proceeding, and Potter's counsel also failed to appear. The Bankruptcy Court issued a minute order dismissing the adversary proceeding for the parties' failure to appear and their failure to submit a proposed pretrial order.

On March 28, 2001, Armstrong filed a motion to reconsider the dismissal, to which both Rushton and Potter responded. On May 3, 2001, the Bankruptcy Court issued a written order dismissing the adversary proceeding, and Armstrong appealed.

The Bankruptcy Appellate Panel noted that Armstrong's "motion to reconsider" was filed eight days after the entry of the minute order dismissing the adversary proceeding, and so considered it a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). The Panel further noted that Bankruptcy Rule 8002 requires a notice of appeal to be filed within ten days of the date of an entry of judgment, but that the ten-day period is tolled by the timely filing of a motion to alter or amend. In addition, Bankruptcy Rule 8002 provides that, while such a motion is pending, a notice of appeal is ineffective to appeal from the judgment.

Citing ***Norman v. Apache Corp.***, 19 F.3d 1017, 1021 (5th Cir. 1994), the Panel stated that a bankruptcy court's denial of a motion may be implied by the entry of a judgment or of an order inconsistent with the relief sought in a motion to alter or amend. However, the panel found that here, although the Bankruptcy Court's order dismissing the adversary proceeding was inconsistent with the relief sought in the motion to reconsider, it did not deny the motion to reconsider by implication, because both the title and the body of the order made it clear that the adversary proceeding was dismissed because the parties failed to file the required pretrial order. There was no indication that the Bankruptcy Court considered the motion to reconsider in issuing the order of dismissal. Accordingly, the Bankruptcy Appellate Panel remanded the appeal for the limited purpose of entering an order on the motion to reconsider, noting that such an order might involve a determination as to whether Armstrong had the standing to contest the dismissal of the adversary proceeding.

Armstrong v. Rushton (In re Armstrong), (10th Cir. B.A.P., March 28, 2002) (Utah) (Unpublished Disposition).

In a related case to ***Armstrong v. Potter***, Chapter 11 Debtor Armstrong appeals the Bankruptcy Court's order approving a settlement agreement between the Chapter 11 Trustee and Steven Bailey which resolved claims between Armstrong's Chapter 11 estate and the Chapter 7 estate of Willow Brook Cottages, L.L.C.

An involuntary Chapter 11 petition was filed against Willow Brook Cottages, L.L.C., and Steven Bailey was appointed Chapter 11 Trustee. The case was later converted to a Chapter 7 proceeding. In May, 1999, Armstrong sued Trustee Bailey and his counsel both personally and as representatives of Willow Brook's estate. Armstrong was president of an entity known as Mountainview Pacific Ventures, which had formed Willow Brook and was also a debtor in bankruptcy. Armstrong's complaint alleged negligent breach of fiduciary duty, willful and deliberate breach of fiduciary duty, breach of fiduciary duty to maximize the estate, and waste of estate assets. He also sought removal of Bailey as Trustee, but the Bankruptcy Appellate Panel earlier found that he had no standing to seek that remedy.

Armstrong's complaint was later dismissed with prejudice, and the Bankruptcy Court in the Willow Brook case held Armstrong in contempt for violating the automatic stay, awarding Bailey $3,620.50 in actual damages and $5,000 in punitive damages, a total judgment of $8,620.50 in favor of Bailey. The Bankruptcy Court further enjoined Armstrong from asserting claims against Bailey or his attorney without prior court approval. Thereafter, Bailey commenced garnishment proceedings against Armstrong by serving the trustee of the Mountainview estate with garnishment documents.

Armstrong appealed the damage award to the District Court, which reversed the punitive damage award but upheld the $3,620.50 actual damage award. Armstrong then appealed this ruling to the Tenth Circuit Court of Appeals, and Bailey cross-appealed. The matter is still pending before the Tenth Circuit.

In the meantime, Armstrong had filed his own Chapter 11 petition. Kenneth Rushton was appointed as Chapter 11 Trustee. Bailey filed a proof of claim in Armstrong's case on behalf of Willow Brook in the amount of $150,000, based on a promissory note Armstrong had executed in favor of Willow Brook.

