

CASE LAW UPDATE
AND
BANKRUPTCY TRENDS
August 2005-August 2006

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EDITED FOR RELEVANCY TO
PRO BONO ATTORNEYS

Honorable Robert J. Kressel
United States Bankruptcy Judge
Minneapolis, MN

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**Supreme Court, Minnesota Supreme Court, Eighth Circuit, Bankruptcy
Appellate Panel, District Court, and Minnesota Bankruptcy Court Cases¹**
August 2005—August 2006

A. Jurisdiction/Appeal

1. DEBTOR'S STATUS AS A FARMER IS NOT JURISDICTIONAL, RATHER IS AFFIRMATIVE DEFENSE TO INVOLUNTARY BANKRUPTCY

Marlar v. Williams (In re Marlar), 432 F.3d 813 (8th Cir. (Ark.) 12/22/05) (per curiam)

The 8th Circuit affirms the bankruptcy court and district court holding that for purposes of 11 U.S.C. § 303(a), the debtor's status as a farmer is an affirmative defense to an involuntary bankruptcy petition that can be waived by the debtor's failure to raise it as a timely defense. In 1998, an involuntary bankruptcy petition was filed against the debtor. A hearing was held at which the debtor did not raise his status as a farmer and the debtor was adjudicated a debtor. After five years passed, the debtor filed a motion to dismiss the case asserting that the bankruptcy court lacked subject matter jurisdiction over the bankruptcy because the debtor was a farmer. After hearing, the bankruptcy court ruled that the debtor's status as a farmer was an affirmative defense that the debtor should have pled and proved at the time that the involuntary bankruptcy petition was filed. The district court held that the bankruptcy court's conclusion was correct and additionally held that the five year delay in raising the debtor's status as a farmer was rendered such a defense untimely. The 8th Circuit reasons that subject matter jurisdiction over bankruptcy proceedings is provided by 28 U.S.C. § 1334, which states that "the district court shall have original and exclusive jurisdiction of all cases under title 11", and under § 28 U.S.C. § 157(a), which states that "the district court may provide that any and all cases under title 11 . . . shall be referred to the bankruptcy judges for the district." The 8th Circuit also reasons that 11 U.S.C. § 303(h) required that an involuntary petition be timely controverted in order to preclude the commencement of an involuntary case against a farmer. Accordingly, the 8th Circuit holds that an alleged debtor must timely assert his or her status in one of the exempted categories (including a farmer) as an affirmative defense. In this case, the debtor's five year delay in raising the affirmative defense that he was a farmer was untimely, and the debtor's motion to dismiss the case was also untimely.

2. COURT HAS SUBJECT MATTER JURISDICTION IN FARMER INVOLUNTARY

US Bank, N.A. v. Young (In re Young), 336 B.R. 775 (8th Cir. BAP (Mo.) 1/12/06) (McDonald, J.)

The Eighth Circuit BAP rules that Section 303(a), prohibiting an involuntary filing against a farmer, is not jurisdictional. Creditors filed an involuntary Chapter 7 against the debtor and he consented to the order for relief, then moved to convert to Chapter 11. The court denied the motion in 2001, and in 2005 granted creditors summary judgment on their dischargeability complaint. Debtor appealed the 2001 orders and the 2005 order on the basis that the bankruptcy court lacked subject matter jurisdiction because he is a farmer. As to the 2001 orders, the BAP notes that to even consider whether the bankruptcy court had subject matter jurisdiction, there must be a timely appeal. Absent timely appeal, the appellate court lacks jurisdiction to consider any issues. As to the timely appeal of the 2005 order, the BAP follows the recent case of *In re Marlar*, 2005 WL 3488457 (reported in the January 3, 2006 update), to hold that the Section 303(a) prohibition on involuntary filing against a farmer is an affirmative defense, but is not

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jurisdictional. By consenting to the order for relief, the debtor waived the defense, and the bankruptcy court had subject matter jurisdiction.

