

Selected Opinions 1986

- (173) 1-21-86 APPEAL In re Pacheco, 81C-01246, Judge Greene.**
Debtors appealed an order of the bankruptcy court denying their Motion for Violation of Section 524 of the Code and awarding attorney's fees.
- (174) 1-29-86 PUBLISHED In re Colvin, 82A-00429, Judge Allen.**
57 B.R. 299 This case is before the Court on the creditor's motion to terminate the automatic stay as to the debtors' home for failure to pay its allowed claim for attorneys' fees. The Court is called upon to decide when the debtors are required to pay this claim in the plan.
- (175) 2-3-86 UNPUBLISHED Styler, Trustee, v. Aztec Copy, Inc. (In re Glead Investment Corp.), 83PC-0152, Judge Clark.**
Transfer of funds to defendant be set aside and recovered for benefit of creditors.
- (176) 2-19-86 APPEAL Zions First National Bank, et al. v. Sanders Livestock Co., Inc. (In re L.W. Gardner Company), 84PC-1032, Judge Jenkins.**
Conflicting claims to real property.
- (177) 2-26-86 UNPUBLISHED The Lockhart Co. v. Hansen, et al. (In re Hansen), 83PC-0010, Judge Clark.**
Fraudulent representations; materially false statement; reliance.
- (178) 3-26-86 APPEAL In re Irving Financial Corp., 82C-02706, Judge Jenkins.**
Compromise of claims.
- (179) 3-31-86 APPEAL Martin v. Wasatch Factoring, Inc. (In re Wasatch Factoring, Inc.), 85PA-0687, Judge Winder.**
Transfer of funds.
- (180) 3-31-86 APPEAL Merrill, Trustee, v. Dietz (In re Independent Clearing House, et al.), 83PA-3105, Judge Winder.**
Accounting and recovery of funds allegedly diverted by principals of the debtors. Voidable preferences.
- (181) 4-1-86 UNPUBLISHED Artistic Tape and Label Printers, et al. v. Coordinated Financial Services (In re Artistic Tape and Label**

Printers, et al.), 83PA-0458, Judge Allen.
Filing of proof of claim.

- (182) 4-1-86 UNPUBLISHED In re Allen, 85A-00372, Judge Allen.**
Debtors' motion to dismiss first chapter 7 in order to file a second chapter 7 case immediately thereafter and to obtain discharge of student loan.
- (183) 4-2-86 UNPUBLISHED In re Horne, 84A-00403, Judge Allen.**
Application by attorney for debtor for interim compensation in defending four dischargeability actions against debtor.
- (184) 4-7-86 PUBLISHED C & C Company v. Seattle First National Bank (In re Coal-X Ltd. "76"), 84PC-1651, Judge Clark.**
60 B.R. 907 Priority of lien.Appealed; see #209.
- (185) 4-22-86 APPEAL Merrill, Trustee, v. Chad Allen et al. (In re Independent Clearing House, et al.), 82PA-0253, Judge Winder.**
60 B.R. 985 Ponzi scheme. See #157.
- (186) 4-30-86 APPEAL L. Joel & Elliott Anderson General Contractor v. Sorenson, et al. (In re Sorenson), 84PC-0965, Judge Jenkins.**
Mechanic's lien.
- (174) 4-30-86 APPEAL In re IML Freight, Inc., 83C-01950, Tenth Circuit Court of Appeals.**
789 F.2d 1460 Collective bargaining agreements.
- (188) 5-2-86 PUBLISHED Rees v. Employment Security Commission of the State of Wyoming (In re Rees), 85PC-0016, Judge Clark.**
61 B.R. 114 Possible conflict between the Wyoming employment security taxation scheme and Section 525(a) of the Bankruptcy Code.
- (189) 5-5-86 PUBLISHED Research-Planning, Inc. v. Segal, Trustee (In re First Capital Mortgage Loan Corp.), 84PC-0129, Judge Clark.**
60 B.R. 915 Creditor moved that funds recovered by trustee in exercise of preference avoidance powers be found subject to trust in its favor. See #226.See #313a.
- (190) 6-10-86 PUBLISHED Sutherland v. Brown (In re Brown), 84PC-0053, Judge Clark.**

66 B.R. 13 The question presented is whether the findings of fact of the Third Judicial District Court should be given collateral estoppel effect in this proceeding.

(191) 6-18-86 APPEAL Executive Air Services, Inc., 83C-00795, Judge Sam.

This is an appeal from the Bankruptcy Court's denial of the motion by appellant, Wildflower, Inc., to amend an order to include a provision approving Wildflower's application for an 11 U.S.C. 364(c)(1) superpriority and payment of its claim thereunder, effective nunc pro tunc.

(192) 6-20-86 PUBLISHED John Deere Company v. Iverson (In re Iverson), 83PC-3128, Judge Clark.

66 B.R. 219 Materially false representations, intent to deceive, reliance, reasonableness standard.

(193) 7-28-86 UNPUBLISHED Greenwell v. Greenwell (In re Greenwell), 85PC-0011, Judge Clark.

Plaintiff commenced this adversary proceeding alleging fraud by defendant with respect to representations concerning his personal financial condition and the financial condition of two convenience stores in connection with the parties' divorce proceedings.

(194) 7-31-86 UNPUBLISHED In re Parkinson, 85C-00545, Judge Clark.

Objection to proof of claim. This Court is called upon to determine whether and to what extent the claim shall be allowed and whether the debtor's rejection of the executory contract should be approved.

(195) 8-1-86 PUBLISHED In re Kerr, In re McClean, Sr., In re McClean, Jr., 84C-03028, 84C-01280, 84C-01279, Judge Clark.

65 B.R. 739 Issues of law: Whether or not these self-employed debtors' interests in their Keogh retirement plans are excluded or exempt from their bankruptcy estates.

(196) 8-7-86 PUBLISHED In re J.R. Research, Inc., 84C-02061, Judge Clark.

65 B.R. 747 Former trustee does not have standing to assert a claim under 506(c).

- (197) 8-15-86 PUBLISHED In re Jeppson, 84C-00380, Judge Clark.**
66 B.R. 269 The issue in this case is whether a creditor's plan of reorganization is confirmable.
- (198) 8-21-86 PUBLISHED In re Tri-L Corp., 81C-02084, Judge Clark.**
65 B.R. 774 Trustee's objection to an administrative expense claim.
- (199) 8-22-86 PUBLISHED Stuart, Trustee, v. Pingree (In re Afco Development Corp.), 85PC-0795, Judge Clark.**
65 B.R. 781 Chapter 7 trustee brought suit to avoid allegedly preferential transfer, and defendants moved to dismiss complaint as untimely. The court held that trustee, initially appointed under Chapter 11 and subsequently appointed to serve as Chapter 7 trustee upon conversion of case, had two years after date of second appointment within which to commence proceeding to avoid preference.
- (200) 8-22-86 PUBLISHED Tradex, Inc. v. The United States of America (In re IML Freight, Inc.), 83PC-3254, Judge Clark.**
65 B.R. 788 The Court is called upon to determine whether or not the United States may set off a tax penalty against its prepetition obligation to the debtor.
- (201) 8-27-86 UNPUBLISHED I.F.S. Inc. v. National Credit Union Administration Board, et al. (In re I.F.S. Inc.), 86PC-0334, Judge Clark.**
Appealed; See #221.
- (202) 9-4-86 APPEAL Wasatch Bank of Lehi v. Hunter (In re Hunter), 85PA-0581, Judge Sam.**
Plaintiff sought 523(a)(2)(A) determination that a debt owed by the defendants to the plaintiff should be adjudged nondischargeable because the defendants allegedly obtained the subject loan by false pretenses, false representation, or actual fraud.
- (203) 9-4-86 UNPUBLISHED Main Hurdman, Trustee, v. A & W Investments, Inc., et al. (In re IML Freight, Inc.), 85PC-1265, Judge Clark.**
Motion to dismiss complaint on the ground that it fails to state a claim upon which relief may be granted and is barred by the statutes of limitations.
- (204) 9-4-86 UNPUBLISHED National Acceptance Company of America v. Salina Truck & Auto Parts, Inc., et al. (In re Salina Truck & Auto Parts, Inc.), 84PC-1082, Judge Clark.**

Plaintiff is seeking a determination that it holds a properly perfected first priority security interest in the seller's interest under a Utah Uniform Real Estate Contract. The trustee counterclaimed under 11 U.S.C. 544 to avoid the security interest of plaintiff for failure to properly perfect its interest in property of the debtor.

- (205) 9-14-86 UNPUBLISHED Main Hurdman, Trustee, v. Baldwin, et al., (In re Vasilacopulos), 84PC-1094, Judge Clark.**
Fraudulent conveyances. Reasonably equivalent value and insolvency elements.
- (206) 9-30-86 APPEAL In re Ralsu, Inc., 85A-02848, Judge Anderson.**
Issues on appeal: Was the debtor's petition filed in bad faith?; Should the stay be lifted for lack of adequate protection?; Was the transfer of assets to debtor a fraudulent transfer?; Did the stay expire because the bankruptcy court failed to enter its final order within 30 days of the hearing?
- (207) 9-30-86 APPEAL In re Gibson Products Company, Inc., 86C-00933, Judge Winder.**
Motion to stay the effect of the bankruptcy court's order denying the debtor's motion for an extension of time in which to assume or reject the sublease on the premises previously occupied by the debtor and to enjoin the sublessor from transferring, assigning, or otherwise conveying the debtor's leasehold interest in the premises during the pendency of this appeal.
- (208) 10-2-86 APPEAL Rupp, Trustee, v. Graybar Electric Company, Inc. (In re Henningsen), 85PA-0096, Judge Winder.**
Preferential transfers.
- (209) 10-7-86 APPEAL C & C Company v. Seattle First National Bank (In re Coal-X Ltd. "76"), 84PC-1651, Judge Winder.**
See #184. Priority of lien.
- (210) 10-8-86 APPEAL Aetna Finance Company v. Bedford (In re Bedford, 84PC-1914, Judge Winder.**
False pretenses, false representations, or actual fraud.
- (211) 10-21-86 APPEAL In re Paiute Oil and Mining Corp., 84C-03451, Judge Jenkins.**
Constructive trust, proof of claim.
- (212) 11-4-86 APPEAL American Tierra, Inc., 81-03073, Judge Winder.**
Attorney conflicts of interest.

(213) 11-12-86 APPEAL Mosier, Trustee, v. Schwenke, et al. (In re Dennis L. Carlson, Inc.), 86PC-0575, Judge Jenkins.

Trustee's sale of real property.

(214) 11-18-86 PUBLISHED In re Black, 85C-02395, Judge Clark.

70 B.R. 645 Whether a cross-claim against the debtor for indemnification or contribution, arising out of a prepetition business transaction, is enjoined by the automatic stay where, under state law, the claimant's cause of action would first arise upon the commencement of postpetition litigation against it.

(215) 11-26-86 APPEAL Main Hurdman, Trustee, v. Trailer-Train, Inc. (In re IML Freight, Inc.), 85PC-0283, Judge Jenkins.

Preferential action, subject matter jurisdiction.

(216) 12-9-86 UNPUBLISHED Elton, Inc. v. United States of America, et al. (In re Boswell Land & Livestock, Inc.), 85PC-0777, Judge Clark.

Doctrine of inverse order of alienation; validity of lien.

(217) 12-12-86 APPEAL In re Durfee, 86C-01501, Judge Jenkins.

Violation of automatic stay and contempt of court.

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(218) 2-6-87 PUBLISHED In re Bajan Resorts, Inc., In re Bajan Development Company, Ltd., 84C-03443, 84C-03444, Judge Clark.

71 B.R. 53 Filing of late proof of claim.

(219) 2-23-87 APPEAL Rushton, Trustee, v. Truab (In re Nell), 86PA-0104, Judge Jenkins.

71 B.R. 305 Court holds that the bankruptcy court lacked jurisdiction to enter a final order.

(220) 3-6-87 PUBLISHED In re Anderson, 86A-00085, Judge Allen.

70 B.R. 883 Debtor's motion to convert chapter 11 case to a case under chapter 12.

(221) 3-13-87 APPEAL I.F.S. Incorporated v. National Credit Union Administration Board (In re I.F.S. Incorporated), 86PC-0334, Judge Winder.

See #201. The debtor was not allowed to set aside a postpetition sale of stock, since a prepetition stock purchase agreement under U.C.C. 9-504 cut off the debtor's fixed right of redemption pursuant to 9-506.

(222) 3-18-87 APPEAL Value Oil, Inc. v. Green River Development

Associates, Inc. (In re Value Oil, Inc.), 85PA-0200, Judge Jenkins.

Failure to timely file pre-trial order; motion to reconsider; timeliness of appeal.

(223) 3-25-87 PUBLISHED Bank of Utah v. Auto Outlet, Inc., et al. (In re Auto Outlet, Inc.), 86PC-0297, Judge Clark.

71 B.R. 674 Nondischargeability complaint for willful and malicious injury under 523(a)(6).

(224) 4-15-87 PUBLISHED Orem Postal Credit Union v. Twitchell (In re Twitchell), 85PA-0922, Judge Allen.

72 B.R. 431; See #245 Defalcation while acting in a fiduciary capacity.

(225) 4-17-87 APPEAL World Communications, Inc. v. Direct Marketing Guaranty Trust (In re World Communications, Inc.), 86PA-0893, Judge Winder.

Bankruptcy court's finding that the escrow account in question constitutes property of the estate is affirmed. Case remanded prior to execution of turnover order for determination of existence of a security interest and the propriety and availability of adequate protection and whether there was an oral modification of the written agreement pertaining to the amount of sales proceeds that could legitimately be withheld and placed in escrow.

(226) 4-24-87 APPEAL Research-Planning, Inc. v. Roger G. Segal, Trustee (In re First Capital Mortgage Loan Corp.), 84PC-0129, Judge Jenkins.

__ B.R. __ The issue is whether money that the debtor See #189 received as an escrow agent, deposited in its general account and used to pay its debts should be returned to the escrow depositor after the bankruptcy trustee recovered the payments as preferential transfers.

(227) 5-26-87 APPEAL Mann v. Duncan, (In re Clealon Mann), 84A-01011, Judge Winder.

