

1997

(396) 1-10-97 **UNPUBLISHED** In re Ricci Investment Company, 93B-23895, Judge Boulden.

The proponents of a confirmed chapter 11 plan objected to the fee application filed by the chapter 11 trustee's attorneys and raised issues regarding the chapter 11 trustee's business judgment versus the attorney for the trustee's legal judgment, whether certain tasks performed by the trustee's attorneys were beneficial to the estate, and the impact of a violation of Fed. R. Bankr. P. 3016(a) on the allowance of fees. Relying on *In re Curlew Valley Assoc.*, 14 B.R. 506 (Bankr. D. Utah 1981), the Court found that although in hindsight, some of the trustee's decisions may have appeared improvident or premature, the trustee's decisions were reasonable, made in good faith, and were within the scope of the trustee's authority under the Bankruptcy Code. Applying 11 U.S.C. § 330 as it existed prior to the Bankruptcy Reform Act of 1994, the Court determined benefit under *Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321 (10th Cir. 1993) by looking at whether services rendered by the trustee's attorneys promoted the bankruptcy process in accordance with the Bankruptcy Code and Rules. The Court concluded that time spent by the trustee's attorneys to draft the trustee's disclosure statement and plan that were filed in violation of Fed. R. Bankr. P. 3016(a) and time spent by the trustee's attorneys on an escrow agreement that allowed a result contrary to that approved by the Court were not beneficial to the estate. The Court denied compensation for these services.

(397) 3-6-97 **UNPUBLISHED** Republic National Bank of New York vs RSH Ltd., et al. (In re Ben Lomond Suites, Ltd.), 96PC-2270, 96PC-2316, Judge Clark.

Motions for dismissal and remand are before the Court. The fact that a dispute may require an interpretation of a confirmed plan does not necessarily make the dispute a core proceeding. A

confirmed plan has characteristics of both a contract and a judgment. State courts are well qualified to adjudicate contract disputes and to enforce judgments. The removed adversary proceeding existed outside of bankruptcy and the adversary proceeding filed in this Court, which is nearly identical to the removed adversary, could exist outside of bankruptcy. The Court finds that the controversy before the Court is in the nature of a contract dispute which can be adjudicated in state court. Accordingly, neither the removed adversary proceeding nor the adversary proceeding is a core proceeding. The Court can find nothing in the adversary proceeding or the removed adversary proceeding that would affect the reorganized debtor's rights, liabilities, options or freedom of action in any way, nor can the Court find that this litigation will affect, in any conceivable way, the handling or administration of the bankruptcy estate. The Court finds that there is no bankruptcy estate to administer. The bankruptcy estate ceased to exist at the point when the transfer of estate property from the reorganized debtor to RSH became effective. The Court orders that adversary proceeding no. 96PC-2270 is dismissed for lack of jurisdiction, and orders that adversary proceeding no. 96PC-2316 is remanded to state court for the reason that this Court lacks jurisdiction to adjudicate the matter.

(398) 7-8-97 **UNPUBLISHED** In re Ricci Investment Company, Inland Oil Products, Inc., Monrovia Oil Products, Inc., and Salina Investment Company, Inc., Substantively Consolidated Case No. 93B-23895, Judge Boulden.

Chapter 11 trustee, his counsel and the trustee's accounting firm submitted their third and final supplemental fee applications seeking reimbursement for fees and costs related to the defense of their second fee applications. The trustee and his counsel had encountered significant opposition to their second fee application and the Court disallowed a portion of the fees requested in their second applications. The determination whether the fees requested in the supplemental fee applications is governed by Section 330 as it existed prior to the Bankruptcy Reform Act of 1994 and the Tenth Circuit case law interpreting Section 330. *See Rubner &*

Kutner, P.C. v. U.S. Trustee (In re Lederman Enters., Inc.), 997 F.2d 1321 (10th Cir. 1991) (benefit to the estate is threshold concern when determining eligibility for reimbursement of fees). The Court determined that trustee's counsel did not exercise reasonable discretion during the course of administering the assets of the estate and the time spent preparing and defending the previous fee application was disproportionate to the amount ultimately in dispute. The reasonableness and necessity of incurring fees to defend a prior fee application in comparison to the benefit to the estate entitled trustee's counsel to 4 percent of the total fee request. The Court awarded a collective 34 percent of the total amount requested by the trustee and the trustee's accounting firm because there was benefit to the estate for the trustee's defense against allegations that the trustee acted negligently because those allegations were subsequently found to be untrue. The Court further disallowed the applicants' request for payment of interest and collection costs on the fees previously approved by the Court.

(399) 10-3-97 **UNPUBLISHED** *In re Hammond Computer, Inc.*, 96C-24958, Judge Clark.

The matter before the Court is the second and final application for fees filed by the debtor's attorney. Novell, Inc. objected to the application arguing that debtor's attorney's fees and costs associated with defending a motion to appoint a trustee were not beneficial to the estate under § 330 and that, as a professional appointed to represent the debtor-in-possession, debtor's attorney failed in his duty to the estate to see to it that certain avoiding actions were commenced against insiders of the debtor. The Court finds that the time spent on services and rates charged for the services are reasonable and that the services were necessary to the administration of the estate and were beneficial at the time at which the services were rendered.

1998

- (400) 2-12-98 **APPEAL** In re Bonneville Pacific Corp., 91A-27701 (Case numbers for purposes of appeal: 2:96-CV-572-B and 2:96-CV-573-B), Judge Thomas R. Brett, United States District Court.
- See #386. The Court affirms the bankruptcy court's disallowance of fees and costs incurred by S&W while employed as general counsel for the debtor as debtor in possession and reverses the bankruptcy court's disallowance of S&W's fees and costs while employed as special counsel to the trustee. (See Opinion #386.)
- (401) 10-1-98 **PUBLISHED** In re Eleva, Inc., 97C-22299, Judge Clark.
- 226 B.R. 123 Creditor, Chapter 7 debtor-employer's group health insurance carrier, filed motion for allowance of administrative expense for unpaid premiums for postpetition insurance coverage provided to debtor's employees. The bankruptcy court held that creditor was not entitled to administrative priority for its claim.
- (402) 10-15-98 **UNPUBLISHED** Duane H. Gillman, Trustee v. James Van Treese and Jason Van Treese (In re Northwest Publishing, Inc.), 97PB-2036, Judge Boulden.
- Chapter 7 trustee brought this action against two of the debtor's officers and directors claiming corporate mismanagement, requesting an accounting, and seeking a determination that the debtor was defendants' alter ego. The court held that the proceeding was non-core but was related to the main case, and that the parties consented to entry of a final judgment. The court applied state law in analyzing the trustee's corporate mismanagement claim, holding that the presumption of good faith contained in the business judgment rule was overcome by the

defendants' gross negligence. The debtor was also determined to be the alter ego of the debtor's president.