3. DEBTOR CANNOT ALLOW A REPOSSESSION TO OCCUR AND LATER RELY ON PROVISIONS OF A CONFIRMED PLAN

Kurtzahn v. The Sheriff of Benton County, Minnesota (In re Kurtzahn), 342 B.R. 581 (Bankr. D. Minn. 2006) (Kishel, C.J.)

You remember Kurtzahn. She failed to obtain an extension of the automatic stay. She proceeded with her chapter 13 plan and proposed a plan providing for her to retain her mobile home and make payments to Anderson Homes; which held a security interest on her mobile home. Anderson Homes and the debtor then proceeded on separate tracks. The debtor proceeded with her plan and obtained confirmation without participation by Anderson Homes. Anderson Homes went ahead with a replevin action in state court and obtained a default judgment against the debtor for possession of her home. The debtor finally woke up, came to Chief Judge Kishel asking him to enjoin the repossession of her mobile home, arguing that Anderson Homes was bound by her confirmed plan. Chief Judge Kishel found that notwithstanding the confirmed plan, the state court replevin judgment was entitled to full faith and credit and declined to interfere.

4. FAIR DEBT COLLECTION PRACTICES ACT IS NOT PREEMPTED BY THE BANKRUPTCY CODE

Drnavich v. Cavalry Portfolio Service, LLC, 2005 WL 2406030 (D. Minn. 2005) (Magnuson, J.)

This former bankruptcy debtor brought an action in district court against a credit card issuer, claiming that it was violating the automatic stay and was in violation of the Fair Debt Collection Practices Act. The defendant moved to dismiss on the grounds that no remedy would lie under F.D.C.P.A. because the debtor was limited to her remedies under the Bankruptcy Code for violations of the automatic stay. Judge Magnuson ruled that there was no such preemption and that the debtor could assert an action under F.D.C.P.A. and denied the motion to dismiss.

B. Exemptions

5. ORDER REGARDING FEDERAL EXEMPTION NOT RES JUDICATA REGARDING STATE EXEMPTION

Ladd v. Ries (In re Ladd), 450 F.3d 751 (8th Cir. (Minn.) 5/5/06) (Beam, J.)

The Eighth Circuit Court of Appeals reverses the Minnesota bankruptcy court and holds that denial of a claim of exemption under the "federal" exemptions is not a bar to a claim under state exemption law. The debtors claimed their farm exempt under federal bankruptcy law, which puts a value limit on the homestead exemption. The trustee objected and a default order was entered denying the federal exemption. The Debtors amended their schedules to claim the Minnesota state exemption, which puts an acreage and value limit on the homestead. The bankruptcy court, affirmed by the BAP, determined that the trustee's motion to deny the federal exemption was the equivalent of a lawsuit, and the final order was res judicata as to homestead exemption. The Eighth Circuit disagrees, noting that because the exemption statutes consider different factors (value vs. area), the cause of action is not the same for res judicata purposes. The 8th Circuit examines the debtors' reasons for claiming the federal exemption and subsequently allowing judgment by default to be entered, noting that they had little motivation to engage in costly litigation to defend the federal homestead exemption to protect a nominal amount of personal

property. It then reverses and remands to the bankruptcy court to determine whether the debtors should be allowed to amend their schedules under Bankruptcy Rule 1009. In doing so, the court suggests that there was no claim of bad faith and that the bankruptcy policy allowing maximization of exemptions justifies Rule 1009 allowing liberal amendment.

6. TAX REFUND EXEMPT AS NOT SUBJECT TO ATTACHMENT OR EXECUTION

Benn v. Cole (In re Benn), 340 B.R. 905 (8th Cir. BAP (Mo.) 4/6/06) (Mahoney, J.)

A divided Eight Circuit BAP reverses the Missouri bankruptcy court's order overruling debtor's claim of exemption for federal and state tax refunds. Missouri has opted out of the "federal" exemptions, and in the opt-out provisions states that a debtor may exempt any property that is not "subject to attachment and execution" under Missouri or federal law. Missouri law does not expressly exempt tax refunds. Missouri case law provides that a contingent interest cannot be attached. Two of the three judges on the BAP panel find that the case was filed before the end of the tax year and the refunds were "contingent," so under the above law, they could not be attached. The majority also concludes that the refunds were not subject to execution due to Internal Revenue Code provisions prohibiting payment to a third party. The majority concludes that the Missouri exemption statute is intended to treat a bankruptcy debtor just like a non-bankruptcy debtor, and the refunds unavailable to creditors outside of bankruptcy were also exempt in the bankruptcy.