Issue is whether the bankruptcy court abused its discretion in approving the settlement recommended by the trustee where the sole basis for objection to that settlement was that the objecting party offered to pay \$300.00 more for sale or abandonment of the claim to them than was given to settle.

(228) 5-27-87 UNPUBLISHED In re Beehive International, 84C-02702, Judge Clark.

District court entered an order staying all proceedings in an action before it and certified the following questions for the bankruptcy court's determination: Is the license at issue in this action an executory contract assumed by debtor as a reorganized debtor? Would any bankruptcy policy or interest be impaired if this action were referred to arbitration, and if so, what bankruptcy policy or

interest should be considered in deciding whether this action should be stayed pending arbitration and transferred as requested by defendants?

- (229) 6-8-87 APPEAL In re Roberts, In re Roberts, Inc., 82C-01037, 82C-01038, Judges Jenkins, Winder, Greene, and Sam.**
75 B.R. 402 Potential conflicts in atty. representation.
- (230) 6-26-87 UNPUBLISHED In re Tri-L Corporation, 81C-02084, Judge Clark.**
Allowance of postconfirmation, preconversion administrative expense claim.
- (231) 6-30-87 APPEAL In re Dondy, Inc., In re Wright, 86A-02236, 86A-02237, Judge Anderson.**
Potential conflicts in atty. representation.
- (232) 7-8-87 UNPUBLISHED In re Raines, 84C-01879, Judge Clark.**
Motion to reopen case to add a creditor.
- (233) 7-16-87 APPEAL Moxley v. Bingham (In re Moxley), 83C-02914, Judge Winder.**
Reopening of a chapter 7 case to add a creditor.
- (234) 7-20-87 UNPUBLISHED John Deere Company v. Iverson (In re Iverson), 83PC-0666, Judge Clark.**
Determination of the nature, validity and priority of various liens and interests in certain farm equipment.
- (235) 7-20-87 UNPUBLISHED In re Lawn Care Corporation, 86C-03606, Judge Clark.**
Objection to trustee's notice of intent to sell assets of the estate.
- (236) 7-20-87 UNPUBLISHED Wilkins, Trustee, v. Union Bank (In re Irving Financial Corporation), 85PC-0181, Judge Clark.**
Was debtor's repayment of a loan obligation preferential. Did debtor receive "reasonably equivalent value" in exchange for securing and satisfying the loan obligation?
- (237) 7-23-87 APPEAL Merrill, Trustee, v. Abbott, et al. (In re Independent Clearing House Company, et al.), 83PA-0986, Judges Jenkins, Winder, Greene.**
77 B.R. 843 Limits on Court's equitable powers. Ponzi scheme payments.
- (238) 8-6-87 APPEAL In re Clark Tanklines Company, 86C-00545, Judge Winder.**
Adequate protection.

(239) 9-11-87 APPEAL Merrill, Trustee, v. Allen, et al. (In re Universal Clearing House Company, et al.), 81A-02887, 81A-02886, 81A-03704, Judge Winder.

Appellant asking court to overrule the decision of the bankruptcy court denying him relief from a judgment under 60(b) Fed.R.Civ.P.

(240) 9-25-87 APPEAL In re Larson, 87C-00042, Judge Winder.

Motion for disqualification of bankruptcy judges. Dismissal of Chapter 11 case. Judge Clark's findings of fact are not clearly erroneous nor do his conclusions of law constitute an abuse of his discretion.

(241) 11-16-87 UNPUBLISHED Rushton, Trustee, v. Nell Investment Company, et al. (In re Nell), 86PA-0026, Judge Clark.

Fraudulent conveyances.

(242) 12-1-87 UNPUBLISHED In re CFS Fox River, Ltd., 86C-02732, Judge Clark.

Sanctions, superpriority claim for moneys expended pursuant to cash collateral stipulation.

(242a) 12-4-87 APPEAL Prudential Federal Savings v. Dana (In re Dana), 87C-00810, Judge Winder.

Multiple filings.

(243) 12-30-87 APPEAL Merrill, Trustee, v. Turner (In re Independent Clearing House Company, et al.), 83PA-3081, Judge Jenkins.

Fraudulent conveyances from debtors to attorneys.

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(243a) 1-11-88 APPEAL The Lockhart Co. v. Multi-Resort Ownership Partnership (In re Sweetwater), 86PA-0766, Judge Sam.

Perfected security interest in contracts. Two issues: When did the insolvency proceeding terminate for purposes of commencing the sixty-day period in Utah Code Ann. 70A-9-403(2), and were appellants required to file a continuation statement to maintain their perfected status?

(244) 2-16-88 In re Retirement Inn at Forest Lane, Ltd., 84A-04462, Judges Jenkins, Winder, Greene, and Anderson.

83 B.R. 795 Transfer of venue.

- (245) 2-22-88 APPEAL Orem Postal Credit Union v. Twitchell (In re Twitchell), 85PA-0922, Judge Winder.**
See #224; 91 B.R. 961 Sole issue on appeal is whether appellant was in a fiduciary capacity within the meaning of 523(a)(4) when the defalcations occurred.
- (246) 3-10-88 PUBLISHED In re Terracor, et al., 81B-00599 to 81B-00602 and 81B-00689 to 81B-00696, Judge Boulden.**
86 B.R. 671 Report and recommendation for abstention pursuant to 28 U.S.C. 1334(c)(1) and Bankruptcy Rule 5011(b).
- (247) 3-28-88 PUBLISHED Bowen v. United States Internal Revenue Service, (In re Bowen), 87PB-0236, Judge Boulden.**
84 B.R. 214The issue is the proper method for calculating abuse tax shelter penalties under I.R.C. Section 6700.
- (248) 4-29-88 American Community Services, Inc. v. Wright Marketing, Inc. (In re American Community Services, Inc.), 86PC-0996, Judge Winder.**
Withdrawal of reference.
- (249) 5-12-88 UNPUBLISHED In re The Weber Clinic, 86A-00633, Judge Allen.**
Issue of whether or not the release by parties of their claim against other parties, without a reservation of right to proceed against joint obligors, constitutes a release of the debtor.
- (250) 5-26-88 UNPUBLISHED Community First Bank v. Quinlan (In re Quinlan), 87PB-0893, Judge Boulden.**
The creditor's nondischargeability action was dismissed for failure to file the pretrial order. The creditor moved for reconsideration of the order under Rule 9024 for excusable neglect. The Court could not find excusable neglect and would not vacate the order of dismissal. The Court also discusses the conflict of interest of creditor's counsel who was also the trustee.
- (251) 5-27-88 UNPUBLISHED In re Dunyon, 87B-04887, Judge Boulden.**
See #274.Damages would be awarded under 11 U.S.C. 362(h) when state court causes of action against the debtor and property of the estate were republished by a creditor postpetition.
- (252) 6-15-88 PUBLISHED Dewsnap v. Timm, et al. (In re Dewsnap),**

87PC-0116, Judge Clark.

87 B.R. 676 The issue is whether the debtors in this See 908 F.2d 588 Chapter 7 case may redeem real property, which (10th Cir. 1990) has been or may be abandoned to them, by paying to the secured creditors the fair market value of the property. The Court holds that a Chapter 7 debtor may not utilize 506(d) to avoid the undersecured portion of a lien on property which is exempt or which has or will be abandoned by the trustee. The avoiding power of that section is limited to property which is property of the estate and is administered by the trustee.

(253) 6-24-88 PUBLISHED In re Granada, Inc., 87C-00693, Judge Clark.

88 B.R. 369 Issue is whether accrued postpetition lease obligations under a nonresidential real property lease must be paid immediately, even when the trustee is no longer in possession of the premises and there are insufficient estate funds with which to pay all accrued administrative expenses in full. Stated otherwise, the Court must decide whether an administrative rent claim arising under 365(d)(3) is entitled to superpriority over other 507(a)(1) administrative expense claims.

(253a) 6-30-88 APPEAL DLB Collection Trust v. Harline (In re Harline), Zions First National Bank v. Harline (In re Harline), 87PA-0184, 87PA-0185, Judge Jenkins.

Erroneous dischargeability date.

(254) 7-1-88 PUBLISHED In re Smith and Son Septic and Sanitation Service, 86B-05435, Judge Boulden.

88 B.R. 375 Debtor filed a motion to dismiss its Chapter 11 case. Because of debtor's failure to pay the quarterly fees required under 28 U.S.C. 1930(a)(6), the United States Trustee objected to the motion. The Court holds that cause exists to dismiss the case and concludes that the United States Trustee's motion for a judgment for unpaid fees is procedurally improper and is therefore denied.

(254a) 7-20-88 ANR Limited Inc. vs Chattin, District Court No. C-87-845W, Judge Winder.

89 B.R. 898 An alter ego remedy is property of the bankruptcy estate and should be brought by the bankruptcy trustee.

(255) 7-21-88 UNPUBLISHED Megabar Corporation v. First Security Bank of Utah (In re Megabar Corporation), 87PB-0772, Judge Clark.
Preferential transfer.

(256) 7-27-88 UNPUBLISHED Eggett v. Shaffer (In re Shaffer), 86PC-1063,

Judge Clark.

A cause of action under 523(a)(2)(A) requires a showing of intentional misrepresentation. Negligent misrepresentation is insufficient.

(257) 7-27-88 APPEAL Clendenen, Trustee, v. Van Dyk Oil Company, Inc., (In re By-Rite Distributing, Inc.), 86PA-0946, Judge Sam.

89 B.R. 906 Postpetition payments of checks, delivered prepetition to the payee, constitute voidable postpetition transfers under 11 U.S.C. 549(a).

(258) 8-10-88 APPEAL In re Skinner, 87A-03646, Judge Winder.

Bankruptcy court incorrectly imposed sanctions under 11 U.S.C. 362(h).

(259) 8-12-88 APPEAL Hurdman, Trustee, v. Anderson (In re Vasilacopulos), 84PC-1101, Judge Sam.

Trustee may recover excess funds transferred to defendants.

(260) 8-15-88 APPEAL Rupp, Trustee, v. Codale Electric Supply, Inc. (In re Henningsen), 85PA-0099, Judge Greene.

Preferential transfers.

(261) 8-15-88 APPEAL Merrill, Trustee, v. Nelson Family Trust (In re UCH), 83PA-1087, Judge Sam.

Preferential transfers.

(262) 8-22-88 APPEAL Bryant v. Straup (In re Straup), 85PA-1419, Judge Winder.

Section 523(a)(9) must be read broadly in order to allow an injured party access to another forum that can enter a judgment relating to a debt arising from a drunk driving incident.

(263) 9-6-88 APPEAL Cottonwood Leasing v. Cossey (In re Cossey), 86PC-0408, Judge Jenkins.

If a secured creditor elects to file a proof of claim and the debtor's plan purports to provide for that claim, the secured creditor ignores the plan and the confirmation hearing at his peril.

(264) 9-21-88 APPEAL Joseph v. Stone (In re Stone), 84PC-0988, Judge Anderson.

91 B.R. 589 Appellants have failed to demonstrate by clear and convincing evidence that the debtor violated 523(a)(2)(A) and have failed to demonstrate that the debtor was a fiduciary within the meaning of 523(a)(4).

(265) 9-27-88 PUBLISHED Job v. Calder (In re Calder), 86PA-0989, Judge Allen.

93 B.R. 734 Deliberate omissions by the debtor may result in the denial of the debtor's discharge, and See 907 F.2d 953 the debtor's assertions that the assets are (10th Cir. 1990) worthless or unavailable to creditors does not relieve the debtor from disclosing all his property interests. Furthermore, the debtor may not hide behind the "invisible cloak of disclosure" by alleging that, although not listed appropriately, the assets were revealed to the trustee at the Section 341 meeting of creditors and thereafter.

(266) 9-30-88 PUBLISHED Walker v. Wilde (In re Walker), 88PB-0356, Judge Boulden.

91 B.R. 968 Motions for relief from stay, relief from 524 injunction, an order of See #282. nondischargeability or an extension of time to file objections to discharge. The court denied all of the motions due to the untimely nature of the motions and the right of the debtor to a fresh start.

(267) 10-28-88 PUBLISHED Billings, Trustee, v. Cinnamon Ridge, Ltd. (In re Granada, Inc.), 87PC-0812, Judge Clark.

92 B.R. 501 A trustee's rights and powers of a bona fide purchaser of real property from the debtor under 11 U.S.C. 544(a)(3) are in addition to the trustee's power to avoid transfers of property of the debtor that are avoidable by a bona fide purchaser. Under section 544(a)(3), a trustee's rights and powers of a bona fide purchaser is without regard to any actual knowledge of the trustee or of any creditor. Inquiry or constructive notice may preclude the trustee from asserting the bona fide purchaser status.

"Property of the estate" under 11 U.S.C. 541 includes not only rights to property that the debtor has prepetition (section 541(a)(1)) but also additional rights which the trustee is given by virtue of the Bankruptcy Code (section 541(a)(3),(4)). Section 541(d) operates to limit the scope of section 541(a)(1) and (2), not section 541(a)(3) or (4).

(268) 11-18-88 PUBLISHED In re Calder, 86A-03558, Judge Allen.

93 B.R. 739 Order Denying Motion to Convert Chapter 7 Proceeding to Chapter 13 Proceeding based on abuse of the bankruptcy process.

(269) 11-18-88 APPEAL In re Hofheins, 87C-06000, Judge Winder.

The bankruptcy court's award of sanctions against a creditor for violating the automatic stay is affirmed.

(270) 11-21-88 PUBLISHED Styler, Trustee, v. Tall Oaks, Inc. (In re

Hatch), 87PA-0683, Judge Allen.

93 B.R. 263 Filing of complaint was without factual foundation and the lack of this foundation resulted in the untimely service of the summons upon the defendant. Sanctions against the trustee and her attorney imposed.

(271) 11-29-88 APPEAL Deseret Federal Savings & Loan Assn. v. Brianhead Royale Development Corporation (In re Brianhead Royale Development Corporation), 87PA-0063, Judge Winder.

Properly designating the appellant is a substantive jurisdictional requirement. Leave to appeal from an interlocutory order is governed by 28 U.S.C. 1292(b); two of the three requirements of that section are not met. The appeal is improperly brought and the case is dismissed.