(403) 12-17-98 **PUBLISHED**

Berdene D. Dennison vs Don L. Hammond (In re Don L. Hammond), 97PB-2227, Judge Boulden.

236 B.R. 751

Debtor's ex-spouse filed a nondischargeability action under 11 U.S.C. § 523(a)(5) and 11 U.S.C. § 523(a)(15). The court found the debt dischargeable under 11 U.S.C. § 523(a)(5) because the ex-spouse failed to prove by a preponderance of the evidence that the parties intended the debt to be in the nature of support at the time of the divorce decree. Because the court did not find that the parties intended the debt to be in the nature of support, it did not reach the issue of whether the substance of the debt was in the nature of support. *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 723 (10th Cir. 1993). However, the court found the debt nondischargeable under 11 U.S.C. § 523(a)(15) because the debtor failed to meet his burden of proving either of the exceptions to nondischargeability under 11 U.S.C. § 523(a)(15)(A) or (B). At the time of trial, the debtor had the ability to make payments on the debt from income not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor. The court excluded contributions to the debtor's 401(k) plan and charitable contributions in making this determination. Reviewing the evidence presented under a totality of the circumstances analysis and as it specifically relates to the eleven factors set forth in *Hart v. Molino (In re Molino)*, 225 B.R. 904, 909 (6th Cir. BAP 1998), the court concluded that the debtor had not shown that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the ex-spouse.

1999

- (404) 1-6-99 **UNPUBLISHED** In re Richard D. Cummins and Tawna R. Cummins, 97B-26970, Judge Boulden.
- Chapter 13 trustee sought clarification of time allowed for responding to his motion to dismiss. The court recognized a conflict between Local Rules 2003-1(a), 2083-1(b), and 5005-1(b)(1) which allow a ten-day response time, and Federal Rules of Bankruptcy Procedure 1017(a) and 2002(a) which allow a twenty-day response time. When there is a conflict between the Local Rules and Federal Rules of Bankruptcy Procedure, the Federal Rules control. Accordingly, the response time to a motion to dismiss is twenty days unless otherwise ordered by the court.
- (405) 2-8-99 **PUBLISHED** America First Credit Union v. Matthew Scott Gagle, et al., (In re Matthew and Lisa Gagle), 97PB-2386, Judge Boulden.
- 230 B.R. 174
- Debtor disassembled and sold off all parts of debtor's truck which was subject to a security interest. Secured creditor brought § 523(a)(2)(A) action alleging fraudulent misrepresentation in obtaining the loan and § 523(a)(6) action alleging willful and malicious injury. The court looked to the Restatement of Torts for guidance on the meaning of both § 523(a)(2)(A) and § 523(a)(6). The creditor failed to establish its § 523(a)(2)(A) claim which was dismissed. The court relied on *Kawaauhau v. Geiger* (*In re Geiger*), 118 S.Ct. 974 (1998), and *Dorr, Bentley & Pecha, CPA's P.C. v. Pasek* (*In re Pasek*), 983 F.2d 1524 (10th Cir. 1993) in holding that "willful and malicious injury" requires a deliberate or intentional injury that is performed without justification or excuse. In a two part analysis, the court held there was no intent to injure the creditor because the debtor intended to repay the debt. However, the debt was held nondischargeable as the debtor intended to injure the creditor's property consisting of its security interest by disassembling and selling his truck, and did so without

justification or excuse. The court based the measure of damages and the disallowance of attorney's fees on a tort analysis, rather than relying upon the underlying contract.

(406) 3-3-99 **APPEAL**

In re Wayne Allen Gamble, 98A-21285 (case number for appeal is 2:98CV497G), Judge Greene, U.S. District Court.

232 B.R. 799

Chapter 7 debtor brought action against towing company hired to repossess his vehicle, alleging violation of automatic stay. The bankruptcy court imposed sanctions for willful violation of automatic stay. Towing company appealed. The district court held that intentional violation of automatic stay was necessary for award of punitive damages. Judgment vacated and case remanded.

(407) 7-20-99 **PUBLISHED**

In re Geneva Steel Company, 99C-21130, Judge Clark.

236 B.R. 770

Debtor's motion for authorization to implement a employee retention program is before the court. In view of the objection by the United Steelworkers of America, the court finds that to propose this retention program without first having discussed its provisions with the Steelworkers is not an example of good business judgment, especially when the continued existence of the business is in question. Granting the motion may jeopardize the continuing support of the Steelworkers in the reorganization process. To be acceptable to this court, the severance plan must contain a mitigation provision that reduces the amount payable in the event the executive obtains other employment during the six or nine month reimbursement period. The severance plan is unacceptable because of the adverse impact the provision could have on the administration of the case in chapter 7. Further, the court will construe the payment of the emergence bonus only in the event that a plan of reorganization is confirmed and not an chapter 11 liquidating plan. The motion is denied without prejudice. The debtor is granted leave to set a hearing on ten days notice for approval of a retention program consistent with this order.

(408) 7-27-99 **PUBLISHED**

In re WIN Trucking, Inc., 98B-25814, Judge Boulden.

236 B.R. 774

Chapter 11 debtor elected to be treated as a small business but no party filed a plan within the 160-day time limit imposed by 11 U.S.C. § 1121(e). After filing an untimely plan, the debtor filed a withdrawal of its small business election. The court concludes that the debtor's failure to timely file its plan and its belated attempt to withdraw its small business election preclude confirmation of the plan under 11 U.S.C. § 1129(a)(1) and (2).

2000

- (409) 2-4-00 **APPEAL** Steven R. Bailey, Trustee, v. Big Sky Motor, Ltd. (In re Wayne R. Ogden), 98PA-2198, (case number for appeal is 2:99-CV-270B), Judge Benson, U.S. District Court.
- The bankruptcy court held that Big Sky received a \$300,000 preferential transfer from debtor, which the trustee was entitled to avoid and recover from Big Sky as the initial transferee. The district court finds that the bankruptcy court correctly determined that the trustee could avoid the \$300,000 transfer to Big Sky under § 547(b) and recover the money from Big Sky under § 550(a)(1).
- (410) 2-16-00 **UNPUBLISHED** In re Donnie Lee Amos, 98B-32761, Judge Boulden.
- “Gap period” attorneys fees incurred after the filing of a chapter 13 petition but before conversion to chapter 7 which are not allowed under § 330(a)(4)(B) will not be allowed under § 503(b)(1)(A). Applications for allowance of administrative expenses filed prior to conversion to chapter 7 are timely pursuant to Fed R. Bankr. P. 1019(c), and, to the extent allowed by the court, should be paid by the chapter 13 trustee from available § 1306(a)(2) funds. If there are more allowed chapter 13 administrative claims than available § 1306(a)(2) funds, the allowed § 503(b)(2) administrative claims should be prorated and paid from § 541 property after chapter 7 administrative expenses pursuant to § 726.
- Procedure change: Parties seeking allowance of any chapter 13 administrative expense must timely file a request for payment of the administrative expense prior to conversion to chapter 7 and have that request resolved by a final order, or other order extending the period, within sixty days of the conversion, or the administrative expense claim will be deemed waived by the applicant.