Rushton and Bailey reached a settlement on behalf of their estates, which resolved the litigation before the Tenth Circuit. The settlement called for the Trustee in the Mountainview case to pay Rushton, as Trustee for the Armstrong estate, $5,000, plus $3,620.50 for recovery of a preferential transfer. Bailey would reserve the right to file a proof of claim against the Armstrong estate in the amount of $3,620.50, and to pursue the proof of claim for $150,000. Similarly, Rushton retained the right to object to the $150,000 proof of claim. Otherwise, Bailey and Rushton agreed to waive their claims against each other's estates. The Bankruptcy Court approved this settlement over Armstrong's objection.

The Bankruptcy Appellate Panel found that the Bankruptcy Court conducted an evidentiary hearing on the motion to approve the settlement, and heard testimony from Bailey, Rushton, and Armstrong. The Court weighed the merits of the settlement according to the standards set forth in Bankruptcy Rule 9019(a), based on adequate information, and was fully apprised of all the circumstances surrounding the Armstrong case. Therefore, the Panel affirmed the Bankruptcy Court's approval of the settlement agreement.

State of Missouri ex rel. Nixon v. Audley (In e Audley), **___**B.R.**___**, 2002 WL 484640 (10th Cir. B.A.P., March 28, 2002) (Kansas).

The State of Missouri held a 1991 judgment for $235,000 against the Debtor based on findings that the Debtor was liable for violations of Missouri's consumer protection statutes. On November 11, 1999, the Debtor filed his Chapter 7 petition in the District of Kansas. Missouri filed an adversary proceeding on February 22, 2000, alleging that its debt was nondischargeable under 11 U.S.C. §523(a)(2)(A) and (a)(7). The Debtor filed a *pro se* answer alleging that the state court trial had violated his constitutional rights. The Bankruptcy Court granted Missouri's motion for summary judgment, finding that there were no controverted facts, and that the state judgment contained factual findings satisfying the elements of fraud under 11 U.S.C. §523(a)(2)(A), that the Debtor was collaterally estopped from relitigating those factual findings, and that the judgment was nondischargeable. The Bankruptcy Court further found that the debts for civil penalties and restitution were also nondischargeable under 11 U.S.C. §523(a)(7).

On appeal, the Debtor argued that contested issues of fact precluded summary judgment, and that the state court proceeding had violated his constitutional rights, making it improper to accord preclusive effect to the state court's findings. The Bankruptcy Appellate Panel noted that the doctrine of collateral estoppel applies to bankruptcy proceedings, and federal courts reviewing a state court judgment for applicability of collateral estoppel must use the collateral estoppel law of the state in which the judgment was rendered, pursuant to the Full Faith and Credit Statute, 28 U.S.C. §1738. In Missouri, collateral estoppel applies when 1) the issued decided in the prior adjudication was identical with the issue in the present action; 2) the prior adjudication resulted in a decision on the merits; 3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. ***Shahan v. Shahan***, 988 S.W.2d 529, 532-33 (Mo. 1999) (en banc). In addition, in Missouri, a party may use collateral estoppel "offensively," that is, to preclude a defendant from relitigating issues determined by a valid prior judgment. ***In re Caranchini***, 956 S.W.2d 910, 912 (Mo. 1997) (en banc), *citing* ***Parklane Hosiery v. Shore***, 439 U.S. 322, 329 (1979).

The Panel noted that the Debtor had been found liable for violations of §407.020 of the Missouri Statutes, which requires a determination that a party willfully and knowingly engaged in conduct that was unfair and did so with the specific intent to defraud his victim by means of the unfair practice. ***State v. Shaw***, 847 S.W.2d 768, 776 (Mo. 1993) (en banc). The Panel concluded there was an identity of issues between the prior state court action and the adversary proceeding, because the state court proceeding found by clear and convincing evidence, a higher standard than that imposed by 11 U.S.C. §523(a)(2)(A), that the employees of the Debtor's company knowingly and intentionally deceived consumers, that the consumers justifiably relied on their misrepresentations, and that the consumers had suffered damages as a result. Thus, the State of Missouri had met its burden of proof under 11 U.S.C. §523(a)(2)(A), that 1) the Debtor knowingly committed actual fraud or false pretenses, or made a false representation or a willful misrepresentation; 2) the Debtor had the intent to deceive the consumers who became creditors through the action of the State of Missouri; 3) that they justifiably relied on the misrepresentations; and 4) that they suffered damages.