(272) 12-8-88 PUBLISHED Calder v. Segal, Trustee, (In re Calder), 88PA-0021, Judge Allen. 94 B.R. 200

Defendant received from the chapter 13 trustee a series of checks representing attorney's fees for certain of plaintiff's prepetition services to chapter 13 clients. The court is called upon to decide whether those fees are property of the estate under 11 U.S.C. 541. The court rules that the fee agreements between the plaintiff and his chapter 13 clients are not contingent fee agreements and are property of the plaintiff's bankruptcy estate.

(273) 12-13-88 APPEAL Rothery v. Shah (In re Shah), 84PC-0059, Judge Greene.

Does plaintiff's forbearance from calling in demand notes, as a result of reliance upon false financial statements (assuming arguendo that they were false), constitute an extension, renewal, or refinance of credit within the meaning of 11 U.S.C. 523(a)(2)? Court holds that forbearance in demanding payment on the demand notes constituted an extension of credit within the meaning of 11 U.S.C. 523(a)(2).

(274) 12-30-88 APPEAL In re Dunyon, 87B-04887, Judge Winder.

See #251. The question before the court is whether the bankruptcy court erred in awarding sanctions against the creditor pursuant to 11 U.S.C. 362(h).

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(275) 1-18-89 UNPUBLISHED BancBoston Financial Company v. Dunyon (In re Dunyon), 87PB-0960, Judge Boulden.

False financial statements.

- (276) 2-6-89 UNPUBLISHED Hurdman, Trustee, v. Anderson, et al. (In re Vasilacopulos), 84PC-1094, et al., Judge Clark.**
Fraudulent conveyances.
- (277) 3-9-89 APPEAL In re Vasilacopulos, 82C-01031, Judge Greene.**
Motions seeking removal of counsel for the trustee based on conflict of interest and removal of trustee based on inadequate notice of the conversion from chapter 7 to chapter 11. Affirmed.
- (278) 3-10-89 UNPUBLISHED R. D. Bailey Rigging, Inc. v. United States of America (In re R.D. Bailey Rigging, Inc.), 87PB-0475, Judge Boulden.**
Resolution of creditors' claim and debtor's adversary dispute relating to rate charges for hauling freight for United States government agencies pursuant to tenders and bills of lading submitted by the shipper to the government.
- (279) 3-14-89 UNPUBLISHED Scovill v. Beauty, Inc. (In re Scovill), 88PC-0929, Judge Clark.**
Report and recommendation for abstention under 28 U.S.C. 1334(c) and Bankruptcy Rule 5011(b).
- (280) 4-3-89 APPEAL Federal Savings and Loan Insurance Corp. v. Smith and Smith & Corder (In re LittleTree Inns-Layton, Inc.), 88PC-0018, Judge Winder.**
The question before the court is whether the bankruptcy court erred as a matter of law in deciding FSLIC's cause of action to recover funds transferred from the debtor in possession to its attorney allegedly in violation of Section 363(c)(2) is a core proceeding conferring jurisdiction upon the bankruptcy court. Affirmed.
- (281) 4-7-89 PUBLISHED American Savings & Loan Association v. Weber (In re Weber), 87PB-0790, Judge Boulden. 99 B.R. 1001**
Unauthorized use of cash collateral constitutes defalcation while in a fiduciary capacity resulting in a substantial loss to plaintiff. Nondischargeable judgment awarded in favor of plaintiff and a general denial of discharge is warranted.
- (282) 6-8-89 APPEAL Walker v. Wilde, et al. (In re Walker), 88PB-0356, Judge Anderson. See #266. 103 B.R. 281**
Bankruptcy court correctly concluded that action against another entity would violate the statutory injunction of 524 and prejudice debtor's fresh start. Further, the bankruptcy court is correct in denying as untimely the motion for an extension of time to file an objection to the dischargeability of

claim. Affirmed.

(283) 6-9-89 PUBLISHED In re Caldwell, 88B-07175, Judge Boulden. 101 B.R. 728

Creditor moved for relief from stay and for conversion of debtor's Chapter 12 case under 11 U.S.C. 1208(d) to a case under Chapter 7. The court held that cause did not exist sufficient to grant relief from stay, but that an intent to deceive could be inferred under section 1208(d) sufficient to convert the case based on fraud arising from the debtor's failure to list approximately half of his asset's on Chapter 12 statements.

(284) 7-7-89 UNPUBLISHED In re Sedgwick, 84C-01985, Judge Clark.

Debtors claimed a portion of income tax refunds as exempt under Utah Code Ann. 70C-7-103 and Rule 64D of the Utah Rules of Civil Procedure (limitations on garnishment). The Chapter 7 trustee objected to the exemption. The issue is whether or not an income tax refund constitutes disposable earnings from personal services. The court sustained the trustee's objection.

(285) 7-7-89 UNPUBLISHED Cascade Energy & Metals Corp. v. Banks (In re Cascade Energy & Metals Corp., 88PC-0861, Judge Clark.

Defendant's recording in California of a judgment from the District of Utah that is not registered as a judgment in California does not give constructive notice to the world of an equitable lien declared in the judgment. There is no genuine issue of material fact; and the court finds, as a matter of law, that the equitable lien was not properly perfected. The court finds that plaintiff is not estopped from contesting the perfected status of the equitable lien.

(286) 7-7-89 PUBLISHED In re Turner, 88C-05093, Judge Clark.

The matter before the court is an order to appear and show cause as to why a homeowners association and its manager should not be held in contempt of court and sanctioned for violation of the discharge provision of 524. The issue is whether or not common expenses (i.e., homeowner fees) assessed postpetition by a homeowners association are a debt for which the debtor has been released from personal liability as a result of the debtor's discharge in Chapter 7.

(287) 7-17-89 APPEAL Tradex, Inc., et al. v. Volvo White Truck Corp. (In re IML Freight, Inc.), 84PC-0844, Judge Winder.

The court agrees with the defendant's position and believes that 553 was intended to preserve, with some changes, the right of setoff in bankruptcy cases which had been found in its predecessor statute, 68(a) of the Bankruptcy Act of 1898. Because the clear wording of 542(b) precludes a turnover of debts to the extent they are subject to setoff, it is the opinion of the court that the

defendant's offset claims may be asserted to defeat plaintiff's claim in this turnover proceedings. The judgment of the bankruptcy court is reversed.

(288) 7-27-89 UNPUBLISHED Irwin v. Arrowsmith (In re Arrowsmith), 88PB-0699, Judge Boulden.

The court determines that plaintiff has failed to meet his burden of establishing by clear and convincing evidence that defendant committed defalcation while acting in a fiduciary capacity imposed by statute.

(289) 8-4-89 UNPUBLISHED In re College Terrace, Ltd., 88B-04591, Judge Boulden.

The matter before the court is a motion for relief from the stay on property that is the sole asset of the debtor. The court determines that this property is necessary to debtor's rehabilitation efforts and that a reorganization is in prospect. No finding based on clear and convincing evidence can be made that debtor has equity in this property. Criteria used to determine if a Chapter 11 plan is expected or possible are set forth. Debtor has failed to comply with court orders and has breached obligations of a debtor-in-possession; however, other remedies are available to bring debtor's conduct into conformity with the orders of the court short of divesting debtor of its assets. The automatic stay will remain in effect upon conditions set forth.

(290) 8-11-89 PUBLISHED Telecash Industries, Inc. v. Universal Assets (In re Telecash Industries, Inc.), 89PC-0232, Judge Clark.

104 B.R. 401 Debtor-in-possession brought adversary proceeding to avoid as preferential transfer security interest perfected by creditor more than ten days after underlying loan transaction. On debtor-in-possession's motion for summary judgment, the court held that: (1) creditor's delayed perfection of security interest granted in connection with loan qualified as transfer for or on account of antecedent debt, within meaning of preference provision, but (2) mere fact that creditor waited more than ten days in order to perfect its security interest did not preclude finding that transfer occurring upon creditor's perfection of interest was substantially contemporaneous with loan, within meaning of preference exception. Motion denied.

(291) 9-29-89 UNPUBLISHED Peoples National Bank of Washington v. Tracy Bancorp, et al. (In re Tracy Bancorp), 86PC-0861, Judge Clark.

12 U.S.C. 1823(e) and the United States Supreme Court's holding in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) bar actions against the FDIC acting in its capacity as receiver, seeking to recover property or subordinate a lien based on claims of fraud, conspiracy, or lack of consideration.

(292) 11-7-89 APPEAL Rushton, Trustee, v. Holy Land Christian Mission, et al. (In re Jensen), 88PA-0769, 88PA-0783, 88PA-0837, 88PA-0796, 88PA-0763, 88PA-0841, 88PA-0839, Judge Jenkins.

The sole issue on appeal is whether the two year limitations period set forth in 11 U.S.C. 546(a)(1) begins to run from the date of the trustee's actual permanent appointment at the first meeting of creditors, or from an earlier date if the creditors' meeting is held later than the twenty to forty-day time period dictated by Bankruptcy Rule 2003(a).

(293) 11-13-89 UNPUBLISHED In re Creech, 86C-05249, Judge Clark.

Integrity of confirmed plan; res judicata effect of confirmed plan; equitable estoppel. Standards for dismissal under 11 U.S.C. 1208(c).

(294) 12-15-89 UNPUBLISHED Associated Builders and Contractors of Utah, Inc., v. United Bank (In re Lindsay), 89PB-0550, Judge Boulden.

Report and recommendation concerning plaintiff's motion for remand or for mandatory abstention. Court denied the motion for remand finding that equity would not be served by remanding the action to state court. The motion for mandatory abstention is also denied because it is inapplicable to this related matter because claims of nondischargeability are inappropriate for state court adjudication and the matter can be timely adjudicated in the bankruptcy court.

1990

(295) 1-2-90 UNPUBLISHED In re Naka Industries, Inc., 86B-03175, In re Nakashima, 86B-03178, Judge Boulden.

Court denies the granting of counsel's nunc pro tunc motion for appointment as counsel for these two Chapter 7 debtors. Ruling based upon the finding that counsel was not disinterested and had failed to make full and adequate disclosure in his application. The court restated the law regarding nunc pro tunc motions noting the appropriate use of such a motion is to correct a mistake or error that actually occurred rather than to change the record to reflect something that did not occur or to cure the omissions of counsel.

(296) 1-26-90 PUBLISHED Billings, Trustee, v. Zions First National Bank (In re Granada, Inc.), 89PC-0418, Judge Clark. 110 B.R. 548

Triangular preference cause of action and fraudulent transfer cause of action under 547(b) and 548(a).

(297) 1-31-90 PUBLISHED In re Vanderbilt Associates, Ltd, 89B-02556, In re Sandal Ridge Associates, 89B-04314, Judge Boulden. 111 B.R. 347

Law firm sought to simultaneously represent two Chapter 11 debtor limited partnerships which had a common general limited partner. The court held such representation constituted an actual conflict of interest adverse to the estate of each debtor so as to prohibit employment.

(297a) 2-27-90 APPEAL In re Fossey, 87B-06187, Judge Winder. 119 B.R. 268

Court abused its discretion in not allowing reopening of debtor's Chapter 7 case where all of the debtor's assets had not been administered. Discussion of proper procedure of abandonment of property.

(298) 4-3-90 UNPUBLISHED Dahlstrom v. Placer U.S., Inc. (In re Dahlstrom), 89PC-0653, Judge Clark.

Interpreting Reliable Elec. Co., the court finds that a claim not scheduled by the debtor is nondischargeable. Debtor's failure to give reasonable notice of the plan confirmation hearing constitutes denial of due process, therefore the creditor's claim is not subject to the debtor's plan and is not dischargeable.\

(299) 4-3-90 PUBLISHED In re Dillon, 89B-06914, Judge Boulden. 113 B.R. 46

Trustee objected to exemptions claimed by debtor in an automobile which she had won in a contest and in a rifle which she had purchased to replace a rifle she had previously owned as a child but had subsequently lost as part of a property settlement in a divorce proceeding. The court held the automobile possessed no particular sentimental value as contemplated by the Utah Code, the rifle likewise failed to hold any such sentimental value, and the car did not qualify for the motor vehicle exemption as a tool of the trade.

(300) 4-13-90 PUBLISHED America First Credit Union v. Shaw, (In re Shaw), 89PB-0668, Judge Boulden. 114 B.R. 291

Chapter 7 debtor moved for an award of attorney fees against a lender which had brought nondischargeability action but then stipulated to a dismissal with prejudice. The court held the lender's position regarding alleged misrepresentations would not have been substantially justified if lender had undertaken reasonable inquiry. But, the lender's reliance upon the sworn testimony of the debtor represented special circumstances which would relieve the lender of liability for attorney fees.

(301) 4-13-90 PUBLISHED Commercial Factors of Salt Lake City, Inc. v. Jensen (In re Jensen), 88PB-0679, Judge Boulden. 113 B.R. 51

Creditor sought inclusion of attorney fees in amount of debt held to be nondischargeable. The court held creditor was entitled to attorney fees and costs incurred both pre and postpetition pursuant to provision in parties'

contract stating that losing party would pay prevailing party's costs of enforcement under the contract.