(411) 4-13-00 **APPEAL**

Steven R. Bailey, Trustee, v. Orlando Nickerson and Rosemary Nickerson (In re Wayne R. Ogden), 98PA-2299 (case number for appeal is 2:00-CV-49K), Judge Kimball, U.S. District Court.

The bankruptcy court awarded summary judgment in favor of the trustee and against the Nickersons for \$211,237.50 together with interest and held that the Nickersons were thereby the initial transferees pursuant to 11 U.S.C. § 550. The bankruptcy court found that the Nickersons must return the profits they derived from the Ponzi scheme (operated by the debtor) to the debtor's estate. The district court affirmed the bankruptcy court in its entirety.

(412) 4-14-00 **UNPUBLISHED**

Diane George v. Robert Lee Cevering (In re Robert Lee Cevering), 99PB-2022, Judge Boulden.

Debtor's ex-spouse filed a nondischargeability action under 11 U.S.C. §§ 523(a)(4), (a)(5), and (a)(15) seeking \$50,000, an award of punitive damages and attorney fees. On the day of trial, the debtor stipulated that the \$50,000 debt was nondischargeable under 11 U.S.C. § 523(a)(15). The court found that the debt was also nondischargeable under 11 U.S.C. § 523(a)(4) but declined to award punitive damages because the statute of limitations ran on any state law conversion claim prepetition and no provision of the Bankruptcy Code allowed punitive damages under the circumstances of the case. The court declined to award attorney fees finding there was no case law, contractual, or statutory basis. The plaintiff also sought a general denial of the debtor's discharge under 11 U.S.C. §§ 727(a)(2) and (a)(4)(A). The court denied the debtor's discharge under § 727(a)(4)(A) finding that the debtor knowingly and fraudulently made a material false oath.

(413) 5-18-00 **APPEAL**

In re Donald E. Armstrong v. Steven R. Bailey and Duane H. Gillman (In re Willow Brook Cottages, LLC), 99PC-2187, (case number for appeal is 2-99-CV-0725K), Judge Kimball, U.S. District Court.

After holding a hearing to show cause, the bankruptcy court held that Armstrong had violated the bankruptcy automatic stay provision, § 362, by filing his adversary proceeding without the court's permission. The bankruptcy court held him in contempt, awarded the trustee attorney's fees and punitive damages, and dismissed the adversary proceeding with prejudice. The review of the dismissal with prejudice for the alleged violation of the automatic stay was reviewed *de novo*. The factual determinations of the bankruptcy court as to the awarding of fees and damages were reviewed under an abuse of discretion standard. The district court ruled that the bankruptcy court properly dismissed Armstrong's action with prejudice for violating the stay and that it was acting within its discretion in awarding compensatory damages to a corporation. The district court determined that the punitive damage award is an abuse of discretion and that Armstrong's procedural defect does not merit the awarding of punitive damages based upon criminal contempt. The punitive damages award is reversed and the contempt charges are set aside.

(414) 7-21-00 **PUBLISHED**

In re W. Kerry Jackson, 99-33070, Judge Clark 251B.R. 597.

The issue before the court is the willful violation of the automatic stay and the failure of the creditor to turn over property of the estate. The court awarded debtor compensation but declined to award punitive damages because it believed that punitive damages were not necessary to deter similar conduct in the future.

(415) 8-24-00 **UNPUBLISHED** In re Bashar and Ouhoud A. Dabbas, 00-21217 GEC, Judge Clark.

The matter before the court is a motion to dismiss a chapter 7 bankruptcy case for substantial abuse under § 707(b). The bankruptcy court relied upon In re Stewart, 175 F.3d 796 (10th Cir. 1999) and its “totality of the circumstances” test to determine if substantial abuse exists. Under the totality of the circumstances test, the debtors can reduce expenses without being deprived of adequate food, clothing, shelter, or other necessities; therefore, unless the case is converted to another chapter within ten days, the case is dismissed for substantial abuse of the bankruptcy laws.

(416) 11-9-00 **PUBLISHED** In re Michael A. Parks and Theresa L. Parks, 00-27517JAB, Judge Boulden255 B.R. 768.

Trustee objected to chapter 7 debtor’s exemption of funds accrued while participating in a 401(k) ERISA qualified pension plan where funds were available to debtor as a result of debtor’s employment terminating prepetition. Because the terms of the plan provided that after termination of employment debtor had the absolute right to the funds, trustee argued the funds lost their anti-alienation characteristics as part of an ERISA qualified plan and were not exempt under Utah Code Ann. § 78-23-5(1)(a)(x). Debtor responded by arguing that because the funds remained in the plan until they were deposited into an IRA, postpetition, they remained exempt under either ERISA or state exemption statutes. The court cited *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 39 F.3d 1078, 1082-83 (10th Cir. 1994)(en banc), *cert. denied*, 514 U.S. 1063 (1995), for the proposition that such funds are protected by anti-alienation provisions of ERISA § 206(d)(1), so long as they are within the fiduciary responsibility of private plan managers and not paid to or received by plan participants or beneficiaries. Therefore, the court concluded that the trustee’s objection to exemption was overruled because the debtor’s plan funds were not property of the estate.

(417) 11-22-00 **PUBLISHED**

In re Husting Land & Development, Inc., 97B-20309, Judge Boulden 255 B.R. 772.

Unsecured creditor entered into a postpetition construction agreement with debtor, a land developer, for the purpose of correcting defective work and completing improvements on debtor's sixty-one acre residential subdivision. Upon creditor's application for allowance of administrative expense, the trustee and secured creditors objected, arguing that the postpetition debt was not incurred in the ordinary course of the debtor's business pursuant to 11 U.S.C. § 364(a). The court concluded that the postpetition debt was not incurred in the ordinary course of business and, accordingly, creditor's claim could not be allowed as an administrative expense. The court first determined that the opinion testimony of creditor's expert witness was inadmissible because his methodology could not be proved under the test set forth in *Kuhmo Tire Company, Ltd. vs. Carmichael*, 526 U.S. 137 (1999). The court then applied the well-established "creditor expectation" test to determine that, given its scope and nature, this was not the type of transaction a reasonable creditor would expect the debtor to enter into in the ordinary course of its business. Specifically, when the debtor and creditor entered into the construction agreement, neither had a clear understanding of the amount of corrective work that would be necessary, nor was there any certainty as to the source of funds to repay the debt incurred. As such, this transaction was outside the ordinary course of the debtor's business, and creditors should have been given notice and an opportunity to be heard.