The Panel stated that the Debtor failed to present either the state court or the Bankruptcy Court with relevant disputed factual issues, and that his contention that the state court action violated his constitutional rights was merely a collateral attack on the state court judgment, not evidence of disputed factual issues. In addition, the Panel found that it was without subject matter jurisdiction to consider the Debtor's constitutional arguments, under the ***Rooker-Feldman*** doctrine.

UNITED STATES SUPREME COURT DECISION:

In re Young, ___U.S.___, 122 S.Ct. 1036, 70 U.S.L.W. 4178 (March 4, 2002).

In ***In re Young***, the Supreme Court addressed whether the "three-year lookback period" in §507(a)(8)(A)(i), which renders certain tax debts nondischargeable under § 523(a)(1)(A), is tolled during the pendency of a prior bankruptcy. The debtors owed approximately $15,000.00 in unpaid federal income taxes for the 1992 tax year. After obtaining an extension of time, the tax the debtors filed a return in October, 1993, but did not pay the tax. The debtors made some payments to reduce the amount owed and in May, 1996, still owing about $13,000.00 in taxes and interest, the debtors filed for Chapter 13 relief.

Before confirmation of a plan, the debtors moved to dismiss their Chapter 13 case. On March 12, 1997, one day before the bankruptcy court dismissed the Chapter 13 case, the debtors filed a new Chapter 7 petition. The no asset Chapter 7 case proceeded and the debtors received a discharge in June, 1997. When the IRS subsequently demanded payment of the 1992 tax debt, the debtors moved to reopen their Chapter 7 case to determine the dischargeability of the tax obligation. The debtors argued that, because the tax was due in October, 1993, and they filed their Chapter 7 petition on March 12, 1997, the tax was dischargeable under § 523(a)(1)(A) because it fell outside the three-year lookback in § 507(a)(8)(A)(i). The Bankruptcy Court for the District of New Hampshire disagreed with the debtors and concluded that the three-year lookback period had been tolled during the pendency of the debtors' Chapter 13 case, which had been filed within the three-year lookback period in May, 1996. The District Court and First Circuit Court of Appeals affirmed.

Writing for a unanimous Court, Justice Scalia indicated that "[t]he three-year lookback period is a limitations period subject to equitable tolling" and the lower courts "properly excluded from the three-year limitation" the ten months during which the debtors' Chapter 13 petition had remained pending. ***Id***. at 1039. The Court recognized the "loophole" in the Code that would allow a debtor to render a tax debt dischargeable by filing successive Chapter 13 and Chapter 7 cases and voluntarily dismissing the Chapter 13 case prior to obtaining a discharge. ***Id.*** The Court concluded, however, that tolling of the three-year lookback was "appropriate regardless of the [debtors'] intentions when filing the back-to-back Chapter 13 and Chapter 7 petitions – whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period." ***Id.*** at 1041.

TENTH CIRCUIT COURT OF APPEALS DECISIONS:

Allen v. Geneva Steel Co. (In re Geneva Steel Co.), 281 F.3d 1173 (10th Cir., February 27, 2002).

In this Chapter 11 case, the Tenth Circuit Court of Appeals determined that § 510(b), which provides for subordination of claims "for damages arising from the purchase or sale of [a] security [of the debtor] to all claims or interests that are senior to or equal to the claim or interest represented by such security," is broad enough to cover the debtor's alleged post-investment fraud that caused an investor to retain, rather than sell, his or her securities. ***Id.*** at 1177-78. Geneva Steel Co. filed for Chapter 11 in 1999. Among its listed debt were two public bond issues. According to the terms of the debtor's proposed plan, all bondholders were treated as one class and would receive common stock in the reorganized steel company. Classes subordinate to bondholders were slated to receive nothing.

Although a trustee for each of the two bond issues file proofs of claim on behalf of the bondholders, an individual bondholder filed a separate proof of claim for $500,000.00, alleging that the debtor's fraud had caused him to retain his bonds. The investor alleged that he had kept his bonds, rather than selling them off, because the debtor and its officers had remained silent while the company faced increasing financial hardship. The debtor moved to disallow the investor's proof of claim, contending that the trustee had filed a proof of claim that applied to the bonds and that the individual's claim duplicated the trustee's. The Bankruptcy Court for the District of Utah agreed, concluding that, if the investor's claim was based on the bonds, it was a duplicate of the proof of claim filed by the trustee and would be disallowed. The bankruptcy court also concluded, however, that to the extent that the investor based his proof of claim on fraud, the claim would be subordinate to all bondholders, as well as general unsecured creditors, under § 510(b) because it was a claim for damages "arising from the purchase or sale" of the bonds. The Bankruptcy Appellate Panel affirmed.