- (302) 4-20-90 UNPUBLISHED In re Mann, 89C-03445, Judge Clark.**
Rule 9011 sanctions imposed against attorney for bad faith Chapter 13 filings.
- (303) 5-2-90 UNPUBLISHED In re Isakson, 90B-00604, Judge Boulden.**
Violation of automatic stay. Actual damages, attorneys' fees, and punitive damages awarded.
- (304) 5-10-90 UNPUBLISHED Stoddard v. Stoddard (In re Stoddard), 89PB-0694, Judge Boulden.**
Section 523 action alleging breach of fiduciary duty and embezzlement.
- (305) 5-25-90 PUBLISHED Billings, Trustee, v. Key Bank of Utah (In re Granada, Inc.), 89PC-0420, Judge Clark. 115 B.R. 702; See #316**
Chapter 11 trustee filed complaint claiming that certain payments that debtor made to defendants are avoidable as preferential and/or fraudulent transfers under 547(b) and 548(a) and that the value of those transfers is recoverable by him under 550(a).
- (306) 6-19-90 PUBLISHED In re Martin, 89B-05149; In re Verwer, 89B-05263; In re Fullmer, 89B-06063, Judge Boulden. 115 B.R. 311; See #330**
Chapter 7 trustees objected to debtors' claimed exemptions of funds held in ERISA qualified retirement plans. The court held that funds held in ERISA qualified retirement plans are property of the estate unaffected by any exception for spendthrift trusts and are not exempted from the estate pursuant to Utah Code Ann. sections 78-23-5(1)(j) and 78-23-6 because of ERISA's preemptive effect on state law.
- (307) 6-29-90 UNPUBLISHED Elggren, Trustee, v. Enoch Smith Sons Company (In re Park Meadows Investment Co.), 89PC-0510, Judge Clark.**
Action alleging that certain transfers that debtor had made during the pre-petition year are avoidable as preferential transfers under 547(b) and are recoverable under 550(a).
- (308) 8-14-90 PUBLISHED TS Industries, Inc., 89C-04919, Thermal Systems, Inc., 89C-04920, Thermal Systems of Utah, Inc., 89C-04921, Judge Clark. 117 B.R. 682**
The issue is whether a pre-petition executory contract to extend financial accommodations to a debtor is capable of being assumed under 365(a), notwithstanding the prohibitions of 365(c)(2), if it was entered into by the

parties in anticipation of bankruptcy.

(309) 9-14-90 UNPUBLISHED Haymond, et al., v. Grant (In re Grant), 88PB-0972, Judge Boulden. See #340

The shareholders of an electrical company purchased by a company owned by the debtor filed a nondischargeability action, asserting the debtor used a false financial statement in support of his personal guarantee to repay the purchase price. After hearing extensive evidence, the court found that the plaintiffs failed to prove by clear and convincing evidence the debtor's intent to deceive as required by 11 U.S.C. 523(a)(2)(B).

(310) 9-17-90 UNPUBLISHED In re Lopez, 90B-01420, Judge Boulden.

Creditor filed a motion for sanctions under Bankruptcy Rule 9011 against the debtor and debtor's counsel for filing a Chapter 13 petition while a prior Chapter 13 case was still pending. The court found the debtor had merely relied upon counsel and had not intentionally violated the rule. The court found debtor's counsel had advanced his own personal agenda because of conflicts with the court at the expense of creditors, that no case law supported the position taken by counsel, and that, using an objective standard, a reasonable attorney would not have refiled a new petition on essentially the same debt prior to dismissal of the first case. Sanctions were awarded.

(311) 9-21-90 UNPUBLISHED America First Credit Union v. Shaw (In re Shaw), 89PB-0668, Judge Boulden.

A creditor brought a nondischargeability action against the debtor based on an incomplete investigation of the facts, but the court declined to award attorney's fees to the debtor's attorney under 11 U.S.C. 523(d). The debtor's attorney then requested attorney's fees under Utah Code Ann. 78-27-56.5. The court found that attorney's fees could have been awarded to the prevailing debtor if the contract had provided for attorney's fees for the creditor in the same action. The court found, however, that the contract allowed attorney's fees only for taking possession of collateral. Since this was an unsecured debt, neither the creditor nor the debtor's counsel were entitled to fees.

(312) 9-24-90 UNPUBLISHED Walker, McElliott, Wilkinson & Associates v. Smith, Halander, Smith and Associates, et al. (In re Walker, McElliott, Wilkinson & Associates), 88PB-0669, Judge Boulden.

An action brought under Bankruptcy Rule 9011 and 28 U.S.C. 1927 requesting sanctions and attorney's fees. The court found that plaintiff's attorneys had made reasonable inquiry into the facts and law in relation to the claim for relief for avoidance of transfers taken in alleged violation of the automatic stay. The court found that reasonable inquiry had not been made

into the facts nor the law as they related to a fraudulent conveyance action and sanctioned counsel. One sanction sufficed for both Rule 9011 and 28 U.S.C. 1927.

(313) 10-2-90 UNPUBLISHED Group Communications, Inc., 88B-03045, Judge Boulden.

Chapter 11 debtor objected to two proofs of claim filed by a creditor, asserting that interest on undersecured notes in its bankruptcy case ceased to accrue upon the filing of a bankruptcy petition in a co-maker's bankruptcy case. The court held that the accrual of interest continued until the filing of the debtor's petition. An order incorporating the terms of a stipulation regarding the fair market value of real property in the co-maker's bankruptcy case had no res judicata effect on the accrual of interest in the debtor's case. The court denied the debtor's objection to the unsecured claims as modified.

(313a)10-12-90 APPEAL Research-Planning, Inc. v. Roger G. Segal, Trustee (In re First Capital Mortgage Loan Corp.), 84PC-0129, 10th Circuit. See #189 and #226

Funds recovered by the trustee in settlement of his preference actions comprised part of the bankruptcy estate. The district court's decision is affirmed.

(314) 10-29-90 UNPUBLISHED Billings, Trustee, v. Richards Woodbury Mortgage Corp., et al. (In re Granada, Inc.), 89PC-0401, Judge Clark. See #345

Section 547(b)(5) was not satisfied because the creditor was oversecured. In so holding, the court rejected the trustee's argument that the property collateralizing the debt should be separated and valued according to the debtor's interest.

(315) 11-2-90 PUBLISHED Household Bank v. Touchard (In re Touchard), 89PB-0771, Judge Boulden. 121 B.R. 397

A creditor brought a nondischargeability action against the debtor under 11 U.S.C. 523(a)(2)(A) on a credit card debt. The court adopted the "implied representation" doctrine relating to credit card purchases. The court also referred to a ten-factor list in determining whether the requisite intent to deceive existed. The debtor made numerous charges after exceeding her credit limit, several of which were made in the same store on the same day. The court found that debtor lacked the intent to repay the debt and held that the amount of purchases in excess of the credit limit was nondischargeable.

(316) 11-19-90 APPEAL Billings, Trustee, v. Key Bank of Utah, et al, (In re Granada, Inc.), 89PC-0420, Judge Winder. 156 B.R. 303

The district court reversed the bankruptcy See #305 court's holding that a non-insider creditor was an initial transferee for purposes of 550(a). Conduit theory discussed.

(317) 12-26-90 PUBLISHED In re Whitelock, 90B-00844, Judge Boulden. 122 B.R 582

Chapter 13 trustee objected to confirmation of debtors' plan, asserting that a co-signed claim entitled to specialized treatment was improperly categorized pursuant to 11 U.S.C. 1322(b)(1). Debtors sought to separately classify and provide full payment plus interest of the co-signed consumer debt. The court utilized a four-factor test in determining unfairness and found the disparate treatment unfairly discriminatory. The totality of circumstances evidenced a less than good faith proposal of the plan that did not meet the disposable income requirement of 11 U.S.C. 1325(b)(2)(A). Confirmation was denied.

1991

(318) 1-9-91 UNPUBLISHED Zions First National Bank vs Christiansen Brothers, Inc., et al., (In re Davidson Lumber Sales, Inc.), 90PC-0044, Judge Clark

The court lacks subject matter jurisdiction over this proceeding because it involves non-estate property, is between non-debtor parties, and the administration of the estate will not be affected by its resolution.

(319) 1-18-91 UNPUBLISHED Cascade Energy & Metals Corp. v. Banks, et al. (In re Cascade Energy & Metals Corp.), 88PC-0861, Judge Clark
Language erroneously omitted from a quoted state statute was intended to mislead the court and sanctions are imposed. The motion for release of the recorded lien or for a supersedeas bond is denied because once the language is inserted that was omitted, the statute does not stand for the proposition that the movant claims it supports.

(320) 2-13-91 PUBLISHED Micoz v. Carter (In re Carter), 90PC-0332, Judge Clark. 125 B.R. 631

Both the language of 727(a)(4) and a reading of the statute on a whole lead the court to the conclusion that a false oath made by a debtor in one case which is ultimately dismissed is not grounds for denial of the debtor's discharge in a subsequently filed case.

(321) 3-26-91 UNPUBLISHED Stewart v. Wynn (In re Wynn), 90PC-0297, Judge Clark.

Memorandum opinion and order denying discharge under 727(a)(4)(A) and (a)(5). Discussion of Job v. Calder (In re Calder), 93 B.R. 734, 735 (Bankr. D.

Utah 1988), aff'd, 907 F.2d 953 (10th Cir. 1990).

- (322) 4-2-91 UNPUBLISHED In re CF&I Fabricators of Utah, Inc., 90B-06721, In re The Colorado & Wyoming Railway Company, 90B-06730, Judge Boulden.**

The trustee in this Chapter 11 case filed an unopposed motion for an order allowing payment of prepetition claims prior to confirmation of a plan. Motion is denied.

- (323) 4-5-91 PUBLISHED In re Concept Clubs, Inc., et al., 89A-2750 through 89A-02754, Judge Allen .125 B.R. 634**

Application of broker for debtor for allowance of compensation as an administrative expense for a commission of \$100,000.00. The court used the standard of "reasonable compensation" to determine the amount to be awarded as well as the standards delineated by Matter of Womack, Inc., 1 B.R. 95. The court awarded the broker \$50,000.00.

- (324) 4-9-91 UNPUBLISHED In re Powell, 90B-01412, Judge Boulden.** Motion for sanctions for violating the automatic stay provisions of 362. Defense was made by asserting the applicability of the doctrine of recoupment.

The court concludes that recoupment is inapplicable to the facts of this case and grants the motion.

- (325) 4-9-91 PUBLISHED In re TS Industries, Inc., et al., 89C-04919, 89C-04920, 89C-04221, Judge Clark . 125 B.R. 638**

The issue is whether post-trustee services are compensable as administrative expenses for attorney who represents a Chapter 11 debtor.

- (326) 4-23-91 APPEAL Cascade Energy & Metals v. Banks, et al. (In re Cascade Energy & Metals), 88PC-0861, Judge Winder.**
Bankruptcy court has subject matter jurisdiction to decide Cascade Energy's adversary proceeding initiated after the confirmation of the plan of reorganization.

- (327) 4-26-91 PUBLISHED In re Packham, 90C-04129, Judge Clark. 126 B.R. 603**
Debtors' plan denied and case dismissed because the debtors' proposed Chapter 13 plan did not comply with the disposable income test set forth in 1325(b)(1)(B). In particular, the plan provided for a monthly payment to the Church of Jesus Christ of Latter-day Saints as a tithe.

- (328) 4-30-91 UNPUBLISHED In re Murdock Machine & Engineering Company of Utah, B-75-484, Judge Boulden. See #361**
In this Bankruptcy Act Chapter XI case, the trustee argued entitlement to partial summary judgment on a claim filed by the United States relating to unliquidated progress payments. In response to the trustee's motion, the government filed a motion to dismiss for lack of jurisdiction or to defer resolution of the disputes to the A.S.B.C.A. or the U.S. Claims Court. The court determined that no unliquidated progress payments survived the ruling in *Murdock Mach. & Eng'g Co. v. United States*, 873 F.2d 1410 (D.C. Cir. 1989). The court granted partial summary judgment and denied the government's motion.

- (329) 5-1-91 UNPUBLISHED Bagley, Trustee v. U.S.A. (In re Murdock Machine & Engineering Company of Utah, 90PB-0601, Judge Boulden. See #361 (See related opinion above.)**

The government filed claims against the estate based on government contracts with the debtor. The trustee filed this adversary proceeding objecting to the claims. Finding the case of *In re Gary Aircraft Corp.*, 698 F.2d 775 (5th Cir. 1983) instructive, the court discussed primary jurisdiction and discretionary deferral of government contract claims disputes. The court concluded that deferral would unduly delay administration of the estate and denied the government's motion to dismiss or defer.

(330) 5-9-91 APPEAL In re Fullmer, 89B-06063, Judge Winder. See #306

The bankruptcy court's inclusion of Mr. Fullmer's ERISA funds among the assets in debtors' bankruptcy estate, without state or federal exemption, is affirmed.

(331) 6-11-91 PUBLISHED Alside Supply Center v. Aste (In re Aste), 89PB-0695, Judge Boulden. 129 B.R. 1012

A creditor brought a nondischargeability action against the debtor under 11 U.S.C. 523(b)(2)(B) for a debt obtained through a materially false financial statement the debtor had signed. In response to *Grogan v. Garner*, 111 S. Ct. 654 (1991), the court reconciled the application of the preponderance of the evidence standard with the obligation to narrowly construe exceptions to dischargeability in favor of the debtor. Finding that the debtor had no actual knowledge that the statement was false and had no reason to believe the information on the statement was incorrect, the court concluded that the debtor did not act in reckless disregard of the facts.

(332) 7-3-91 PUBLISHED Placer U.S., Inc. v. Dahlstrom (In re Dahlstrom), 90PC-0678, Judge Clark. 129 B.R. 240

Punitive damages are, as a matter of law, nondischargeable under 523(a)(6).

(333) 7-11-91 PUBLISHED In re Swenson, 90A-04222, Judge Allen. 130 B.R. 99

IRAs are not exempt property under 78-23-6(3) because they fail to fall within the parameters of "annuity or other similar plan."

(334) 7-16-91 PUBLISHED In re Smith, 88A-02388, Judge Allen 130 B.R. 102

The issue is whether the debtors' Chapter 13 plan meets the good faith requirement of 1325(a)(3) where that plan offers to pay 30% of a debt which would be nondischargeable in a Chapter 7 and the plan period is only 36 months. Based on Mr. Smith's employment potential, a 60-month plan is imperative in order for these debtors to meet the good faith requirement for confirmation.

(335) 8-7-91 UNPUBLISHED Richard L. Clissold Investment Co. v. Valley Bank & Trust Company (In re Richard L. Clissold Investment Co.), 90PC-0323, Judge Clark.

Holding: (1) Plaintiff asserted a jury demand in its complaint but failed to request a withdrawal of reference. This constituted a waiver of the jury demand. (2) Under Utah law, when a secured creditor sells collateral securing a debt in a nonjudicial sale, the creditor must commence a deficiency action pursuant to Utah Code Ann. 57-1-32 to preserve its claim for a deficiency. If the debtor is in bankruptcy, the creditor must submit, as appropriate, a notice under 11 U.S.C. 546(b) or an amended proof of claim, to preserve the deficiency claim. (3) When the creditor's collateral consists of more than one item of security, the creditor is not precluded from taking the appropriate steps to preserve its claim for a deficiency until three months after all items of security securing that specific debt are sold.