2001

(418) 1-9-01 PUBLISHED

Transworld Telecommunications, Inc. v. Pacific Mezzanine Fund, L.P., (In re Transworld Telecommunications, Inc.), 98PC-2089, District Court Order on Proposed Findings of Fact, Conclusions of Law, and Judgment Pursuant to 28 U.S.C. §157(c)(1). Judge Stewart.

(419) 2-7-01 **PUBLISHED**

In re Geneva Steel Company, 99-21130, Judge Clark.

Order Allowing Reduced Fees and Expenses. The fourth fee application of The Blackstone Group, financial advisor to the debtor, came before the Court. Even though the advisor's appointment provided for a fixed fee, the Court adjusted downward the award of fees because the number of hours spent by the advisor went downward in subsequent fee periods. The advisor was entitled to recover, as part of its allowable expenses, a reasonable fee for legal services of law firm that it hired to defend its fee application, although law firm had never been appointed to serve as a professional in the case.

(420) 8-17-01 UNPUBLISHED [In re Horsley](#), 99-30458, Judge Boulden.

[Chapter 7 trustee filed a motion for nunc pro tunc substantive consolidation of the assets and liabilities of debtor and a nondebtor entity pursuant to 11 U.S.C. § 105. Acknowledging that Chapter 7 trustee filed a motion for nunc pro tunc substantive consolidation may be appropriate in some cases, see \[Fish v. East\]\(#\) 114, F.2d 177 \(10th Cir. 1940\) and \[Federal Deposit Ins. Corp. v. Hogan\]\(#\) \(In re \[Gulfco Invest. Corp.\]\(#\)\), 593 F.2d 921 \(10th Cir. 1979\), under the circumstances of this case, the Court determined that the debtor and nondebtor were not so intertwined as to afford the trustee the relief sought. Although the debtor managed and controlled both entities, there was insufficient evidence that the nondebtor lacked an economic existence independent from the debtor. In turn, the Court concluded that because nunc pro tunc relief is predicated upon a finding that a substantial identity exists between the parties, lack of evidence to support such a finding precluded the relief.](#)

(421) 10-10-01 **UNPUBLISHED** In re Bowen, 98-28722, Judge Thurman.

Creditor in Chapter 7 case filed a motion for relief from this Court's sanctions order pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b) or, alternatively, to alter or amend the order or grant a new hearing pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59. Although creditor's motion was timely filed under Rule 59, the facts germane to the motion, the arguments of counsel and the testimony at the hearing on the motion first required analysis under Rule 60. Creditor argued that its paralegal mishandled debtors' motion for sanctions and, as a result, the matter was not given the attention it required. Balancing the circumstances surrounding creditor's failure to respond to debtors' sanctions motion, the Court concluded that this mishandling constituted excusable neglect for the purpose of Rule 60(b). The Court also concluded that creditor's timely filed Rule 59 motion raised concerns requiring a new hearing on debtors' motion.

(422) 12-5-01 **PUBLISHED** Rushton v. Williams (In re Williams), 00P-2023, Judge Cornish.

271 B.R. 663

Proceeding was brought to determine spouse's interest in real property that chapter 7 trustee sought to sell. The bankruptcy court, Judge Tom R. Cornish, held that: (1) even if debtor's spouse was entitled to equitable lien in real property that trustee sought to sell, based upon fact that property was acquired with funds in which spouse had one-half interest, and that debtor had allegedly instructed real estate agent to prepare deed naming both himself and spouse as grantees, this lien would merely give spouse the right to recoup her contribution out of proceeds of sale and would not give her joint interest in property, within meaning of bankruptcy statute restricting trustee's right to sell jointly owned property; and (2) equitable lien claim was barred by laches.

2002

(423) 1-17-02 **UNPUBLISHED** In re Northington, 00-34258, Judge Thurman.

Debtors filed an objection to claim 4 of Household Finance Corp. and motion to avoid security interest as an undersecured second mortgage under 11 U.S.C. § 506(a) and (b). The Court overruled the objection and denied the motion to avoid the mortgage holding that it was improper to attempt to avoid a mortgage pursuant to Bankruptcy Rule 3007 instead of utilizing the correct procedure of an adversarial proceeding according to Bankruptcy Rule 7001. Rule 7001(2) specifically states that “a proceeding to determine the validity, priority, or extent of a lien” is an adversary proceeding and a lien should not be avoided through an otherwise properly noticed hearing on objection to claim.

(424) 1-30-02 **APPEAL** In re Husting Land & Development, Inc., 97B-20309 (case number on appeal 2:01-CV-24B), Chief Judge Benson, U.S. District Court.

See #417.

Determining first that the testimony of creditor’s expert was inadmissible, and second, that the “creditor expectation” test was not satisfied, the bankruptcy court concluded that creditor’s postpetition debt was not incurred in the ordinary course of business and, accordingly, creditor’s claim could not be allowed as an administrative expense. The district court affirmed, basing its decision on the reasons set forth in the bankruptcy court’s opinion and with these additional comments: (1) that the creditor expectation test is well supported and in furtherance of the purpose of chapter 11; (2) that the bankruptcy court’s rulings were within its discretion and supported by the reasons articulated in its decision; and (3) that the proffered expert testimony concerning “ordinary course of business” was inadmissible because the opinion was based on the meaning of the law and the witness was not a legal expert and, in any event, testimony by a legal expert is neither common, nor proper in these proceedings.

(425) 2-25-02 PUBLISHED

Pierce v. Beneficial Mortgage Co. of Utah (In re Pierce), 01P-2367, Judge Thurman.

The debtors filed a complaint, arguing that the second mortgage holder's trust deed on the debtors' personal residence was completely unsecured and should be voided or "stripped" pursuant to 11 U.S.C. § 506(a) and (d) and that the claim filed by the creditor should be treated as an unsecured claim under the debtors' chapter 13 plan. The debtors argued that because the value of the collateral was only \$66,000.00 and the first mortgage holder's claim exceeded that value, any remaining claim holder must be entirely unsecured and, therefore, the lien on the property held by the creditor may be voided. The Court held that under § 506(a), a completely unsecured mortgage holder does not have a secured claim, and is therefore not protected by the antimodification statute under § 1322(b)(2) and its lien can be stripped. The Court determined that a party should first look to § 506(a) for a valuation of the collateral and if the collateral has no remaining value after giving credit for senior secured debt, the claim is unsecured. Once it is determined that a claim is not "secured only by a security interest in real property that is the debtor's principal residence," § 1322(b)(2), then the lien is void under § 506(d).

(426) 4-9-02 PUBLISHED

Skull Valley Band of Goshute Indians v. Chivers (In re Chivers), 99P-2573, Judge Boulden.