7. EARNED INCOME CREDIT AND WORKING FAMILY CREDIT ARE NOT EXEMPT UNDER BANKRUPTCY EXEMPTIONS

In re Espey, ___ B.R. ___ 2006 WL 2258367 (Bankr. D. Minn. 2006) (O'Brien, J.)

The debtor in this case claimed as exempt, portions of her federal and state tax refunds which were attributable to the federal Earned Income Credit and the state Working Family Credit respectively. The claim to exemption was made under § 522(d)(10)(A) which provides an exemption for the right to receive "a local public assistance benefit." Judge O'Brien construed the word "local" to be distinguishable from either state or federal and thus, neither of these payments could be characterized as local and he denied the exemption claim. Compare the result in this case to In re Tomczyk, 295 B.R. 894 (Bankr. D. Minn. 2003) where Judge Kressel held that the Earned Income Credit and the Minnesota Working Family Credit were both exempt under Minnesota Stat. 550.37, subd. 14 which provides an exemption for "all relief based on need"

8. HOMESTEAD EXEMPTION THAT WAS INCREASED AS THE RESULT OF A FRAUDULENT TRANSFER WAS DISALLOWED TO THE EXTENT OF THE INCREASE

In re Maronde, 332 B.R. 593 (Bankr. D. Minn. 2005) (Dreher, J.)

In this first application of the new § 522(o), Judge Dreher found that the debtor's prebankruptcy planning, whereby he sold nonexempt assets and used the sale proceeds to pay off a second mortgage on his home, went beyond bankruptcy planning and constituted a transfer with the intent to hinder, delay, or defraud his creditors. She therefore reduced his exemption in his homestead as required by § 522(o). The result was to create additional nonexempt property, causing the debtor's chapter 13 plan to fail the best interest of creditors test.

C. Property of the Estate

9. TAX REFUNDS ATTRIBUTABLE TO FEDERAL CHILD TAX CREDITS ARE PROPERTY OF THE ESTATE

Law v. Stover (In re Law) and Brouse v. Stover (In re Brouse), 336 B.R. 780 (8th Cir. BAP (Mo.) 1/26/06) (Mahoney, J.)

The Eighth Circuit BAP affirms the bankruptcy court and holds that federal tax refunds arising from federal child tax credits are property of the estate. Disagreeing with *In re Schwarz*, 314 B.R. 433 (Bankr. D. Neb. 2004), the Court concludes that for bankruptcy purposes federal child tax credits are the same as earned income tax credits since both types of credits are contingent interests on the petition date and, thus, are to be included as property of the estate. The statutory differences between the two types of credits relied on in *Schwarz* are only significant for tax purposes and are not significant for purposes of determining whether a refund is property of the estate.

10 STATE COURT ORDER DIVESTED DEBTOR OF PROPERTY PRE-PETITION

Ziemski v. Ziemski (In re Ziemski), 338 B.R. 802 (8th Cir. BAP (Ark.) 3/10/06) (Schermer, J.)

The Eighth Circuit BAP reverses the bankruptcy court, concluding that because of a pre-bankruptcy order, a pension right was not property of the estate and not subject to the automatic stay. When her marriage was dissolved, the court directed that a wife receive 40% of her husband's pension. Several years later, the state court modified the property division, ordering that the ex-wife "forfeit" her 40% until the ex-husband received approximately \$14,000.00. Six days after that order was entered, the ex-wife filed a Chapter 13. Her ex-husband continued to receive all of the military benefits, and she sued alleging willful violation of the stay and a right to turnover. The bankruptcy court ruled that the ex-husband's receipt of benefits violated the stay and ordered sanctions and turnover. On appeal, the BAP reverses. As a result of the state court order, the Debtor was not entitled to receive any portion of the benefits at the time she filed bankruptcy. They were not property of the estate and no basis existed to order turnover. Similarly, there was no violation of the automatic stay.