(336) 8-13-91 UNPUBLISHED Trustee v. Swire Pacific Holdings, Inc., Trustee v. Spreckels Sugar Company, Inc. (In re D-Mart Services, Inc. and Estate Realty, Inc.), 90PC-0524, 90PC-0551, Judge Clark. See #349

The two-year limitation period pursuant to 546 commences anew when a Chapter 7 trustee is appointed after a conversion from another chapter.

(337) 8-13-91 PUBLISHED In re Green Street, 91A-03794, Judge Allen. 132 B.R. 460

Before the court are motions for employment of counsel for three Chapter 11 cases. The court finds an actual conflict that qualifies applicants as "interested" parties within the scope of 101(13)(E) and thus subject to disqualification pursuant to 327(a). This disqualification is mandated because the conflict is actual with these debtors and is not hypothetical or theoretical. Motions are denied.

(338) 8-27-91 APPEAL Trustee v. American Savings & Loan Association (In re CFS Financial Corporation), 88PC-0317, Judge Jenkins.

Trustee filed an adversary action asserting two causes of action: 1) to avoid a lien pursuant to 544; and 2) to recover property of the estate pursuant to 549. The bankruptcy court granted trustee's motion for summary judgment and voided the lien on the property. The issue considered by the bankruptcy court was the validity of the individual acknowledgment rather than a corporate acknowledgement on the deed of trust. The court finds that the question as to the form of the acknowledgement is belated. It need not be decided. The court reverses the order of the bankruptcy court on other grounds--the trustee's lesser interest was extinguished when the property was sold at the foreclosure sale.

(339) 9-18-91 PUBLISHED In re CF&I Fabricators of Utah, Inc., et al., 90B-06721, Judge Boulden. 131 B.R. 474

Professionals sought compensation for services from the estates of Chapter 11 debtors in possession in a jointly administered case. The court held that time reasonably spent preparing fee applications is compensable at normal hourly rates and is not subject to either a percentage limitation or an across-the-board discount provided that the estate is billed only for time spent (1) preparing the fee application pleading, including the narrative section, at the lowest applicable hourly rate; (2) exercising billing judgment while reviewing the application; and (3) responding to objections and attending the hearing on allowance of the fee application. Customary overhead charges such as reviewing time records for accuracy, posting accumulated time records and compiling the billing statement are noncompensable charges. The court also held that if services provided to the estate by a paraprofessional are clerical in nature and would traditionally be charged to overhead in a non-bankruptcy case, such services are noncompensable. Finally, the court found that telecopier charges should reflect the actual cost to the estate of long distance telephone rates and supplies and should not produce a profit for the applicant.

(340) 11-18-91 APPEAL Haymond, et al. v. Grant (In re Grant), 88PB-0972, Judge Sam. See #309

The judgment of the bankruptcy court should be vacated and the case remanded to enable the bankruptcy court to re-examine its ruling in light of the subsequent decision of the Supreme Court in Grogan v. Garner, which held that the standard of proof for the dischargeability exceptions in 523(a) is the ordinary preponderance of the evidence standard rather than the clear and convincing evidence standard. The court concludes that the plaintiffs timely and properly demanded a jury trial and did not waive that right by failure to request a transfer to the district court. However, in this case, the plaintiffs are not entitled to a jury trial on the discharge issue.

(341) 11-27-91 UNPUBLISHED Performance Investment Corporation of Utah, et al. v. Folsom (In re Folsom), 91PC-2296, Judge Clark.

State court action that is in the appeal stage should be remanded on equitable grounds. Equitable grounds include duplication of judicial resources, uneconomical use of judicial resources, effect of remand on the administration of the estate, questions of state law better addressed by a state court, comity considerations, prejudice to involuntarily removed parties, lessened possibility of inconsistent result, and expertise of the court where the action originated. If proceeding is not remanded, the bankruptcy court would be functioning as an appellate court.

(342) 11-27-91 UNPUBLISHED Thomas American Stone & Building, Inc. v. White (In re White), 91PC-0178, Judge Clark.

This action is an ancillary proceeding. The debtor filed bankruptcy in California, removed a Utah federal district court action to the Utah bankruptcy court, and is attempting to change venue to California. Based on equitable grounds, remand of this proceeding to the district court is appropriate. And change of venue is neither in the interest of justice nor for the convenience of the parties.

(343) 12-17-91 UNPUBLISHED In re Spanton, 91B-00661, Judge Boulden.

Issues: 1) whether a subrogation agreement executed by the debtor's mother and included in an ERISA qualified health and welfare plan is binding upon the debtor; 2) whether the claimed exemption constitutes "compensatory damages" as anticipated in the state exemption statute; and 3) whether the claimed exemption is preempted by the subrogation provisions of the ERISA qualified plan. The court concludes that the subrogation provisions are binding upon the debtor, that the proceeds from the personal injury claim is encompassed within the meaning of compensatory damages, and that the claimed exemption is preempted by the plan.

1992

(344) 1-7-92 PUBLISHED First American Savings Bank, et al. v. Iron County, et al. (In re United Construction and Development Co.), 90PC-0744, Judge Clark. 135 B.R. 904

Pursuant to 11 U.S.C. 362(a)(4), the filing of a petition under the Bankruptcy Code stays the postpetition creation and perfection of tax liens under Utah law for real property taxes assessed postpetition. An exception to the stay, found in 362(b)(3), which allows postpetition perfection of an interest in property to the extent the trustee's rights and powers are subject to such perfection under 546(b), is not applicable. If generally applicable law permits perfection to be effective against an entity acquiring rights in property before the date of perfection, 546(b) allows that perfection postpetition. The court could find nothing in Utah law that makes that provision in this circumstance.

(345) 1-17-92 APPEAL Billings, Trustee, v. Richards Woodbury Mortgage Corp., et al. (In re Granada, Inc.), 89PC-0401, Judge Sam. See #314

Payments in question constitute a preferential transfer because such payments were not accompanied by a release of equivalent value. The order of the bankruptcy court is reversed.

(346) 1-29-92 Cottage Farms, Ltd. v. Mary Ellen Sloan, Trustee, et al. (In

re Larsen), 90PC-0720, Judge Jenkins.

Dfd. Mayfield filed a motion to withdraw the reference claiming that she has a right to a jury trial on the legal issues raised by plaintiff's interpleader complaint. The interpleader action appears to be entirely equitable in nature and therefore the parties are not entitled to a jury trial. The motion to withdraw reference is denied.

(347) 2-5-92 UNPUBLISHED In re Medical Systems Research, Inc., 89B-03601, Judge Boulden.

The court denied a motion for confirmation of the debtor's chapter 11 plan. Plan confirmation turned on the debtor's ability to satisfy the new value exception to the absolute priority rule. Prior to the confirmation hearing, an individual equity interest holder was authorized by the court to provide the debtor with an unsecured loan of \$15,000 as a section 503(b)(1) administrative claim. The plan paid this claim by issuance of stock in the reorganized debtor equal to an 83% equity interest postconfirmation. The same individual also agreed to loan the debtor \$150,000 postconfirmation to fund the plan. The \$150,000 loan is not a new value contribution because the plan provided payment in full with interest over the plan term. The court held that other equity interest holders were denied the opportunity to similarly participate in future profits of the reorganized debtor because the \$15,000 contribution was made under Fed. R. Bankr. P. 4001(c) rather than with notice to all creditors. In this case, it was not necessary for the court to determine whether the new value exception to the absolute priority rule remains viable after enactment of the 1978 Bankruptcy Code in light of the recent decision in Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture, 948 F.2d 134 (5th Cir. 1991). The court found that the \$15,000 contribution was not substantial in light of the value to be received by the contributor, the prepetition debt or the debt to be discharged and, therefore, would not be fair and equitable treatment of the rejecting class or satisfy the new value exception even if the exception remains viable under the 1978 Bankruptcy Code.

(348) 3-6-92 PUBLISHED In re SLC Limited V, a California Limited Partnership, 91B-03012, Judge Boulden. 137 B.R. 847

Within a motion for relief from automatic stay, the debtor and the secured creditor requested a ruling whether the debtor would be able to confirm a plan based on the new value exception to the absolute priority rule and whether the new value exception survived the adoption of the Bankruptcy Code of 1978. The circuit courts have split on the continued existence of the new value exception because the judicially-created exception was not expressly incorporated in Section 1129(b) of Bankruptcy Code of 1978. The court, focusing on the plain meaning of the language in 11 U.S.C. sections 1129(b) and 102(3), accepted principles of statutory construction, case law, the

legislative history of section 1129(b) and important policy considerations, found that the new value exception survived the enactment of the Bankruptcy Code of 1978. Due to lack of evidence and the procedural posture of the case, the court refused to rule on whether the application of the new value exception would enable debtor to present a confirmable plan.

(349) 4-7-92 PUBLISHED Trustee, v. Swire Pacific Holdings, Inc., Trustee, v. Spreckels Sugar Company, Inc. (In re D-Mart Services, Inc.), 90PC-0524, 90PC-0551, Judge Clark, Amended. See #336

The two-year limitation period pursuant to 138 B.R. 985 546 commences anew when a chapter 7 trustee is appointed after a conversion from another chapter.

(350) 4-13-92 APPEAL Valley Bank and Trust Co. v. Laurie Jackson McVey's Collectables, and Associated Factors, Inc. (In re Laurie Jackson McVey's Collectables), 89PB-0753, Judge Jenkins.

District court reversed bankruptcy court's determination that it had related jurisdiction in an action removed from state court to bankruptcy court. The chapter 7 trustee had abandoned assets of the debtor prior to the removal of the action. The district court ruled that because of the abandonment, any residual interest that the debtor may have in and to its assets is not an asset of the bankruptcy estate, and, there being no assets subject to administration before the bankruptcy court, the bankruptcy court was without jurisdiction either as a core or related matter to determine and resolve the competing claims of secured creditors.

(351) 4-17-92 UNPUBLISHED Zions First National Bank v. Christiansen Brothers, Inc., et al. (In re Davidson Lumber Sales, Inc.), 90PC-0044, Judge Clark.

The chapter 11 debtor, a subcontractor, entered into a postpetition arrangement to supply lumber to a project. The debtor purchased the lumber from a sub-subcontractor, who did not receive payment from the debtor when due. The sub-subcontractor placed a materialman's lien on the project, which was not property of the estate, pursuant to state law. In turn, the general contractor paid the sub-subcontractor directly for release of the lien, as allowed under state law. The court holds that placement of the lien on the project did not violate the automatic stay. Also, the direct payment by the general contractor to the sub-subcontractor did not violate the stay and was not in violation of the cash collateral provisions of 11 U.S.C. 363. Nothing in 363 precludes the actions taken in this matter. Further, the secured creditor of the debtor's accounts receivable had not notified the account debtor (the general contractor) that payments made on its account must be made to the debtor or the secured creditor.

(352) 5-29-92 UNPUBLISHED In re Ambra Oil and Gas Company, 89B-07810, Judge Boulden.

Chapter 11 debtor-in-possession proposed a plan of reorganization that provided for a systematic liquidation of all of its assets over a two-year period. During the liquidation period, the debtor proposed to continue to operate its business to maximize the value of its assets. The plan also provided that upon confirmation, the debtor would receive a discharge of all of its debt. Under 11 U.S.C. 1141(d)(3), discharge is permissible only if the evidence indicates that the debtor will engage in business after consummation of the plan. Creditors overwhelmingly approved the plan. In this case, the plan would be consummated for the purposes of 11 U.S.C. 1141(d)(3)(B) at the point when substantially all of the debtor's assets will be liquidated. The only remaining assets at consummation would be the skill of the debtor's employees, its name and its debt-free corporate shell. The debtor presented evidence that it intended to conduct its service business after its assets were liquidated but did not clearly establish its ability to do so. The court determined that the mere intent to conduct business, given the uncertainty of market conditions, was sufficient in this case to satisfy 11 U.S.C. 1141(d)(3) where no evidence was presented that the debtor proposed the plan for the improper purpose of trafficking in corporate shells or to avoid its legitimate debts.

(353) 7-15-92 PUBLISHED In re Moulton Excavating, 87A-02805, Judge Allen. 143 B.R. 955

Secured creditor who allows use of cash collateral is entitled to a superpriority administrative claim.

(354) 11-6-92 APPEAL Styler, Trustee, v. American Savings, et al. (In re Delbert and Diane Peterson), 91PB-0213, Judge Winder.

The bankruptcy court ruled that a defective acknowledgement in a trust deed was not controlled by the Utah Effects of Recording Act of 1988, Utah Code Ann. 57-4a-1,-4 (1990), enacted four years after the date of the trust deed. The district court reversed, holding that the Act's plain wording operated to cure any existing defective recorded document.

(355) 11-12-92 APPEAL In re SLC Limited V, 91B-03012, Judge Anderson. 147 B.R. 586; See #364

The chapter 11 debtor sought to disqualify creditor's law firm due to a conflict of interest with an individual attorney of the creditor's law firm, asserting a conflict of interest as a result of an attorney's representation of the debtor's general partner in prior commercial transactions while the attorney worked at a different law firm. The bankruptcy court disqualified the attorney but refused to disqualify the firm. The

district court on appeal held that: 1) the law firm may not sufficiently remedy a conflict of interest by building a "Chinese Wall" to screen the tainted attorney after potential for improper disclosure has existed; and 2) disqualification of creditor's attorney was required under U.P.C.R. imputed disqualification provision when individual attorney at the firm had represented debtor's general partner in prior commercial transactions while attorney worked at a different firm, since neither the firm nor attorney produced any evidence indicating that the firm instituted screening mechanisms prior to the attorney's arrival at the firm.

AFFIRMED in part, REVERSED in part by 10th Cir; Case No. 92-4225. See #364.