275 B.R. 606

Creditor sought nondischargeability of certain debts under 11 U.S.C. §§ 523(a)(2)(A) and (B) and sought a determination thereof pursuant to its motion for summary judgment. Debtor filed a cross motion for summary judgment seeking dismissal of claims. The decision required a determination of the meaning of the term "financial condition" under § 523(a)(2)(B) and the interplay of Field v. Mans, 516 U.S. 59 (1995) and the tort of fraudulent misrepresentation with § 523(a)(2)(A). The Court adopted a narrow reading of "financial condition" which requires that a false written statement describe the debtor's net worth, overall financial health, or ability to generate income. The Court also recognized the Supreme Court's reference in Field to the Restatement (Second) of Torts and adopted the analysis set forth in the

Restatement in analyzing fraudulent misrepresentations under § 523(a)(2)(A). Judgment in favor of creditor.

(427) 6-4-02 **UNPUBLISHED** In re Tae Sun Hong and Bok R. Hong, 01-35072, Judge Boulden.

Upon the chapter 7 trustee's objection to exemption, the debtors sought a determination that funds rolled over prepetition from an ERISA qualified plan into an IRA annuity were either not property of the chapter 7 estate under 11 U.S.C. §541(c)(2), or were exempt under Utah Code Ann. §§ 78-23-5(1)(a)(x) or 79-23-6. The Court determined that the funds in the IRA annuity lost their ERISA anti-alienation characteristics prepetition and were therefore property of the estate. Once property of the estate, the funds were exempt pursuant to Utah Code Ann. §§ 78-23-5(1)(a)(x) because they were held in an arrangement described in Section 408 of the Internal Revenue Code, unless the funds constituted a "contribution" made to the IRA annuity within one year of filing for bankruptcy. The Court found that the statute did not restrict "contribution" to exclude rollover funds, and therefore Utah Code Ann. §§ 78-23-5(1)(b) applied, and the funds were not exempt. Further, Utah Code Ann. § 78-23-6 was inapplicable to exempt the funds as a matter of fact.

(428) 7-30-02 **PUBLISHED** In re JD Services, Inc., 00-29460, Judge Clark.

This dispute involves a transfer that resulted in \$725,000.00 being credited to debtor's bank account instead of \$7,250.00 because of a bank encoding error. The encoding error and transfer of disputed funds took place postpetition. The Court finds that the debtor was unjustly enriched in the amount of \$717,750.00. Unjust enrichment will support a constructive trust. The funds were commingled with other funds to which general creditors have a claim. Therefore, the bank must trace its funds held in constructive trust utilizing the lowest intermediate balance rule. Because the funds held in constructive trust have always belonged to the bank, it is entitled to the interest actually earned by the \$394,460.53 in constructive trust funds held. The bank is entitled to a postpetition administrative priority claim in the amount of \$323,289.53 which represents the difference between the \$717,750.00 originally transferred by mistake and the amount successfully traced using the lowest intermediate balance method. Because the \$323,289.53 is unsecured, it is not entitled to the accrual of interest.

(429) 9-3-02 **UNPUBLISHED** General Motors Acceptance Corporation v. Staples (In re Staples), 01P-2084, Judge Boulden.

GMAC brought a nondischargeability action against the debtor seeking to have a deficiency debt resulting from the sale of a repossessed vehicle declared nondischargeable under 11 U.S.C. § 523(a)(2)(C). The Court found, under all the facts of the case, that the 2000 GMC Jimmy SLC 4x4 4-door sport utility vehicle was not a "luxury good" as used in the statute, and the debt was discharged.

(430) 9-26-02 **UNPUBLISHED** In re Linda Marie Mount, 02-29694, Judge Clark.

The debtor filed a Chapter 7 petition in bankruptcy less than one year after she transferred her 401(K) plan into an IRA. The trustee objected to the debtor's claimed exemption. It is the opinion of this Court that Tae Sun Hong (see opinion #427) correctly interprets the effect of U.C.A. § 78-23-5(1)(b)(ii) on debtor's claimed exemption.

The trustee's objection to the claimed exemption is sustained.

(431) 10-21-02

UNPUBLISHED

In re Mountaineer Development Corp., 00-28590,
Judge Boulden.

The high bidder at a trustee's auction moved to set aside the sale of the estate's interest in a note, alleging that false or misleading information induced his bid. Following the failed sale, the chapter 7 trustee moved for authority to sell the asset to a third party. The original high bidder also objected to sale of the estate's interest in the note to a third party.

The original sale was authorized by the court, made regularly and with notice. The terms of the sale were as is, where is, if is, with no warranties or representations. To set aside such a sale, a party must show fraud, accident, mistake, or some other equitable cause for avoiding a like sale between private parties. *See Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852, 859-60 (10th Cir. 1997) (citations omitted). The trustee had passed along some, but not all, information in her possession regarding the status of the asset to the bidder. The trustee lacked independent knowledge of the accuracy of the information in issue, and the bidder made no specific request for this information. The court denied bidder's motion, finding the evidence insufficient to show any of the required elements. The court further held that the trustee owed no heightened fiduciary duty to disclose information to a bidder at auction where the bidder is also a creditor of the estate. The trustee's duty to a bidder-creditor is the duty of due care, diligence, and skill as measured by a reasonable person standard. *See United States of America v. Aldrich (In re Rigden)*, 795 F.2d 727, 731 (9th Cir. 1986). There was no evidence in this case that the trustee had failed to fulfill her duty.

Relying on the factors set forth in *In re Anchor Exploration Co.*, 30 B.R. 802 (N.D. Okla. 1983), the court found the trustee's proposed second sale to a non-bidding third party appropriate under the terms of the original Sale Order. *See In re Anchor*, 30 B.R. at 808.

November 6, 2002

432 Published In re Sorrell; 02-28611

The Debtors filed a bankruptcy petition under Chapter 12 of the Bankruptcy Code and moved for confirmation of their plan of reorganization. The Debtors proposed a plan wherein they surrendered one piece of real property to the secured creditor but kept another piece, providing for a twenty-year amortization of the remaining amount due under the secured claim. In addition, certain additional obligations were secured by personal property and were treated in the plan. The secured creditor objected on several grounds including that the Debtors did not meet the definition of family farmer as contemplated by Congress when drafting Chapter 12 and that the Debtors' plan was not proposed in good faith. The Court concluded the Flygare Chapter 13 factors of good faith are equally applicable in Chapter 12 cases and determined that if certain conditions were met, the plan met the good faith test as required under 11 U.S.C. § 1225(a)(3). See Flygare v. Boulden 709 F.2d 1344, 1347-48 (10th Cir.1983). In addition, the Court held that because the Debtors satisfied the criteria of the family farmer definition in the previous year that they could go forward under Chapter 12 despite evidence that the Debtors' current farming operations were minimal.