D. Automatic Stay/Discharge Injunction

11. POST-PETITION PRESENTMENT OF CHECK DOES NOT VIOLATE STAY

Thomas v. Money Mart Financial Services, Inc. (In re Thomas), 428 F.3d 735 (8th Cir. (Mo.) 11/04/05) (Gruender, J.)

The Eighth Circuit Court of Appeals affirms a bankruptcy court ruling that a lender's presentment of debtor's post-dated checks after the filing date did not violate the automatic stay. Debtor took a "payday loan" and gave the lender post-dated checks. The lender cashed them after the borrower filed Chapter 7, and the borrower-debtor sued for violation of the automatic stay. She argued that the lender could not lawfully "present" the checks, and fall within the exception of § 362(b)(11), because state law provides that an instrument is unenforceable against an obligor who has a defense of bankruptcy discharge. Although when the checks were cashed, she had not received a discharge, she relied on a Ninth Circuit case that did not distinguish between a discharge and a potential discharge. In affirming the bankruptcy court, the Eighth Circuit rejected the Ninth Circuit case and held that where the debtor has not yet received a discharge, Missouri law allows a holder to present an instrument. Because the lender lawfully presented the checks, it qualified for the § 362(b)(11) exception and did not violate the stay.

12. BANKRUPTCY COURT HAS JURISDICTION TO GRANT RELIEF FROM STAY FOR CAUSE

Martens v. Countrywide Home Loans, 331 B.R. 395 (8th Cir. BAP (Mo.) 10/3/05) (Federman, J.)

The Eighth Circuit BAP affirms an order for relief from stay where the debtor did not dispute the facts that she was not making payments to the lender and that there was not sufficient equity in her homestead to protect the lender's interest. In response to the relief from stay motion, the debtor argued that the bankruptcy court did not "support and defend" the Constitution and therefore lacked jurisdiction, and that the lender could not foreclose its deed of trust without presenting the original promissory note. The BAP agreed with the bankruptcy court that, the debtor having submitted herself to its jurisdiction by filing Chapter 7, the court had jurisdiction. Noting that the grant of relief from stay is not the equivalent of a foreclosure, the BAP affirms the bankruptcy court's findings that cause existed because the Debtor was not making payments and because there was insufficient equity in the property to adequately protect the lender's interest.

13. PRO SE APPELLANTS LOSE DESPITE HELP FROM THE BAP

Ruesch v. Household Automotive Fin. Corp. (In re Ruesch), 337 B.R. 203 (8th Cir. BAP (Mo.) 12/05/05) (Kressel, C.J.)

The Eighth Circuit BAP affirms an order denying debtors' motion to vacate a bankruptcy court order that granted relief from stay and prohibited debtors from filing another case for six months. In debtors' fifth Chapter 13 in thirteen months, a creditor moved for relief from stay, debtors did not respond or appear, and the court granted relief and said that if the case were later dismissed, it would also grant the creditor's request for a six month prohibition on future filings. Debtors failed to cure deficiencies in their case filing and the case was dismissed with the six month prohibition. Debtors moved to vacate the relief from stay and to "reinstate" the case. The court refused, and on appeal from that order the BAP affirms. Debtors failed to provide an appendix of relevant documents or a transcript on appeal, but the BAP reviewed the bankruptcy court documents and construed debtors' unusual and untimely requests for relief to get to the merits of the appeal. Finding that the debtors failed to respond to the original creditor motion, failed to seek timely relief from the stay order, failed to provide any factual or legal basis for the relief they sought, and failed to provide an adequate record on appeal, the BAP concludes that (a) the bankruptcy court did not abuse its discretion in dismissing the case, (b) the six months having expired, the appeal from the prohibition order is moot, and (c) the case having been dismissed, review of the stay order is also moot.

14. DEBTOR GIVEN REASONABLE NOTICE OF HEARING ON MOTION FOR RELIEF

Harris v. The Boyd G. Montgomery Testamentary Trust (In re Harris), 337 B.R. 921 (8th Cir. BAP (Ark.) 2/15/06) (McDonald, J.)