The Tenth Circuit Court of Appeals first reviewed the history and policy behind the enactment of § 510(b), tracing its roots more than 100 years. In construing the language of the statute and its intended scope, however, the court concluded that § 510(b) is ambiguous. The court then focused on the legislative history to discern Congress' intent and, "in examining the statute's purpose and objectives within the larger context of bankruptcy law," the court found "the most compelling reasons for subordinating [the investor's] retention claim." ***Geneva Steel***, 281 F.3d at 1179. The court drew largely from ***In re Granite Partners, L.P.***, 208 B.R. 332 (Bankr. S.D.N.Y. 1997) and a law review article referenced in the legislative history of § 510(b); J. Slain and H. Kripke, *The Interface Between Securities Regulation and Bankruptcy – Allocating the Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors*, 48 N.Y.U. L. Rev. 261 (1978); and was persuaded that a fraudulent retention claim should be treated the same as a claim that a debtor fraudulently induced an investor to purchase or sell a security.

The court agreed that the risk of holding the security, and the risk of fraud by the debtor after the sale, should be borne by the investor, rather than by the company's general creditors. "Just as the opportunity to sell or hold belongs exclusively to the investors, the risk of illegal deprivation of that opportunity should too." ***Id.*** at 1180 (quoting ***Granite Partners***, 208 B.R. at 342). In addition, the court recognized that the allowing the investor to transform his bond claim into a fraud claim that would receive treatment on par with other creditors, would disregard the absolute priority rule, which requires certain classed of claimants to be paid in full before any member of a subordinate class receives payment. ***Id.*** at 1181 n.4. In concluding that subordination of the investor's claim under § 510(b) was proper, the court acknowledged that courts generally look "skeptically at any effort by an investor in a bankrupt entity to refashion himself or herself into a general creditor." ***Id.*** at 1182.

Unpublished Opinions from the Tenth Circuit (see 10th Cir. R. 36.3):

Financial Instruments Group, Ltd. v. Leung, No. 01-1205, 2002 WL 321899 (10th Cir. March 1, 2002).

The debtor, Financial Instruments Group, Ltd., initiated adversary proceedings in Colorado district court against some 200 defendants in connection with its bankruptcy case. The debtor sued one of the defendants, a resident of Illinois, seeking to recover preferences and fraudulent conveyances totaling $484,621.65 under 11 U.S.C. §§ 547(b) and 548. The defendant appeared pro se and refused to accept service of process by mail. The debtor did not complete personal service on the defendant until eight days after the 120 day time limit provided in Fed. R. Civ. P. 4(m). The district court refused to dismiss the complaint, however, finding "good cause" for the failure of service within the limits of Rule 4(m). The defendant thereafter moved for a change of venue under 28 U.S.C. § 1404(a), claiming that Illinois would be more convenient for her because she did not have an attorney. The district court denied that motion. The defendant then failed to abide by court orders regarding discovery, failed to appear for deposition and failed to attend a hearing. The district court entered default judgment against the defendant.

The Tenth Circuit Court of Appeals affirmed. The court concluded that, with respect to service of the summons and complaint, the defendant's "actual notice of the action and her efforts to avoid service, coupled with the absence of any evidence that [the debtor] was not diligent in its attempts to locate [the defendant] and effect service upon her, demonstrate "good cause" for purposes of Fed. R. Civ. P. 4(m). ***Financial Instruments Group***, 2002 WL 321899 at *1. The court likewise found "no authority for giving preference to a defendant's choice of venue merely because of her pro se status," and expressed its concern in a footnote that an attorney had been ghostwriting the defendant's pleadings. ***Id.*** at *1 n.1, *2. Finally, the court concluded that the district court did not abuse its discretion in entering default judgment against the defendant under Fed. R. Civ. P. 16(f) and 37(b)(2)(C). The defendant "willfully and intentionally failed to comply with numerous scheduling and pretrial orders of the district court and [the defendant] was aware of the possible consequences of her failure to do so." ***Id.*** at *3.

Crump v. United States, No. 01-1069, 2002 WL 120523 (10th Cir. Jan. 30, 2002).