November 14, 2002

433 Published In re Medical Software Solutions, dba PerfectPractice.MD; 02-32330

The issue before the Court was whether the Debtor's proposed sale of substantially all of its assets outside the ordinary course of business, and before a Chapter 11 Plan of Reorganization and Disclosure Statement had been proposed, should be approved by the Court. Complicating matters further, the proposed buyers were insiders as that term is defined within the Bankruptcy Code. The Court concluded that in order to approve a sale of substantially all the Debtor's assets outside the ordinary course of business, the following elements must be met. The Debtor must show (1) that a sound business reason exists for the sale; (2) there has been adequate and reasonable notice to interested parties, including full disclosure of the sale terms and the Debtor's relationship with the buyer; (3) that the sale price is fair and reasonable; and (4) that the proposed buyer is proceeding in good faith. See e.g., In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991); WBQ Partnership v. Virginia Dep't of Med. Assistance Serv. (In re WBQ Partnership), 189 B.R. 97, 102 (Bankr. E.D. Va. 1995). The Court specifically found that because of the proposed purchaser's insider status that the purchaser has a heightened responsibility to show that the sale is proposed in good faith and for fair value. Relying upon the court-appointed examiner's reports in this case, the Court found no evidence of fraud or collusion or other actions indicative of bad faith and approved the sale free and clear of all liabilities including possible successor liability claims by the former president of the company.

February 28, 2003

(434) UNPUBLISHED In re Alice M. Sink, aka Alice M. Phillips, 02-40042; In re Hipolito D. Valenzuela, 02-32504; In re Clay Petersen, 02-38843; Judge Judith A. Boulden

Creditors filed motions to dismiss with prejudice, pursuant to 11 U.S.C. § 109(g)(1). In each case, the debtor had failed to make plan payments, failed to appear at the first meeting of creditors, or failed to file required statements and schedules. To prevail on a § 109(g)(1) motion, the movant must prove either that the debtor willfully failed to abide by an order of the court or that the debtor willfully failed to appear before the court in proper prosecution of the case.

The first clause of § 109(g)(1) relates to the debtor's failure to abide by a specific order that may be issued in the case. The Court distinguished *In re Fulton*, 52 B.R. 627 (Bankr. D. Utah 1985) which stated that failure to appear at a meeting of creditors may be a violation of a court order, because the standing order then in effect governing dismissal procedures has been superceded by Local Rules 2003-1(a) and 2083-1(a) and (b). The Court determined it was unnecessary to consider whether statutory requirements and local rules of practice are equivalent to court orders. Turning to the second clause of § 109(g)(1), the Court stated that an "appearance" encompasses a broad range of conduct in addition to physical presence at a hearing. An appearance was determined to include, among other things, being represented at non-court hearings related to a case and filing papers required by rule or statute. The Court further determined that a debtor's conduct is willful within the meaning of § 109(g)(1) when the debtor has notice of the responsibility to act and intentionally engages in conduct that results in a failure to fulfill that responsibility.

The Court held that failure to file required papers, failure to appear at the first meeting of creditors, and failure to make Chapter 13 plan payments were failures to appear before the court in proper prosecution of the case. Failure to defend against dismissal proceedings was also held to be a failure to appear in proper prosecution. Evidence of repeated filings allowed an inference in each case that the debtor knew his or her responsibilities under the Bankruptcy Code and knew the consequences of failing to fulfill those responsibilities. Therefore, the Court determined that the debtor's conduct in each case was willful. Each case was dismissed with prejudice to refile a bankruptcy petition for 180 days.

**(435) 4/25/2003 PUBLISHED, In re Simon Transportation Services, INC. 02-22906, Dick Simon Trucking, INC., and Simon Terminal, LLC, [Jointly Administered], Judge Clark.
Citation: 292 B.R. 207**

Following entry of order confirming sale of Chapter 11 debtors' assets to insider used as stalking horse, debtors filed supplemental motion for assumption and assignment of trade-back agreements allegedly included in assets sold. The court held that (1) insider used as stalking horse in connection with sale of debtors' assets did not pay anything for trade-back agreements which it later claimed to have purchased as part of its total bid of \$51 million, so that motion to assume and assign such agreements to insider would not be approved as not being in best interests of estate; and (2) options which debtors had pursuant to terms of trade-back agreements with company from which they acquired refrigerated trucks, to require company to buy trucks back at price equal to 55 percent of original purchase price, were in nature of "executory contracts," that debtors could assume and assign.

The United States trustee objected to dismissal and filed a motion to disgorge fees under 11 U.S.C. § 329 due to unusual circumstances that led to two cases being open for the debtor simultaneously. Due to serious violations of the Bankruptcy Code and rules, counsel's services were found to have been performed so poorly and negligently as to be of no value.

The Court's ruling was based on several factors, including counsel's failure to provide any legal advice to the debtor prior to filing the bankruptcy petition, failure to file a list of creditors and their addresses with the petition, failure to notify the debtor of important deadlines affecting the case, and counsel's action in filing a second bankruptcy petition without the debtor's knowledge or consent. Counsel also collected a fee exceeding the amount disclosed on the Fed. R. Bankr. P. 2016(b) statement in violation of 11 U.S.C. § 329. The Court condemned counsel's office procedures which result in the routine filing of defective chapter 7 petitions absent a schedule of liabilities or list of creditors in violation of Fed. R. Bankr. P. 1007(a)(1) and (c). The Court further condemned counsel's practice of filing an incomplete list of creditors in a practice calculated to deprive creditors of proper notice of the first meeting of creditors under Fed. R. Bankr. P. 2002(a)(1) and circumvent the debtor's statutory duties under 11 U.S.C. § 521(1).

The Court overruled the objection to dismissal, but ordered debtor's counsel to disgorge fees in full.

June 6, 2003
Judge Judith A. Boulden

A creditor filed a motion to dismiss the case with prejudice pursuant to 11 U.S.C. § 109(g)(1). Based upon the debtor's failure to file required papers or attend the first meeting of creditors, combined with his admission that the debtor had no intent to prosecute the case, the Court granted the motion.

The debtor filed a chapter 13 petition in order to stave off a pending foreclosure and allow time to consummate a sale of the property. The debtor failed to file a list of creditors and their addresses, failed to file any statements or schedules and failed to file a plan of reorganization in violation of 11 U.S.C. § 521, Fed. R. Bankr. P. 1007, LR 2002-1(d) and LR 5005-1. These failures are also failures to appear before the court in proper prosecution of the case within the meaning of 11 U.S.C. § 109(g)(1).

The debtor offered several explanations for his conduct, but the Court found only one explanation to be credible. The debtor intended to satisfy all of his creditors through a sale of the property on which foreclosure was pending, and had no intent to pursue reorganization under the Bankruptcy Code. On that basis, the Court concluded that the debtor's failures to appear noted above were willful and dismissed the case with prejudice.