The Eighth Circuit BAP affirms the bankruptcy court's termination of the automatic stay taken in the absence of the debtor or representative of the debtor. In this case, the movant filed a motion to terminate the stay, which the court set for hearing on September 1, 2005. The bankruptcy court's certificate of service for the notice of hearing for motion to terminate the stay included the Debtor. At a hearing on August 15, 2005, at which new counsel appeared for Debtor, three unrelated matters were continued to September 15, 2005. Debtor claimed that he received inadequate notice of the hearing on the motion to terminate the automatic stay and that he believed that the motion to terminate the automatic stay was continued with the other matters to the September 15 hearing. At the hearing on September 1, 2005, the

court noted at the hearing that the Debtor notice but was not present at the hearing. After review of the record, the motion to terminate the stay was granted. Due process only requires that a party receive notice in a manner consistent with the Bankruptcy Code, which notice is reasonably calculated to apprise the parties of the pendency of the action and an opportunity to be heard. In this case, the BAP determined that notice was adequate, that the bankruptcy court's continuance of unrelated matters clearly did not include the motion to terminate the stay. The termination of the automatic stay was upheld.

15. MOTIONS FOR EXTENSIONS OF THE AUTOMATIC STAY MUST BE SERVED ON AFFECTED PARTIES

In re Collins, 334 B.R. 655 (Bankr. D. Minn. 2005) (Kishel, C.J.)

Because the debtor had filed a previous case within the one year before she filed her current case, she received the benefit of the automatic stay for only thirty days. When she moved the court for an extension of the automatic stay, she gave notice of the hearing only to the interim trustee and the U.S. Trustee. Chief Judge Kishel held that entities (which normally would include all creditors against whom the debtor wanted the automatic stay extended) were parties in interest entitled to notice of the hearing and in the absence of such notice, he denied the debtor's motion.

16. NOT ONLY ARE CREDITORS ENTITLED TO NOTICE, THEY ARE ENTITLED TO ADEQUATE NOTICE

In re Taylor, 334 B.R. 660 (Bankr. D. Minn. 2005) (Kishel, C.J.)

Taylor was in the same boat as Collins. Taylor made a motion for continuation of the automatic stay and Collins made another motion to extend the automatic stay. The creditors were served, but only a few days before the hearing. Chief Judge Kishel held that such abbreviated notice was not adequate and therefore denied both motions.

17. THERE ARE PRESUMPTIONS AND THEN THERE ARE PRESUMPTIONS

In re Kurtzahn, 337 B.R. 356 (Bankr. D. Minn. 2006) (Kishel, C.J.)

Like Collins and Taylor, Kurtzahn had a case pending within one year before the filing of her current case. She gave enough notice to all creditors, but lost on the merits. In a thorough opinion, Chief Judge Kishel wends his way through the statutory provisions and the various shifting presumptions, found that the debtor had not rebutted the statutory presumption of bad faith and denied her motion.

E. Claims

18. EVIDENTIARY HEARING NOT REQUIRED FOR CLAIM OBJECTION ON NEGATIVE NOTICE IF NO HEARING IS REQUESTED

Roberts v. Pierce (In re Pierce), 435 F.3d 891 (8th Cir. (Ark.) 1/25/06) (Riley, J.)

The Eighth Circuit affirms the bankruptcy court's grant of a claim objection by disallowing a claim in part and holds that negative notice as provided under local rule gave claimant sufficient opportunity to request a hearing. In this case debtor objected to a claim requesting that it be disallowed in part, which was properly served on negative notice pursuant to local rule. Claimant failed to respond or otherwise request a hearing, and the claim objection was granted without further hearing. Claimant appealed claiming the that bankruptcy court must hold a hearing on a claim objection under 11 U.S.C. § 502, which states that

"the court after notice and a hearing shall determine the amount of such claim." The Eighth Circuit held that negative notices are authorized under the Bankruptcy Code because 11 U.S.C. § 101(1)(B)(i) a bankruptcy court is authorized to act "after notice and a hearing" if a hearing is timely requested by a party in interest. Claimant failed to timely request a hearing.