The debtor, Allen Crump, appeared pro se in this adversary proceeding quieting title to the debtor's former residence. The Internal Revenue Service ("IRS") had seized the debtor's property prepetition to satisfy the debtor's tax obligations and the debtor filed for bankruptcy on the eve of a tax auction. The bankruptcy court granted summary judgment to the successful bidders at the auction and quieted title in their favor. The district court affirmed. The debtor claimed on further appeal that the sale of the residence was void because the IRS had failed to comply strictly with the procedures for the sale. Specifically, the debtor argued that notices of the sale were insufficient because they had been taped to the door of his residence, the public notice was deficient because it was not published in a proper publication, the venue for the auction had been improperly changed to a different county, and the auction had been conducted by an unauthorized private party.

The Tenth Circuit Court of Appeals affirmed. The court concluded that service of the notices of the seizure and sale of the property were proper under 26 U.S.C. § 6335(a), because the notices had been "left at [the] usual place of abode" as required by the statute. ***Crump***, 2002 WL 120523 at *1-*2. The court rejected the debtor's claim that the IRS was required to serve the notices on a person of competent age. The court also rejected the debtor's claim that publication of the notice of sale was deficient because a private firm conducting the auction, rather than the Secretary of the

Treasury, had actually placed the notice in *The Denver Post*. The court noted that 26 U.S.C. § 6335(b) requires only that the Secretary "cause" a notice of sale to be published; the statute does not require that the Secretary place every notice. ***Id***. at *2. The court concluded that venue of the auction in a county other than that where the property was located was proper, as well, under the "special order" provisions of the Internal Revenue Code, 26 U.S.C. § 6335(d), and the accompanying regulations, 26 C.F.R. § 301.6335-1(c)(1). The court likewise relied on the Internal Revenue Code and regulations in concluding that the sale, which had been conducted by a private party rather than the Secretary of the Treasury, was proper. ***See*** 26 U.S.C. § 6335(e)(2) (requiring the Secretary to "prescribe the manner and other conditions of the sale"); ***see also*** 26 C.F.R. § 301.6335-1(c).

***Kline v. Internal Revenue Service*,** No. 01-2125, 2002 WL 193910 (10th Cir. Jan. 2, 2002).

The Chapter 11 debtor objected to a proof of claim filed by the Internal Revenue Service ("IRS") in which it asserted claims for estimated tax liabilities in the amount of $66,540.98. The debtor had not filed tax returns for the years in question and the bankruptcy court denied the objection. The district court affirmed, adopting the recommendation of the magistrate judge.

The Tenth Circuit Court of Appeals affirmed, concluding that, although the IRS had implied that the debtor "is what once was designated by the IRS as an 'illegal tax protestor," that designation is no longer proper under 1998 revisions to the Internal Revenue Code. ***Kline***, 2002 WL 193910 at *1 n.1. Nevertheless, the court recognized that "many of [the debtor's] arguments flow with typical protestor rhetoric." ***Id.*** at *2. In essence, the debtor claimed that, although she did have income for the years at issue, she did not have "taxable income" as defined by the Internal Revenue Code because she had not filed a tax return for those years. The debtor also denied being a "taxpayer" or having a "taxable year" as defined by the Internal Revenue Code. The court rejected these arguments as "circular, and similar to other frivolous arguments that attempt through tautology to render the tax laws ineffective." ***Id.*** at *2.

DECISIONS FROM OTHER CIRCUITS:

FIRST CIRCUIT:

Jamo v. Katahdin Federal Credit Union (In re Jamo), No. 01-9010, 2002 WL 441958 (1st Cir. March 26, 2002).

The First Circuit Court of Appeals considered, as a matter of first impression at the circuit level, whether a lender in a Chapter 7 case "who is owed both secured and unsecured debts [may] insist upon reaffirmation of the latter as a condition to reaffirmation of the former." The Chapter 7 debtors owed one creditor, Katahdin Federal Credit Union, more than $60,000.00, approximately $37,000.00 of which was secured by a first mortgage on their home, and the balance of which was unsecured personal loans and credit card debt. The debtors wanted to reaffirm the mortgage obligation and the creditor indicated that it would not reaffirm that debt unless the debtors also reaffirmed the unsecured debts. Counsel for the debtors refused endorse a reaffirmation agreement for all of the debt, but the debtors nevertheless signed the agreement with the creditor and filed it with the bankruptcy court. The debtors then commenced an adversary proceeding against the creditor, alleging that the creditor had violated the automatic stay; § 362(a)(6); by conditioning reaffirmation of the mortgage on reaffirmation of the other unsecured debts. The bankruptcy court concluded that the creditor had violated the automatic stay by attempting to "strong-arm" the debtors into reaffirming the unsecured debts and by threatening foreclosure. The bankruptcy appellate panel affirmed.