(356) 11-25-92 PUBLISHED In re CF&I Fabricators of Utah, Inc., et al., 90B-06721, Judge Boulden. 148 B.R. 332; See #388

The IRS filed proofs of claim against each of the debtors in this jointly administered case for priority tax claims under 11 U.S.C. 507(a)(7)(E) and (G) or in the alternative, as administrative claims for "excise taxes" pursuant to 26 U.S.C. 4971(a) and (b). The claims are based on the debtors' failure to make minimum funding payments to their ERISA qualified pension plans. Under 26 U.S.C. 4971(a), the IRS imposes an immediate 10% first tier tax based on accumulated funding deficiency if an employer fails to make the minimum funding contribution to an ERISA qualified plan when the employer's annual report is due. If the sponsoring employer does not correct the deficiency, 26 U.S.C. 4971(b) imposes an additional second tier tax equal to 100% of the accumulated funding deficiency. The IRS filed amended proofs of claim for the debtors' liability under 26 U.S.C. 4971(a) and (b) as post-petition administrative priority or alternatively, as pre-petition priority taxes under 11 U.S.C. 507(a)(7)(E) and (G). In addition to findings based on the specific circumstances related to timing and claim calculations peculiar to this case, the court found that claims for excise taxes under 26 U.S.C. 4971 are not excise taxes allowed priority payment pursuant to 11 U.S.C. 507(a)(7)(E) or pecuniary loss penalties related to a governmental claim under 11 U.S.C. 507(a)(7)(G), rejecting the holding of *In re Mansfield Tire & Rubber Co.*, 942 F.2d 1055 (6th Cir. 1991), cert. denied sub nom, *Krugliak v. United States*, 112 S. Ct. 1165 (1992). The court also found that penalties under 26 U.S.C. 4971 do not relate to a tax and, therefore, are not entitled to administrative priority under 11 U.S.C. 503(b)(1)(C). The IRS asserted that its original proofs of claim included protective language that placed the debtors' income tax liability in issue and the amended proofs of claim should be permitted to cure the defect in the claims as originally filed. The court held that under the circumstances of this case, whether the original proofs opened the door for later amendment was subject to different interpretation and reserved the issue for further evidentiary proceedings. However, the court held that the original proofs did not give the debtor notice of the existence or amount of the 1990 excise tax claims under 26 U.S.C. 4971. The court held that the amended proof of claim created a new claim that tripled the amount of the original claim and allowance of the amended claim could not be justified under the circumstances.

(357) 12-1-92 PUBLISHED In re Bonneville Pacific Corp., 91A-27701, Judge Allen.

147 B.R. 803; See #386 Application for fees denied and award for past professional services had to be disgorged after court discovered that efforts of counsel had been directed at protection of principals of debtor corporation and their status quo, rather than toward any attempt to save estate.

(358) 12-31-92 UNPUBLISHED In re CF&I Fabricators of Utah, Inc., et al., 90B-06721, Judge Boulden. See #375a

The court heard evidence related to remaining factual issues regarding proofs of claims filed by Pension Benefit Guaranty Corporation (PBGC) against the debtors' estate for under-funded ERISA qualified pension plans sponsored and administered by the debtor. (For background information, see Memorandum Decision and Order Relating to Debtor's Objections, Dated 10/02/92, to Twenty Amended Proofs of Claim Filed by Pension Benefit Guaranty Corporation dated November 9, 1992). The court ruled as follows: (1) The amount of Minimum Contribution Claims representing "normal pension costs" for the 180 days prior to filing bankruptcy allowed under 11 U.S.C. 507(a)(4) is \$429,232. Under the circumstances in this case, there could not be a distribution under 11 U.S.C. 507(a)(3). Therefore, no allowed unsecured wage claims existed on the date of filing and the PBGC's Claims could not be reduced by a pre-petition distribution to employees. Normal pension costs are granted administrative priority pursuant to 11 U.S.C. 507(a)(1). (2) Although the burden shifted to the PBGC to prove the validity of all aspects of its proofs of claim, PBGC failed to allocate its Minimum Contribution Claims between post-petition interest, post-termination funding requirements or charges attributable to amounts due in the future. Based upon the lack of credible evidence regarding the components of the Minimum Contribution Claims, \$69,228,373 is disallowed. (3) Debtor failed to establish that the method (prescribed by regulation and substantive non-bankruptcy law) used by the PBGC to calculate the amount of its Claims disproportionately favored the PBGC or unjustifiably inflated its Claims. Although the court recognized its authority to modify the rate in a case of manifest injustice or unreasonableness, the equitable factors unique to this bankruptcy filing did not warrant such a modification; (4) The reiterative process employed by the PBGC to calculate the total amount of its Unfunded Benefit Claims, as reduced by the probable recovery on its Minimum Contribution Claims, eliminated any duplication and produced a total Unfunded Benefit Claim of \$212,286,000.

(359) 1-15-93 PUBLISHED Matravers v. United States of America, IRS, (In re Matravers), 88PA-0967, Judge Allen. 149 B.R. 204

Chapter 13 debtors commenced adversary proceeding against IRS requesting declaratory judgment that tax liabilities were discharged and seeking return of sums paid postpetition to the IRS and attorney fees and costs. Debtors moved for summary judgment. The court held that: (1) taxes became payable when tax return was due, not when income was earned on which tax was applied; (2) requirements for waiver of sovereign immunity were met; and (3) debtors were entitled to recover property seized postpetition and attorney fees and costs incurred in pursuing the proceeding. Motion granted in part.

(360) 3-18-93 PUBLISHED SLC Limited V v. Bradford Group West, Inc. (In re SLC Limited V), 92PB-2195, Judge Boulden. 152 B.R. 755

The court held that a secured lender's interest in an assignment of rents and proceeds was an interest in real property under applicable state law. Accordingly, the secured lender perfected its interest prepetition upon proper recordation of the assignment of rents with the county recorder. The lender's interest in rents was a perfected postpetition interest in cash collateral under 363(a) and 552(b). The lender's action to enforce its interest in the collateral rents by obtaining appointment of a receiver in state court within 90 days prior to the petition date was not a voidable preference under 547(b). Settlement funds derived from an action by the debtor to recover unpaid rents, both prepetition and postpetition, from a tenant in breach of its lease agreement were also subject to the lender's perfected security interest in rents. The debtor's unilateral action to recover the rents through judicial action did not change the nature of the funds from rents to general intangibles which would not have been subject to the lender's recorded security interest. The secured lender did not violate the Utah one-action rule by pursuing an action against the individual guarantors of the debt before it had exhausted its remedies against the property securing the debt. The guaranty agreement is a separate, unsecured debt and the one-action rule does not prevent a creditor on a debt secured solely by real property from pursuing an action against guarantors without first foreclosing the security.

(361) 4-6-93 APPEAL Logan A. Bagley, Trustee, v. United States of America (In re Murdock Machine and Engineeri

The 10th Circuit ruled that the bankruptcy court had discretion See #328 and #329 to defer to the ASBCA or to determine itself whether the government had a viable claim against the estate, and that any error by the bankruptcy court in declining to abstain was harmless assuming that the disputed contract claim against the government was the bankrupt's only asset.

(362) 4-7-93 UNPUBLISHED I.A.Corp., 89B-07724, Judge Boulden.

Attorneys for unsecured creditor and equity interest holder filed an application for allowance of attorney's fees under 11 U.S.C. sections 503(b)(3)(D) and (4). The court determined that the attorneys' services related to an objection to a secured claim produced a substantial and demonstrable benefit to the estate and were compensable under section 503. The attorneys were not allowed compensation for general participation in the reorganization process where any benefit to creditors was too contingent or speculative to be quantified. In addition to entries related to general matters, the court also disallowed incomplete itemized entries and duplicate services.

(363) 5-11-93 UNPUBLISHED In re CF&I Fabricators of Utah, Inc., et al., 90B-06721, Judge Boulden.

The debtor owned and operated a 216 acre limestone quarry from 1931 through 1981 to supply limestone used in open hearth furnace production of steel and iron in Pueblo, Colorado. The debtor converted to electric arc furnaces and no longer needed large amounts of limestone. The court found that the quarry, without reclamation liabilities of \$222,662, might have a market value of \$84,000, but concluded that there is no realizable equity in the property. The debtor filed a motion under 554(a) to abandon the quarry as property of the estate that is burdensome or of inconsequential value and benefit to the estate. Colorado objected to abandonment of the quarry as

improper under the standard announced in *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986), which limits a debtor's right to abandon property in contravention of state laws designed to protect public health and safety from identified hazards. Colorado asserted that the debtor's abandonment fell within the Midlantic exception because abandonment would violate Colorado state law requiring mine operators to reclaim mined property. Colorado failed to prove that any existing hazards at the quarry site presented inevitable and imminent harm to the public or that abandonment of the quarry would aggravate existing conditions or create peril at the quarry. No hazardous or toxic substance were stored at the quarry site. The only hazard at the quarry that will not be remedied by forfeiture of the reclamation bonds is the general presence of unconsolidated and unstable rock. The court found that application of the Midlantic exception was not warranted under the circumstances of this case and granted the debtor's motion to abandon.

(363a) 7-6-93 APPEAL David Dorsey Distributing, Inc. vs Odell Lynard Sanders (In re Odell Lynard Sanders), 92A-23941, Judge Winder. Appealed.

Chapter 7 debtor brought motion to avoid a judgment lien 39 F.3d 258 (10th Cir. 1994) pursuant to 522(f)(1). The district court held that where a judgment lien impairs an exemption, 522(f)(1) does not permit a debtor to avoid the lien beyond the amount of the debtor's homestead exemption provided by Utah Code Ann. 78-23-1 to -15. Under Utah law a homestead interest takes priority over and is automatically exempt from a judicial lien, rendering it unnecessary to avoid the lien to enjoy the exemption. The court determined that Utah's homestead exemption statute performs the same function as 522(f)(1).

(364) 7-12-93 APPEAL In re SLC Ltd. V, 91B-03012, Tenth Circuit. 999 F.2d 464; See #355

Chapter 11 debtor sought to disqualify the secured creditor's law firm. The bankruptcy court disqualified one attorney in the firm, but refused to disqualify the entire firm. On appeal, the U.S. District Court disqualified the law firm by imputation. The secured creditor appealed from the district court's order. The 10th Circuit held that: 1) the bankruptcy court properly disqualified the attorney because the attorney's prior representation of the debtor's general partner was "substantially factually related" to the current litigation; 2) the attorney's disqualification did not have to be imputed to the law firm because the attorney did not have actual knowledge of material information protected by Utah Rules of Professional Conduct 1.6 & 1.9(b); and 3) the bankruptcy court improperly imposed screening measures because the Utah Rules of Professional Conduct only require screening measures for

former government attorneys. URPC 1.10, 1.6 and 1.9(b).

(365) 8-11-93 UNPUBLISHED Logan A. Bagley, Trustee, v. United States of America (In re Murdock Machine and Engineering Company of Utah), 90PB-0601, Judge Boulden.

Findings of Fact and Conclusions of Law and Order. The trustee of a Chapter X debtor (the case was originally filed in 1975 under the former Bankruptcy Act) objected to multi-million dollar proofs of claim filed by the Government. The Government's claims resulted from the bankrupt's failure to perform on several military procurement contracts and were based on alleged costs of re-procurement, over-payment, recovery of Government property and other damages. The court found that the bankrupt's defaults on the contracts at issue were due to circumstances beyond its control and were the direct result of the Government's improper actions related to another contract. Because the bankrupt's defaults were excusable, the court converted the contract terminations to termination for the convenience of the Government. The Government lost its right to claims for excess costs of re-procurement and to recover unliquidated progress payments. The Government was ordered to re-calculate and re-submit its claims to the court in an amount consistent with this ruling.

(366) 9-7-93 UNPUBLISHED In re John M. Griffin, 90B-22845, Judge Boulden. Appealed; see #373

Findings of Fact and Conclusions of Law. The court previously approved the employment of special counsel to debtor on a contingency fee basis. The Application for Payment of Fees and Reimbursement of Expenses came before the court for final approval. The court found that the underlying contingency fee agreement between the applicant and the debtor was inconsistent with California law and was therefore void. In light of the circumstances of the case, including the applicant's manipulation of the settlement amount to increase the amount of the contingency fee, the court further found that the original approval of the contingency fee agreement was improvidently granted. Due to these developments, the court determined that compensation would not be allowed under the terms of the contingency fee agreement. The court found, however, that applicant was entitled to a reasonable fee under California law. To calculate a reasonable fee, the court applied a lodestar rate of \$160/hour after making percentage reductions in hours for travel time, insufficient time entries, ineffective representation, and manipulation of the settlement.

1994

(367) 1-13-94 UNPUBLISHED CF&I Steel Corporation v. Joseph P.

Conners, Sr., et al. (In re CF&I Fabricators of Utah Inc., et al.), 92PB-2129, Judge Boulden.

Memorandum Decision and Order on Cross-Motions Dated 5/7/93 For Partial Summary Judgment and Summary Judgment. CF&I sold two mines to Wyoming Fuel in 1983. Under a collective bargaining agreement between CF&I and the United Mine Workers of America, CF&I agreed to require a successor to assume the obligation to pay non-pension benefits to retirees. Instead, CF&I agreed with Wyoming Fuel that CF&I would continue to provide the benefits. Despite the sale of the mines and the termination of CF&I's collective bargaining agreement, CF&I continued to pay the non-pension benefits through the date of filing its chapter 11 petition and post-petition until October of 1992. The court found that Wyoming Fuel was a successor, that CF&I did not have a contractual liability under the collective bargaining agreement to provide non-pension benefits, but that CF&I had common law breach of contract liability for failure to require Wyoming Fuel to assume the non-pension benefits. The court found that the 1974 Benefit Plan (a non-pension benefit trust fund) was liable to pay the non-pension benefits after the termination of the collective bargaining agreement. CF&I asserted claims under 11 U.S.C. 548 and 549 to avoid the payment of the non-pension benefits pre and post-petition. The court found all elements of 548(a)(2)(A) had been met (reserving the issue of insolvency), and that pursuant to 549, CF&I's post-petition non-pension benefit payments were voidable because they were neither authorized under Title 11 or by the court. The court held 550(a)(1) allowed recovery from the 1974 Benefit Plan as an entity for whose benefit the transfers were made. The court ruled that intent to benefit was not an element of 550(a)(1). See *Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners)*, No. 92-1337, 1993 WL 535698 (10th Cir. December 28, 1993). Therefore, the court allowed recovery of the transfers avoided under 548 and 549 from the 1974 Benefit Plan. The court also considered whether CF&I was obligated to pay retiree benefits pursuant to 1114. Since CF&I did not enter bankruptcy with either a contractual or common law duty to pay retiree benefits, the court ruled that CF&I's confirmed plan of reorganization did not impermissibly alter or modify rights prohibited by 1114 by failing to provide for the payment of retiree benefits.