July 23, 2003
Judge Glen E. Clark

(438) 7/23/2003 UNPUBLISHED In re C AND M PROPERTIES, L.L.C. v. RICHARD D. BURBIDGE, et al., Judge Clark.

A Chapter 11 plan was confirmed with no mention or treatment of a claim that debtor asserted against the defendant in this adversary proceeding. There was also no specific disclosure of the claim or its value in the debtor's schedules, statements or monthly financial reports. Post confirmation, debtor commenced a lawsuit against defendant. Defendant removed the matter to this Court and filed a motion to dismiss based upon res judicata and judicial estoppel arguing that because the claim had not been disclosed, the debtor is barred by res judicata and judicial estoppel from suing on the claim. Because affidavits were submitted by both parties, the Court treated the motion as a motion for summary judgment and ruled that res judicata did not apply because the plan relied solely on the sale of debtor's real property to pay all claimants in full plus interest. As such, it never became necessary to consider the existence and value of the claim at confirmation. The Court denied defendant's motion based upon the judicial estoppel argument because the Tenth Circuit Court of Appeals has repeatedly stated that the doctrine of judicial estoppel is not recognized in this Circuit.

July 23, 2003
Judge William T. Thurman

(439) 7/23/2003 UNPUBLISHED In re Snow, 03-20144, Judge Thurman

The United States Trustee brought a motion to dismiss the Debtors' case for substantial abuse of the bankruptcy system as provided by 11 U.S.C. § 707(b). The Debtors had filed a Chapter 7 case but their household income was greater than \$150,000 per year. Applying the "totality of the circumstances" test set forth by the Tenth Circuit Court of Appeals in the case of *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 809 (10th Cir. 1999), the Court granted the Trustee's motion but stayed the effectiveness of the order for ten days to allow the Debtors to convert their case to one under Chapter 11 or Chapter 13. Although the Court determined that the Debtors' ability to repay debt was the primary factor in its analysis, the Court considered other factors as well including whether the Debtors suffered any unique hardships, whether cash advances and purchases exceeded the Debtors' ability to pay at the time they were incurred, whether the Debtors had a stable source of future income, whether the Debtors current expenses could be reduced without deprivation of necessities, whether the Debtors qualify for Chapter 13 relief, and the Debtors' good faith. The Court determined, based on an analysis of each factor, that the case should be dismissed primarily due to the amount of surplus income that the Debtors should have under a plan of reorganization and the Debtors' failure to provide accurate information regarding their household income and expenses on their bankruptcy schedules at the time the case was filed or in any written amendments.

July 29, 2003
Judge Judith A. Boulden

(440) 7/29/2003 UNPUBLISHED In re Gregory Marshall, 01-36611, Judge Boulden

Chapter 12 Trustee objected to allowance of debtors' counsel's fee applications in a case originally filed as a Chapter 11 case. The Trustee objected on the grounds that while counsel did file an Application to Employ while the debtor was in possession in the Chapter 11 case, the law firm was never appointed under 11 U.S.C. § 327 and was thus never employed as a professional person entitled to compensation under 11 U.S.C. § 330. Counsel for the debtors argued appointment by the court under 11 U.S.C. § 327 is not necessary for debtors counsel to receive compensation when representing individual debtors under Chapter 12.

The Court found that 11 U.S.C. § 330(a)(4)(B), added to the Code by The Bankruptcy Reform Act of 1994, Pub.L.No. 103-394, 108 Stat. 4106 (1994), obviates the need for court appointment of debtor's counsel in a Chapter 12 case in which the debtor is an individual. However, while the Court held fees and costs were allowed, it also discovered that no payment of fees is authorized under the express terms of the confirmed Plan which only allows payment to professionals appointed under 11 U.S.C. § 327.

July 10, 2003

(441) 7/10/2003 Unpublished In re David, 02-21500, Judge Thurman Judge William T. Thurman

The Chapter 7 Trustee brought a motion to require the Debtors to turnover property of the estate to the Trustee. The property consisted of \$825.74 that existed in the Debtors' bank checking account at the time the case was filed. The Debtors originally filed the case as a Chapter 7 case, but following their 341 meeting, the Debtors converted their case to one under Chapter 13. Approximately four months after the case was converted, the Debtors reconverted the case back to one under Chapter 7. Several months after the conversion back to Chapter 7, the Chapter 7 Trustee brought his motion for turnover seeking the money that existed in the checking account at the time the case was originally initiated. During the course of their case, the Debtors had spent the money in their checking account on moving expenses and on other ordinary living expenses. The Debtors were never put on notice that the Trustee would seek turnover of those funds until nearly sixteen months after the case was filed. The Court held that under 11 U.S.C. § 348(f) property of the Debtors' Chapter 7 estate after conversion from Chapter 13 consisted of property that remains in possession of the debtor or is under the control of the debtor on the date of the conversion and, therefore, did not include the checking account funds that had been subsequently consumed before the conversion back to Chapter 7. The Court also concluded that it may not rule the same in a case where a debtor converted to another chapter in bad faith.

June 16, 2003
Judge William T. Thurman

(442) 6/16/2003, UNPUBLISHED In re Scarbrough, 02-32949, Judge Thurman

Goldenwest Credit Union filed a motion to extend the time to file a proof of claim in the case. The Debtors case was filed on August 5, 2002. When the Debtors filed their bankruptcy petition, they also filed a creditor matrix. For some unknown reason, an error occurred in the bankruptcy clerk's office and the matrix was not entered into the system. Subsequently, on August 21, 2002, notice of the meeting of creditors, as well as notice of the last day to file proofs of claim was sent to all parties in the case, but due to the error in failing to correctly enter the matrix, only one creditor, the Chapter 13 Trustee, the Debtors and Debtors' counsel received notice of the filing and of the claims bar date. The claims bar date was set for December 12, 2002. On April 2, 2003, Goldenwest Credit Union filed its motion to extend the time to file proofs of claim alleging that the failure to receive notice was cause to extend the deadline. The Court denied the motion under Bankruptcy Rules 9006(b)(3) and 3002(c) as interpreted by the Tenth Circuit Court of Appeals in Jones v. Arros, 9 F.3d 79 (10th Cir. 1993). While Jones was a case under Chapter 12, the Bankruptcy Court held that its holding was equally applicable to Chapter 13 cases and, therefore, held that, despite a creditor not receiving notice of a case, that the claims bar date is absolute and may not be extended. However, recognizing that a creditor may be deprived of due process if never given notice of the claims bar date, the Bankruptcy Court held a Debtor may be able to enlarge the time to file proofs of claim on behalf of creditors under Bankruptcy Rule 3004. The Bankruptcy Court held that the deadline for debtors filing proofs of claim on behalf of creditors may be enlarged upon a showing of "excusable neglect" on the part of the Debtors in not filing a proof of claim prior to the deadline set forth in Bankruptcy Rule 3004.