The First Circuit Court of Appeals reversed, holding that, "while the automatic stay is in effect, a creditor may engage in post-petition negotiations pertaining to a bankruptcy-related reaffirmation agreement so long as the creditor does not engage in coercive or harassing tactics." ***Jamo***, 2002 WL 441958 at *5. The court "reject[ed] the proposition that a creditor's decision to withhold reaffirmation of a secured debt unless the debtor agrees to reaffirm other, unsecured debts, amounts to a per se violation of the automatic stay." ***Id.*** at *7. Instead, the court examined the creditor's conduct in the case and concluded that the creditor had not coerced or harassed the debtors such that its efforts to obtain reaffirmation of the debts constituted a violation of the stay. The creditor simply had attempted to "strike a new bargain" with the debtors concerning the debts and the court concluded that the references to foreclosure during the course of negotiations were "unarguably benign." ***Id.*** at *7-*9.

THIRD CIRCUIT:

In re Telegroup, Inc., 281 F.3d 133 (3d Cir., February 15, 2002).

The Third Circuit Court of Appeals recently had occasion to construe the breadth of § 510(b) and, like the Tenth Circuit in ***Geneva Steel***, broadly interpreted the statute. A corporation had sold assets to the debtor, Telegroup, Inc., in exchange for some cash and shares of the debtor's common stock. The sale took place pre-petition and the stock purchase agreement executed in conjunction with the sale required the debtor to use its best efforts to register the stock and ensure that the stock was freely tradeable by the summer of 1998. The debtor had not registered the stock by the time it filed for Chapter 11 protection in February, 1999.

The corporation filed proofs of claim asserting that the debtor was liable for damages based on a breach of the agreement to register the stock. The corporation claimed that, had the debtor complied with the agreement, it would have sold the shares of the debtor's stock as soon as soon as those shares were tradeable and would have avoided the losses it incurred when the debtor's stock value declined. The debtor objected to the proofs of claim and requested that the claims be subordinated pursuant to § 510(b) because they were claims "arising from the purchase or sale" of the common stock. The bankruptcy court subordinated the claims under § 510(b) and the district court affirmed.

On further appeal, the court recognized that the question of the scope of § 510(b) was a matter of first impression in the Third Circuit, and, like the Tenth Circuit in ***Geneva Steel***, concluded that the language of § 510(b) is ambiguous. ***Telegroup***, 281 F.3d at 138. Turning then to the legislative history and the law review article by Slain and Kripke, the court concluded that, as a matter of policy, § 510(b) "represents a Congressional judgment that, as between shareholders and general unsecured creditors, it is shareholders who should bear the risk of illegality in the issuance of stock in the event the issuer enters bankruptcy." ***Id.*** at 141. "Congress enacted § 510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding." ***Id.*** at 142. Applying that conclusion to the facts of the case, the court held that "a claim for a breach of a provision in a stock purchase agreement requiring the issuer to use its best efforts to register its stock arises from the purchase or sale of the stock and, therefore must be subordinated pursuant to § 510(b)." ***Id.*** at 144.

FOURTH CIRCUIT:

In re Warner, 283 F.3d 230 (4th Cir. 2002), *petition for cert. filed*, (March 22, 2002) (No. 01-1418).

The Fourth Circuit Court of Appeals, taking sides on an issue that has divided the courts of appeals that have addressed it, concluded that "the prepetition settlement of claims involving alleged fraud and intentional tort[s] extinguishes[s] [a] subsequent non-dischargeability claim under Section 523(a)(2)(A)." ***Id.*** at 237. The debtor in ***Warner*** had been sued in state court prepetition in connection with a sale of certain corporate assets. The buyers of the assets asserted claims against the debtor and her debtor-husband at the time, who had been the principals of the corporation, for fraud and misrepresentation arising out of the sale. The parties settled that litigation and executed, inter alia, a promissory note and a general release of claims. After the debtor failed to pay the first installment due on the promissory note, the buyers again sued the debtor and her husband in state court. The debtor then filed for bankruptcy and the buyers initiated an adversary proceeding to determine the dischargeability of the promissory note obligation under § 523(a)(2)(A). The bankruptcy court found in the debtor's favor and, on appeal, the district court concluded that the general release and settlement agreement had substituted a dischargeable contract debt for the fraud-based claims under § 523(a)(2)(A).