(368) 1-27-94 UNPUBLISHED Stephen W. Rupp, Trustee, v. Dale Lowell Larson (In re Dale Lowell Larson), 93PB-2034, Judge Boulden.

Findings of Fact and Conclusions of Law and Judgment Denying Discharge. The court denied the debtor's discharge pursuant to 727(a)(2), (3) and (4) based on the debtor's transfer of his home, his failure to list any assets other than clothes and tools in his schedules, and his failure to either keep recorded information or turn over recorded information to the trustee. The court found that the debtor transferred his home, but retained a secret interest with the

intent to hinder, defraud or delay his creditors, and later his bankruptcy trustee. The court applied the doctrine of continuing concealment to bring the debtor's actions within the one year prior to filing his petition as set forth in 727(a)(2)(A), and also found that the debtor's actions continued after the date of the petition pursuant to 727(a)(2)(B). The court considered whether the debtor had produced records or information from which his financial condition could be ascertained pursuant to 727(a)(3), or had justified his failure to do so. The court found that the debtor kept records and either failed to preserve the records or concealed them without justification and denied the debtor's discharge pursuant to 727(a)(3). The court also considered whether the debtor's failure to schedule his equitable interest in his home, as well as numerous other assets and liabilities, was sufficient to comprise a false oath pursuant to 727(a)(4)(A). The court found from the totality of the circumstances that the debtor failed to disclose information constituting a false oath or account, made knowingly and fraudulently, in connection with material matters related to the bankruptcy case and denied debtor's discharge pursuant to 727(a)(4)(A).

(369) 2-4-94 UNPUBLISHED Stockmen's Hotel, Inc., v. Gary Russell Porter (In re Gary Russell and Lugene E. Porter), 92PB-2535, Judge Boulden.

Memorandum Decision and Order of Dismissal. The plaintiff filed a motion for default judgment in a nondischargeability action filed pursuant to 11 U.S.C. 523(a)(2)(A) and/or (B). The basis for the debt was a check issued by the debtor to a third party and cashed at the plaintiff's business that was returned for insufficient funds. The court held that the plaintiff was required to at least prove in personam, subject matter jurisdiction, and a prima facie case on a motion for default judgment. The court refused to grant collateral estoppel effect to a Nevada state court default judgment because the issue of intent was not actually litigated in the state court, nor were the elements of the state statute identical to the elements required to prevent discharge under 523(a)(2)(A) and/or (B). Further, a Nevada criminal statute that implied intent could not be the basis of a finding of intent under 523(a)(2)(A) and (B). The court held that the plaintiff had not proven by a preponderance of the evidence the elements necessary to except a debt from discharge under 523(a)(2)(A) and/or (B). The court concluded that the issuance of a check upon an account containing insufficient funds is not an implied representation that sufficient funds are on account to cover the check, (following *Williams v. United States*, 458 U.S. 279, 102 S. Ct. (1982)). Nor did the check amount to a written statement regarding the debtor's financial condition for the purposes of 523(a)(2)(B). The court held the debt dischargeable and dismissed the adversary proceeding.

(370) 3-4-94 UNPUBLISHED In re CF&I Fabricators of Utah, Inc., et al., 90B-26721, Judge Boulden.

An application for payment of administrative claims was filed by former inhouse counsel for debtor on behalf of himself and as the pro bono representative for approximately 262 former non-bargaining employees of debtor. The application sought severance allowances and layoff benefits pursuant to 11 U.S.C. 503(a) and (b), and the reorganized debtor objected. Counsel later developed a conflict of interest and withdrew as pro bono counsel for the former employees. The court determined the application was a class claim which is impermissible under the Tenth Circuit's decision in Sheftelman v. Standard Metals Corp. (In re Standard Metals Corp.), 817 F.2d 625, 630 (10th Cir. 1987), modified on other grounds, 839 F.2d 1383 (10th Cir. 1987), cert. dismissed, 109 S. Ct. 201 (1988). In addition, the court found the application to be mooted by the withdrawal of inhouse counsel as the class representative. The court held that the application also failed to meet the Tenth Circuit's standard for an informal proof of claim since it did not contain a demand by the applicants on the estate. The court considered, but declined to apply, the standard of excusable neglect articulated in Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489 (1993), to vacate the prior bar date and allow the claimants additional time to file their administrative claims.

(371) 7-5-94 APPEAL In re CF&I Fabricators of Utah, Inc., 90B-26721, Judge Winder. 169 B.R. 984 (reissued 7-12-94)

Debtor sold substantially all its assets to Oregon Steel pursuant to a court approved plan of reorganization and in accordance with 11 U.S.C. 363(b). Objecting creditor did not seek a stay of the bankruptcy court's orders, arguing that it did not object to the sale, only to the portion of the orders authorizing the sale free and clear of claims of creditors. The district court held the objecting creditor's failure to seek a stay pursuant to Bankruptcy Rule 8005 rendered the appeals moot under 363(m). The district court refused to read out of the sale order the express condition that the sale be free and clear of claims of creditors where the sale was substantially consummated, and to do so would risk unravelling the entire sale agreement. The court noted its refusal "to play the 'Humpty Dumpty repairman' for such an ominous task."

(372) 7-13-94 UNPUBLISHED In re International Business Advisors, Inc., 94B-21947, Judge Boulden.

Court denied a motion to dismiss, or alternatively, to lift stay based on bad faith filing in a chapter 7 case. The motion was brought by a director and 50% shareholder who was also an oversecured creditor foreclosing on the estate's principle asset. The debtor's only other director signed the petition authorizing the chapter 7 filing without the knowledge or consent of the

remaining director for the purpose of preventing the foreclosure. The court acknowledged the general rule that corporate authorization to file bankruptcy requires a quorum and majority vote of the board. An exception to this rule is created under Nevada law where one of two directors has an interest adverse to the corporation and would have voted not to authorize the bankruptcy filing. Failure of the remaining director to obtain corporate authorization to file the bankruptcy did not constitute grounds for dismissing the case where remaining director's interests would be protected, and equity preserved for remaining creditors and equity interest holders. The parties relied upon affidavits that were not admitted into evidence at the hearing, and that contained inadmissible evidence. The court considered the Fed. R. Civ. P. 43(e) exception to the general rule that testimony shall be taken orally in open court. The court discussed the necessity for formal admission of affidavits, but found that the parties waived any objection to the use or content of the affidavits, despite their questionable evidentiary status.

(373) 7-18-94 APPEAL In re John M. Griffin, 90B-22845, Judge Winder. See #366

The district court affirmed an order that found a previously approved contingent fee agreement used to support a request for \$938,617 in fees to be void under 11 U.S.C. 328(a) because it was improvident in light of developments not capable of being anticipated at the time the agreement was originally approved. Instead, the bankruptcy court awarded a reasonable fee of \$329,713 based upon an adjusted hourly rate, multiplied by the number of hours actually expended but reduced for various reasons on a percentage basis. The district court also sustained a refusal to award prejudgment interest requested because of a five year delay in receiving attorneys fees.

(374) 9-12-94 PUBLISHED Kenneth A. Rushton, Trustee, v. Saratoga Forest Products, Inc. (In re Americana Expressways, Inc.), 93PC-2391, Judge Clark. 172 B.R. 99; Rev'd 177 B.R. 960

The court heard two motions for summary judgment brought by the trustee. The trustee challenges the applicability of the Negotiated Rates Act of 1993 ("NRA") as well as the constitutionality of the NRA itself. The trustee seeks to recover over 2.9 million dollars in freight undercharge claims from the defendant and other shippers. If the terms of the NRA apply to this estate, the trustee will be prevented from collecting the vast bulk of the estate's claims. Because the retroactive destruction of the trustee's property rights by the NRA creates almost a complete taking of the trustee's legal rights as opposed to a simple regulation, this court finds a serious doubt as to the constitutionality of the NRA. Accordingly, the court must attempt to interpret the construction of the NRA in a way that avoids the constitutional challenge. The property rights of the estate are defined by bankruptcy law at the

commencement of the case and remain the law of the case unless expressly changed by Congress. Here, Congress made it clear that the NRA would not limit or otherwise affect application of Title 11 of the United States Code. Accordingly, this court holds that the freight undercharge claims asserted by the trustee in the Americana Expressways, Inc. bankruptcy case are unaffected by the provision of the NRA.

(375) 10-23-94 UNPUBLISHED In re Karla Kaye Pokorny, 94C-25246, Judge Clark.

The debtor filed an application for waiver of the chapter 7 filing fee and indicated that payment to an attorney of the amount of \$350.00 was made for services in connection with this case. Because the debtor paid an attorney for services in connection with this case, the court denied the application for waiver of the filing fee.

(375a) 11-17-94 APPEAL Pension Benefit Guaranty Corporation v. Reorganized CF&I Fabricators of Utah, et al. (In re CF&I Fabricators of Utah, Inc., et al.), 90B-06721, Judge Benson. See #358

The bankruptcy court issued rulings dated November 9, 1992, December 31, 1992, and May 20, 1993, related to proofs of claim filed by the Pension Benefit Guaranty Corporation (PBGC). The district court affirmed on all issues except

the applicable discount rate to be applied in determining the amount of the PBGC's claims. The district court held that the bankruptcy court erred in giving deference to the PBGC's interpretation of its regulation in determining an appropriate discount rate and reversed and remanded for the limited purpose of making an independent evaluation of the discount rate to be applied.

1995

- (376) 1-3-95 PUBLISHED Harriet E. Styler, Trustee, v. Conoco, Inc. (In re Peterson Distributing, Inc.), 94PB-2329; Harriet E. Styler, Trustee, v. Pennzoil Products Company, 94PB-2343 (In re Peterson Distributing, Inc.); Harriet E. Styler, Trustee, v. Jardine Petroleum Co.), 94PB-2346; Judge Boulden. 176 B.R. 584**

Defendants in adversary proceedings filed motions to dismiss on grounds that the 546(a) two-year statute of limitations had run. Debtor had filed a voluntary chapter 11 on June 28, 1991, and no trustee was appointed under 1104(a). When debtor-in-possession had failed to progress toward confirmation of a reorganization plan, the court converted the case to chapter 7 on July 22, 1992. An interim trustee was appointed July 16, 1992. When no trustee was elected under 702(b) and (c), the interim trustee became the permanent trustee under 702(d) on August 17, 1992. The defendants asserted the statute of limitations began to run either 1) when the chapter 11 petition was filed, 2) when the chapter 7 interim trustee was appointed, or 3) when counsel for the interim trustee was approved. The court held that under the plain language of 546(a), the applicable date from which the statute of limitations begins to run is that upon which the permanent chapter 7 trustee begins to serve (in this case, August 17, 1992). Therefore, when the trustee filed three complaints seeking to avoid 547 transfers on August 16, 1994, the two-year statute of limitations had not yet run, and the court denied defendants' motion to dismiss the adversary proceedings.

- (377) 4-3-95 UNPUBLISHED In re Pacific Research & Development Corporation, 92B-24501, Judge Boulden.**

Re: Fifth and Final Application For Compensation of Debtor's Counsel. The court previously denied confirmation of debtor's chapter 11 plan which failed to afford to priority tax creditors the protections of 1129. The debtor then proposed a sale of substantially all its assets based on terms more favorable to insiders than to other potential bidders. The court denied the sale motion and the case was converted to chapter 7. Debtor's attorneys (Applicant) filed its fifth and final fee application requesting allowance of fees and costs. Certain taxing authority creditors objected to Applicant's fees as not beneficial to the estate, and on grounds that Applicant had undisclosed conflicts of

interest and performed services for the benefit of corporate insiders. Under the Tenth Circuit standards set forth in *Rubner & Kutner, P.C. v. United States Trustee (In re Lederman)*, 997 F.2d 1321 (10th Cir. 1993), the court found that the chapter 11 fees related to the sale motion were not beneficial to the estate and thus were not necessary because the Applicant should have known under prevailing case law that the sale motion would not be granted. Further, the Applicant represented the interests of insiders in preparing and advocating the sale motion. The court denied the fees incurred in relation to the sale motion based on the failure to provide a benefit to the estate and because the Applicant represented an interest adverse to the estate. The court noted that in chapter 7 there is no requirement that the attorney for debtor be disinterested. Thus, under the standards of 330 the court allowed the Applicant's chapter 7 fees as actual and necessary services.

(378) 4-13-95 APPEAL In re Michael and Sandra Smith, 93C-25852, Judge Winder.

This is on appeal of an order denying debtors' objection to a proof of claim. Debtors filed a chapter 13 petition. Three months later CSE filed a proof of claim asserting a debt owed by Mr. Smith for past-due child support to Ms. Rayl. Debtors filed an objection. At the conclusion of testimony, Chief Judge Clark overruled debtors' objection, finding that the agreement between Ms. Rayl and CSE does not make the claim for past-due child support a dischargeable claim and that the agreement represents essentially a contingency fee arrangement and does not change the nature of the child support obligation. The sole issue on appeal is whether the Assignment for Collection executed by Ms. Rayl is an assignment as contemplated by 11 U.S.C. 523(a)(5)(A), which would effectively transform Mr. Smith's child support debt into a dischargeable claim. The court finds that Ms. Rayl's intent was not to effect the type of assignment anticipated by 523(a)(5)(A), but simply to enter into what is essentially a contingency fee arrangement with CSE. The bankruptcy court's order denying debtors' objection to CSE's proof of claim is affirmed.

(379) 6-18-95 PUBLISHED In re Hurricane R.V. Park, Inc., 91C-28133, Judge Clark. 185 B.R. 610

The matter before the court is debtor's Motion to Enforce the Bankruptcy Discharge and Hold the Internal Revenue Service in Civil Contempt. By filing tax liens, the United States has employed a process intended to collect or recover money or property. At issue is whether the filing of the liens was to collect a debt of debtor. The tax liens on debtor's property are premised on the United States' theory that debtor is the "nominee, alter ego, transferee or agent" of Philip S. Fry, vice president of the debtor. Under any of these theories, the United States would be a contingent creditor of the debtor and be

bound by the court's order of confirmation, the provisions of 11 U.S.C. 1141 and the 11 U.S.C. 524 injunction. Any equitable interest that Fry may have had in debtor pre-confirmation has been extinguished by the bankruptcy confirmation process. Fry's undisputed testimony is that he not the owner of debtor and holds no ownership interest in the real property owned by debtor. The court ordered the United States to release each of the tax liens encumbering debtor's property.