September 16, 2003
Judge Judith Boulden

(443) 9/16/2003 PUBLISHED 298 BR 778, In re Perkins, Barney Retirement Fund v. Perkins 02-2163, Judge Boulden

Creditor, a retirement fund, filed a nondischargeability action against Debtor under 11 U.S.C. §§ 523(a)(2)(A) alleging the Debtor's omissions and misrepresentations to Creditor were material and thus nondischargeable. The Debtor previously operated an investment firm in which Creditor placed funds for retirement. The Debtor failed to disclose personal ties and interests to a company to which the investment firm extended a loan that was funded by the Creditor. In analyzing whether the Debtor incurred a debt to the Creditor by soliciting, receiving and refusing to account for assets through false representations and material omissions, the Court looked to the Restatement (Second) of Torts §§ 551(2). The Court concluded that the parties' relationship was one of trust and confidence which triggered the Debtor's duty to exercise reasonable care to disclose material information. The Debtor failed to uphold this duty to disclose by omitting and misrepresenting significant information that was material to the Creditor's investment decisions. The Creditor justifiably relied on the Debtor's representations and omissions in making investment decisions and was harmed as a result.

September 22, 2003
Judge Glen E. Clark

(444) 9/22/2003, UNPUBLISHED, Lundahl v. Telford (In re Telford), 03-2381, Judge Clark

The matter before the court is on plaintiff's application to proceed without prepayment of fees which seeks waiver of the fees under 28 U.S.C. §§ 1915 (proceedings in forma pauperis). Because the United States Bankruptcy Court is an Article I Court and not an Article III Court, it has no authority to waive filing fees under 28 U.S.C. §§ 1915.

September 24, 2003
Judge Glen E. Clark

(445) 9/24/2003 UNPUBLISHED, Dayton v. Newman (In re Dayton), 03P-2034, Judge Clark

Issue: subject matter jurisdiction.

October 7, 2003
Judge William T. Thurman

(446) 10/7/2003 UNPUBLISHED, In re Brewer v. Brewer, 02-2465, Judge Thurman

Plaintiff/Debtor filed a declaratory action against Defendant, former husband, seeking sanctions and a determination that his state court proceeding to enforce divorce-ordered payments were in violation of her discharge. The Debtor and the Defendant were divorced prior to the Debtor filing for Chapter 7

relief. The Divorce Decree ordered the Debtor to assume and pay two debts that had been co-signed by the parties. The Debtor ceased paying the debts and subsequently filed her Chapter 7 case. The Defendant began paying and eventually paid off the debts. The Debtor did not schedule the Defendant in her bankruptcy papers, but did list the two debts and the corresponding creditors. The Trustee filed a No Asset Report and the Debtor received a discharge. Three years later, the Defendant sought reimbursement from the Debtor for the amounts he had paid on the debts by filing a Motion for Order to Show Cause in state court. The state court ruled that the payments made by the Defendant on the debts were post petition obligations and ordered the obligations non-dischargeable because the Defendant was not scheduled in the Debtor's bankruptcy papers.

At trial, the Bankruptcy Court ruled that the state court order was void ab initio because the state court lacked jurisdiction. The state court order was void under the *Ellis v. Consolidated Diesel Electric Corp.* decision of the Tenth Circuit. As a result, the Rooker-Feldman doctrine did not apply and the Bankruptcy Court had jurisdiction to considering a collateral attack on the state court's ruling. The Court found that the debts were not in the nature of alimony or support and were incurred by the parties pre-petition. Notwithstanding the lack of scheduling in the bankruptcy papers, the debts were discharged by operation of law because Debtor's case was a no asset case, there was no bar date set for filing proofs of claims, and the claims were not in the nature of otherwise non-dischargeable claims. Sanctions were imposed on the Defendant because he refused to cease his collection efforts, even though he had been placed on notice of the Debtor's bankruptcy and the Tenth Circuit's decision of *In re Parker*, at least by the time the Order to Show Cause was heard in state court.

October 27, 2003
Judge Judith Boulden

(447) 10/27/2003 PUBLISHED, In re Mark James Grogan and Jan Grogan, 02-36231, Judge Boulden

Debtors failed to disclose settlement proceeds and the bank account into which the funds were deposited on their statements and schedules. The Chapter 7 trustee discovered the undisclosed assets and sought turnover of the settlement proceeds to the estate. After several months of delay, the debtors amended their schedules by listing the settlement proceeds as an asset and also claiming the funds as exempt property. The trustee objected to the amended objection claiming the omission of the settlement proceeds was intentional. The Court found that the debtors acted in bad faith in claiming the exemption on assets belatedly disclosed in amended schedules. The delayed exemption claim was disallowed for both bad faith and prejudice to creditors of the estate and debtors were required to turnover the settlement proceeds to the trustee.

December 18, 2003

Judge William T. Thurman

(448)12/18/2003, UNPUBLISHED, In re Marker, Trustee v. Robert H. Fullerton, 03-2301, Judge Thurman

The Court granted partial summary judgment on the Plaintiff Trustee's motion in an adversary proceeding commenced for recovery of property fraudulently transferred pursuant to § 25-6-6 of the Utah Code. In this proceeding, the Trustee relied on state law to reach back a period of 4 years prior to the filing of the Debtor's bankruptcy case to challenge a transfer by the Debtor to a former spouse. The Trustee alleged that the Debtor transferred certain real property to the Defendant for less than reasonably equivalent value. The Court ruled that a conveyance where a substantial portion of the consideration consisted of a promise of reduced future rents valued at approximately \$98,550 did not constitute reasonably equivalent value. Other issues of fact remained to be tried.

December 19, 2003

Judge William T. Thurman

(449) 12/19/2003 PUBLISHED, In re Holli Lundahl, 03-21660, Judge Thurman

The Court dismissed the Debtor's Chapter 13 case with prejudice where there was sufficient evidence to support a finding that the Debtor's plan was not proposed in good faith and that the case was filed in bad faith. The Court found that parties who were disputed by the Debtor but who were not scheduled or listed on any mailing matrix filed by the Debtor had standing to object to the Debtor's plan, and could be heard regarding their motion to dismiss or convert. The Court analyzed the Debtor's case in light of the standards adopted by the Tenth Circuit Court of Appeals in the cases of *In re Flygare* and *In re Gier*. The Court analyzed four particular areas: 1) the accuracy of the Debtor's income and expenses; 2) the existence of creditors' claims to be paid through the plan; 3) the motivation of the Debtor filing the case solely for the purpose of having a forum for litigation; and 4) the inaccuracy and misleading nature of the Statement of Affairs and Schedules filed by the Debtor. In each instance, the Court found that the Plan had not been proposed in good faith as required by 11 U.S.C. § 1307(e) and

that the case had been filed in bad faith.