The Court of Appeals for the Fourth Circuit affirmed, following decisions from the Seventh and Ninth Circuits which embody a "novation theory." ***Id.*** at 236 (*citing **In re Fischer***, 116 F.3d 388 (9th Cir. 1997) and ***In re West***, 22 F.3d 775 (7th Cir. 1994)). Under that theory, which in the context of § 523(a)(2)(A) provides that a contract claim is substituted for a tort claim through a settlement agreement, the court "need only address the validity and completeness of the bargained for agreement and release." ***Id***. One judge dissented in ***Warner***, agreeing with the policy-based approach taken by the Eleventh and District of Columbia Circuits, which allows a dischargeability claim for fraud to proceed under § 523(a)(2)(A) even if the claim had been settled prior to bankruptcy. *See* ***United States v. Spicer***, 57 F.3d 1152 (D.C. Cir. 1995); ***Greenberg v. Schools***, 711 F.2d 152 (11th Cir. 1983).

SIXTH CIRCUIT:

Lane v. Western Interstate Bancorp (In re Lane), 280 F.3d 663 (6th Cir, February 7, 2002).

The Sixth Circuit Court of Appeals concluded that, in a Chapter 13 case, "modification of the rights of a totally unsecured homestead mortgagee is permitted by § 1322(b)." ***Id.*** at 665. The debtors had two mortgages on their home; the amount owed on the first mortgage exceeded the value of the debtors' residence. The debtors' proposed Chapter 13 plan provided for regular payments on the first mortgage, but relegated the holder of the second mortgage to share in a pro rata distribution as an unsecured claimant. The second mortgage holder objected to confirmation relying on § 1322(b), which provides that a plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . ." The bankruptcy court agreed with the second mortgage holder and denied confirmation of the debtors' plan. The district court affirmed.

In its opinion reversing the district court, the Sixth Circuit Court of Appeals discussed the Supreme Court's decision in ***Nobleman v. American Savings Bank***, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993), in which the Supreme Court concluded that the rights of an *undersecured* mortgage holder could not be modified in a Chapter 13 plan. The court noted that "[t]he ***Nobleman*** Court had no occasion to say what the result would have been if the [mortgage holder's] claim had involved no secured component at all" and concluded that § 506(a) is "the starting point in the analysis." ***Lane***, 280 F.3d at 666-67. Under § 506(a), the second mortgage holder's claim was a "secured claim to the extent of the value of [its] interest in the estate's interest in [the] property . . . ." Because the value of the real property was insufficient to account for the total amount of the first mortgage holder's claim, the value of the second mortgage holder's interest in the property was nil. ***Id.*** at 668. Thus, the court concluded that, as the holder of an unsecured claim, the second mortgage holder could have its rights modified in the Chapter 13 plan. The court also noted that its conclusion was consistent with decisions from four other courts of appeals that had considered the issue, as well as two bankruptcy appellate panel decisions. ***See id.*** at 667 n.5 (collecting cases).

SEVENTH CIRCUIT:

Petro v. Mishler (In re Petro) , 276 F.3d 375 (7th Cir., January 10, 2002).

At the request of the Chapter 13 Trustee, the bankruptcy court conditioned confirmation of the debtors' Chapter 13 plan on the debtors submitting to the Trustee periodic sworn affidavits concerning their income and employment status. Although the plan was otherwise confirmable under the provisions of the Code, the plan was confirmed on the condition that, every six months, the debtors send to the Chapter 13 Trustee affidavits concerning income from the previous six months and check stubs for that time period. The Chapter 13 Trustee filed the objection and requested the conditions to ensure that the debtors would be submitting any extra income earned to the plan. The district court affirmed the bankruptcy court's order of confirmation.