(380) 8-10-95 UNPUBLISHED In re Gerald V. Eborn, 94B-25640, Judge Boulden.

The matter before the court is an objection by debtor to the fee application filed by his former counsel, Sherri Flans Palmer. A fee application is a summary submitted pursuant to Fed.R.Evid. 1006 of the detailed, contemporaneously maintained time records that are required to be kept by any attorney seeking fees before this court. Considering the disarray of the debtor's file, Palmer's egregious failure to comply with the statute and the standards of this court, Palmer's apparent lack of a cohesive billing system and the potential adverse impact of these circumstances upon Palmer's clients and their creditors, the court denied Palmer's fees and ordered Palmer (among other things) to file meticulous contemporaneously maintained and accurate time records with any fee applications in pending or future cases, including those cases in which Palmer is seeking fees of \$900 or less.

(381) 8-28-95 PUBLISHED In re Rocky Mountain Helicopters, Inc., et al., 93C-25447 through 93C-25450, Judge Clark. 186 B.R. 270

This matter came before the court on final application of Whitman Breed Abbott & Morgan, debtors' counsel, for fees. The court ruled that the fee request is not reasonable and imposed its own billing judgment with an across the board reduction of 12% on fees incurred after the first application period. The court ruled that because debtors' counsel neglected an appeal with GMAC the fees requested in the application were further reduced by \$100,000.00. Further, the court reduced by 50% the amount requested for carfare and delivery expenses. The court also limited reimbursement for airfare, hotel, out of town meals, facsimile expenses, and overtime personnel expenses.

1996

(382) 1-9-96 UNPUBLISHED In re Judy Kay Powell, 91B-03362, Judge Boulden.

The issue before this court is whether the thirty-day objection period provided in Fed.R.Bankr.P. 4003(b) applies to bar a chapter 7 trustee from objecting to a claimed exemption, where the property claimed is identified, but inaccurately described, and the debtor is not entitled to claim the property as

exempt. The trustee asks the court to circumvent the rationale in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) by requiring the debtor to amend her statements and schedules to accurately reflect the precise nature of the property claimed as exempt. This would renew the thirty-day period within which the trustee could object to the debtor's claimed objection. The court concludes that the trustee had sufficient notice that the debtor claimed the property as exempt to prompt further inquiry, and to trigger the thirty-day period for filing objections under Fed.R.Bankr.P. 4003(b). Since the debtor fulfilled her obligation to list the property claimed as exempt with sufficient detail to place the trustee on notice that further investigation may be required, and since an objection to the claimed objection was not timely filed, the court orders that the debtor is entitled to the exemption and she is not required to amend her list of property claimed as exempt.

(383) 2-15-96 UNPUBLISHED In re Doug Turner Feedlot, Inc., In re Douglas F. Turner, consolidated number 94C-25491, Judge Clark.

At issue is the interpretation of 224 of the 1994 Act which amended the Code to delete the phrase "debtor's attorney" from the list of parties to whom the court may award compensation pursuant to 330(a)(1). It is this court's opinion that the 1994 amendment to 330(a) can be read plainly and simply to mean that chapter 7 debtor's counsel is no longer entitled to an award of fees pursuant to 330 of the Code.

(384) 3-28-96 UNPUBLISHED In re Home Center Corporation of America, 95B-22952, Judge Boulden. See #385

The issue before the court is whether the facts alleged by counsel for the debtor constitute extraordinary circumstances sufficient to warrant nunc pro tunc approval of appointment of counsel retroactive approximately six months to the date of the filing of the petition. Counsel did not timely move for appointment as counsel for the debtor because the filing of the case was an emergency, counsel was unusually busy with other cases the week before and two weeks after the debtor's chapter 11 petition was filed, and because of an unexpected one-day absence of a much relied upon secretary/paralegal. In the Tenth Circuit, nunc pro tunc approval of employment is only appropriate in the most extraordinary circumstances and simple neglect is insufficient. *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F.2d 1265, 1267-68 (10th Cir. 1991). Accordingly, nunc pro tunc approval has been limited to cases where the delay in seeking approval is due to either hardship beyond the professional's control, or to the action of another whose failure was beyond the professional's control. The court concludes that counsel failed to prove extraordinary circumstances sufficient to warrant nunc pro tunc approval.

(385) 5-8-96 APPEAL In re Home Center Corporation of America, 95B-2

The court concludes MB&T's failure to file a prepared motion for its appointment as debtor's counsel due to such problems as a demanding workload, neglect, absence of an employee, or oversight cannot be excused as "extraordinary circumstances" under a straightforward reading of controlling law, "extraordinary circumstances" which would justify nunc pro tunc approval of its appointment. Accordingly, the court denies the motion for leave to appeal.

(386) 5-22-96 PUBLISHED In re Bonneville Pacific Corp., 91A-27701, Judge Allen.196 B.R. 868; See #357

The court has before it a motion to alter or amend its December 1992 memorandum opinion and decision on the fee applications of Hansen, Jones & Leta and Snell & Wilmer. When representing a debtor in possession, its attorney has a duty to look to the interests of the estate and not to the interests of its principals, shareholders, officers, or directors. The inability to fulfill the role of independent professional on behalf of the fiduciary of the estate constitutes an impermissible conflict. A bankruptcy attorney who fails in this fiduciary capacity, who fails to remain free of conflicts, who fails to refrain from serving a conflicting interest during a case must be denied all compensation. Consequently, the motion to alter or amend the court's opinion is denied.

(387) 6-12-96 APPEAL Broitman and Hermestroff vs Kirkland (In re Scott and Christy Kirkland), 94PB-2210 and 94PB-2209 (consolidated on appeal); Tenth Circuit. 86 F.3d 172

Plaintiffs failed to show good cause for their failure to timely serve defendant with complaint and summons. The Supreme Court's decision in Pioneer Investment Services, Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380 (1993), does not link the concept of "excusable neglect" contained in Fed. R. Bankr. P. 9006(b)(1) with the concept of "good cause" contained in Fed. R. Civ. P. 4(j) and there are several reasons not to apply the flexible "excusable neglect" concept to the "good cause" standard in Rule 4(j). The plain meaning of the term "neglect" can connote negligence or inadvertencies. The plain meaning of the phrase "good cause" has no such connotation. Rule 4(j) does not use the phrase "excusable neglect." Rule 9006's allowance for late filings due to "excusable neglect" serves an equitable purpose in Chapter 11 proceedings. Rule 4(j), by contrast, applies to a wide variety of proceedings

and does not have a similar, equitable purpose. Rule 4(j) operates independently from Rule 9006(b)(1) and Rule 9006(b)(1) may actually relieve litigants from the harsh consequences of Rule 4(j). As *Putnam v. Morris*, 833 F.2d 903 (10th Cir. 1987) explains, the definition of "good cause" appears to require "at least as much as would be required to show excusable neglect."

(388) 6-20-96 APPEAL In re Reorganized CF&I Fabricators of Utah, Inc., 90B-26721, United States Supreme Court. 116 S.Ct. 2106; See #356

Concluding that characterizations in the Internal Revenue Code (IRC) are not dispositive in the bankruptcy context, the Court held that the exaction imposed by 4971(a) of the IRC on the amount of an accumulated funding deficiency of a pension plan was a penalty and not an excise tax entitled to seventh priority under 507(a)(7)(E). The Court found that the exaction imposed by 4971(a) was imposed for violating a separate federal statute (ERISA) requiring the funding of pension plans and had an "obviously penal character." Accordingly, the Government's 4971(a) claim was to be dealt with as an ordinary, unsecured claim in the plan. However, the Court concluded that the Government's 4971(a) claim could not be subordinated to those of other general unsecured creditors because the "categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under 510(c)."

(389) 6-24-96 UNPUBLISHED Utah Outdoor Advertising, Inc., v. CCI, Inc., et al. (In re CCI, Inc.), 96PC-2044, Judge Clark.

The Chapter 11 plan names a liquidating agent and vests the agent with the power to sell or dispose of assets. The liquidating agent conducted an auction in October 1995 for the sale of the real property which is the subject matter of this adversary proceeding. The plaintiff participated in the auction as an unsuccessful bidder. At the conclusion of the auction, the liquidating agent reported to the court that Michael Todd was the successful bidder. The plaintiff acquired in December 1995 by special warranty deed a claim to the subject property from persons who testified that they never claimed to own the property. The plan vests all property of the CCI bankruptcy estate in the liquidating agent and expressly does not re-vest the property in the debtor upon confirmation. Because the subject property was still property of the estate until March 12, 1996, it remained under the protection of the automatic stay. Therefore, the execution and filing of the special warranty deed conveying title in the subject property to the plaintiff was void and without effect. It appears from the evidence that the adversary proceeding was filed only to harass, to cause unnecessary delay or to needlessly increase the cost of litigation. The adversary proceeding is dismissed and the plaintiff is ordered to pay attorney's fees and damages.

(390) 6-28-96 UNPUBLISHED In re Kevin and Bonnie Briggs, 95B-23778, Judge Boulden.

The narrow issue before the court is whether the debtors filed proofs of claim for unsecured creditors by listing the creditors by name and the amounts owing to them in the debtors' Chapter 13 plan, and if so, whether the claims are allowed unsecured claims that can be eliminated by an amendment to the debtors' plan. Because a Chapter 13 plan cannot constitute a formal debtor-filed proof of claim under Fed. R. Bankr. P. 3004 and because a Chapter 13 plan cannot constitute an informal proof of claim under *Clark v. Valley Fed. Sav. & Loan Assoc. (In re Reliance Equities, Inc.)*, 966 F.2d 1338 (10th Cir. 1992), the court concludes that unsecured creditors may not rely on debtors' plans to ensure payment of their claim without timely filing a proof of claim. Because this result is at odds with the prevailing practice in this jurisdiction, the court's ruling will be effective beginning with Chapter 13 cases filed on or after July 1, 1996. The ruling is not retroactive, nor does it effect any case specific rulings in any case filed before July 1, 1996.

(391) 7-25-96 UNPUBLISHED In re Jeffrey Collins, 95C-22607, Judge Clark.

This matter came before the court on debtor's attorney's motion to reconsider this court's order denying her application for attorney's fees. The court denied the motion because the attorney did not comply with the requirements of the Code and Rules. The court ordered the attorney to not file any application for fees in any case that is currently pending before this court for which she does not have meticulous contemporaneously maintained and accurate time records attached, and, that upon any conversion or dismissal of any unconfirmed Chapter 13 case, the trustee shall return unadministered funds directly to the debtor unless the attorney has first obtained a court order approving her fee application.

(392) 9-5-96 PUBLISHED In re CF&I Fabricators of Utah, Inc., et al., 90B-26721, et al. (jointly administered), Judge Boulden. 199 B.R. 986

The issue before the court is should the Amendment to 28 U.S.C. 1930(a)(6) be applied to cases with substantially consummated liquidating plans allocating all estate assets to creditors, that were confirmed prior to the Amendment's January 26, 1996, effective date? The Bankruptcy Code prohibits the modification of the confirmed plan advocated by the United States Trustee ("UST") and it prohibits the modification of substantially consummated plans. The court is prevented from ruling that these debtors owe quarterly fees as of January 26, 1996, by an application of the presumption against statutory retroactivity articulated in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483. The Amendment's plain language does not indicate that the fees apply to cases confirmed prior to the date of the enactment, and the legislative history does not give clear support that Congress

intended such a result. The court concludes that the Amendment is impermissibly retroactive as applied to these cases. The court concludes that the UST's fees cannot be assessed and collected in Chapter 11 cases with liquidating plans allocating all estate assets to creditors that were confirmed and substantially consummated prior to the effective date of the Amendment.

(393) 9-30-96 UNPUBLISHED Robert E. Wilcox, Liquidator, v. CDX Corporation, et al., (In re CDX Corporation), 94PC-2112, Judge Clark

This court granted summary judgment in favor of Valley Asphalt determining its mechanic's lien to be valid and enforceable. The Liquidator appealed the decision to the United States District Court which issued its order remanding the matter to this court. The order on remand instructs the court to first decide what this court finds to be a threshold inquiry and issue, and that is to determine who is the owner or real party in interest of the properties liened. Further, the issues of alter ego and equitable subordination remain before the court. The court finds that the Seven Peaks Resort Entities are alter egos of one another for the limited purpose of considering the validity of the Valley Asphalt Lien, that the lien is a valid and enforceable mechanic's lien, and that the SAIC lien claim should be equitably subordinated.

(394) 10-25-96 UNPUBLISHED In re Rocky Mountain Refractories, 94B-21665, Judge Boulton.

There are two issues in this case. First, should interest sought by a claimant be allowed on administrative trade and tax claims incurred by a debtor in possession during a chapter 11 case? Second, if allowed, should the interest claims be paid at the same priority as the underlying claims after the chapter 11 case is converted to a case under chapter 7? This court concludes that

interest accrued on certain administrative claims during the chapter 11 case up until the date the case is converted to chapter 7 should be allowed, and that the interest portion of the claims has the same priority as the underlying claims.

(395) 11-14-96 UNPUBLISHED In re Dennis and Shelly Vario, 96B-22208; In re Larry and Kimberly Boswell, 96B-21913; Judge Boulden.

The standing chapter 13 trustee objected to confirmation of the chapter 13 debtors' plans which initially provided that interest would be paid on amounts paid through the plans representing prepetition mortgage defaults. Since in both cases the contracts between the debtors and mortgage holders were entered into after October 22, 1994, 11 U.S.C. 1322(e) was applicable. Section 1322(e), enacted to overrule *Rake v. Wade*, 508 U.S. 464 (1993), prohibits the payment of interest on prepetition mortgage defaults unless the underlying contract or applicable nonbankruptcy law so provides. The court sustained the standing chapter 13 trustee's objection to confirmation, but confirmed both plans as subsequently amended to remove the interest provision.