The Seventh Circuit Court of Appeals reversed, recognizing that the Chapter 13 Trustee had failed to object to confirmation under §1325 or any other Code provision, but had instead based the objection on local rules in the Northern District of Indiana. The court concluded that the Code "sets forth [a] specific and limited universe of requirements that must be met by a debtor" in order for a plan to be confirmed. ***Petro***, 276 F.3d at 378. The "finite list of six affirmative requirements necessary for a plan's confirmation . . . exclude[s] other requisites from being grafted onto section 1325(a)." ***Id***. The court rejected the district court's conclusion that § 105(a) permitted the bankruptcy court to impose the conditions on confirmation. "Absent exceptional circumstances, to permit a bankruptcy court to exercise undefined equitable powers to supplement the requirements of § 1325(a) would alter that section beyond the scope that Congress intended, transforming the finite list of requirements a debtor must meet to receive bankruptcy protection into a potentially infinite list." ***Id.***

EIGHTH CIRCUIT:

Brown v. Luker (In re Zepecki), 277 F.3d 1041 (8th Cir., January 25, 2002) (per curiam).

In this case concerning the reasonableness of fees paid to the Chapter 7 debtor's attorney, the Eight Circuit Court of Appeals affirmed a decision that required debtor's counsel to disgorge $32,840.00 in fees. The attorney had represented the debtor in a prepetition land transaction involving the debtor's primary asset.

The debtor's ex-wife objected to the debtor's discharge and the bankruptcy court, based in part on the debtor's conduct in failing to disclose the real estate transaction, denied the debtor a discharge under § 727(a)(4)(A). During the course of the adversary proceeding, the bankruptcy court discovered that the debtor's attorney had received $40,000.00 in fees from the proceeds of the real estate transaction. The court ***sua sponte*** ordered counsel to appear and show cause as to the reasonableness of his fee.

Of the $40,000.00 in fees, the bankruptcy court found that half of those funds had been received postpetition and required counsel to return $20,000.00 to the bankruptcy estate. The court also concluded that the debtor's attorney was entitled to only $7,160.00 in prepetition fees and required him to disgorge the remaining $12,840.00. The bankruptcy appellate panel affirmed.

The Eighth Circuit Court of Appeals, in a per curiam opinion, concluded that the bankruptcy court properly determined that it had jurisdiction to consider the reasonableness of the attorney's fees and recognized that "[t]o the extent prepetition attorney's fees exceed the reasonable value of legal services provided, the bankruptcy court may order the return of attorney's fees paid within one year prior to the date that a debtor files a bankruptcy petition [if the fees are] related to legal services performed in connection with or in contemplation of bankruptcy proceedings." ***Zupecki,*** 277 F.3d at 1045. The bankruptcy court may disregard a fee agreement in determining the reasonableness of the attorney's fees under § 329(a); that section places the burden on the attorney to show that the compensation agreed upon is reasonable. ***Id.*** at 1046. "For postpetition legal services provided to the debtor, an attorney may be compensated from property of the estate only if he [or she] follows the notice and approval process delineated in the Bankruptcy Code." ***Id.***

NINTH CIRCUIT:

Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir., January 8, 2002).

A Chapter 7 debtor brought a class action on behalf of other similarly situated Chapter 7 debtors against Wells Fargo Bank for alleged violations of the discharge injunction provided by § 524(a)(2). The debtor sought damages for the Bank's alleged attempts to collect debts that had been discharged. The district court concluded that a contempt proceeding is the proper means of enforcing the discharge injunction. That court dismissed the debtor's independent claims under § 524 and referred the contempt claims to the bankruptcy court.

The Ninth Circuit Court of Appeals affirmed, holding that "a private right of action is not available under § 524, or through § 105." ***Walls***, 276 F.3d at 504. The debtor argued that § 105(a) empowered the district court to enforce violations of the § 524 injunction and that § 524 created substantive rights that she could enforce through § 105. The court disagreed, concluding that violations of the injunction created by § 524 "may not independently be remedied through § 105 absent a contempt proceeding in the bankruptcy court." ***Id.*** at 506. "[C]ontempt is the appropriate remedy and no further remedy is necessary." ***Id.*** at 507. The court indicated further that Congress did not intend to create a private right of action under § 524, and it refused to imply such a private right. ***Id***. at 510. Finally, the court determined that the debtor could not maintain a separate claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692f, because the remedy for violations of § 524 "no matter how cast lies in the Bankruptcy Code." ***Id.*** at 511.