19. RESCISSION OF LAND SALE REQUIRES RETURN OF PURCHASE PRICE

Suchy v. Klesalek (In re Klesalek), 336 B.R. 769 (8th Cir. BAP (N.D.) 1/06/06) (Federman, J.)

The Eight Circuit BAP reverses a bankruptcy court order requiring a buyer to return probate estate property, but not requiring the estate to refund the purchase price. The debtor was the agent and fiduciary of his aged aunt. He controlled all of her assets and purchased property from her for much less than market value. Upon her death (at age 106) and his bankruptcy filing, the aunt's probate estate sued in bankruptcy court for the return of the property. The court found that under North Dakota law the debtor failed to rebut the presumption of undue influences as to the real estate, and ordered him to return it to the probate estate. Because the debtor apparently did not request it, the bankruptcy court did not order the estate to refund his purchase payment. On appeal, the BAP notes that where a contract is rescinded for fraud or undue influence, the parties must both be restored to their pre-contract positions. The bankruptcy court therefore erred by not also ordering that debtor's money be returned.

F. Avoidance and Other Trustee Powers

20. TRUSTEE LACKS STANDING TO BRING SUIT FOR LEGAL MALPRACTICE AND AIDING AND ABETTING A FRAUDULENT TRANSFER

Moratzka vs. Senior Cottages of America, LLC, 2005 WL 2000185 (D.Minn. 08/18/05) (Frank, J.)

The U.S. District Court for the District of Minnesota upholds the bankruptcy court's dismissal of an adversary proceeding finding that a bankruptcy trustee lacks standing to sue debtor's attorneys for state law legal malpractice and aiding and abetting a fraudulent transfer from debtor to a sister company owned by debtor's principal. Prior to the bankruptcy filing, the debtor's principal, with the assistance of its attorneys, formed a limited liability company and transferred all of debtor's assets (including tax credits worth approximately \$4.8 million) for the alleged consideration of assumption of all secured debt of the debtor. The debtor then filed bankruptcy. The trustee filed an adversary proceeding against several parties including debtor's attorneys that had assisted in the transaction alleging attorney malpractice and aiding and abetting a fraudulent transfer under state law. The bankruptcy court dismissed the suit because the claims were not property of the estate, but were instead property of creditors, and because the trustee failed to properly allege causation for attorney malpractice, and finally because even if damages had been properly alleged as those of the debtor, the doctrine of *in pari delicto* bars the bankruptcy trustee (as successor to the debtor's rights) from suing third-parties that acted together with the debtor to defraud the debtor's creditors. Property of the estate includes all legal and equitable interests of the debtor in property at the commencement of the case. 11 U.S.C. § 541. In determining if a claim is property of the debtor, the court must look to state law to determine whether the claim belongs to the debtor or if the claim runs straight through to creditors. A claim running through to creditors is not property of the estate. The District Court holds that in this case the adversary proceeding complaint had initially only alleged harm to creditors, which claims would belong only to creditors. Thus, the claims were not property of the estate. Additionally, an amendment to the complaint to allege harm to the debtor would still only be for the benefit of the creditors, as the debtor would still not have been solvent but for the transfer. The District Court holds that because a trustee cannot bring a claim belonging to the creditors of a debtor corporation, the trustee lacks standing in the adversary proceeding. See *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987).

21. BUYER OF LEASED GOODS MUST RECEIVE CERTIFICATE OF TITLE TO OBTAIN PROPER OWNERSHIP

The CIT Group/Equipment Financing, Inc. v. M&S Grading, Inc. (In re M&S Grading, Inc.), 2006 WL 2069443 (8th Cir. BAP (Neb.) 07/27/06) (Venters, J.) [West erroneously cites this as 8th Circuit Ct. of Appeals]

The Eighth Circuit BAP affirms the bankruptcy court's interpretation of Nebraska UCC Section 2A-305 as requiring a buyer in the ordinary course to obtain a certificate of title in order to obtain title to certificated goods. The debtor purchased two pieces of titled equipment from a equipment dealer who was then leasing the equipment from a finance company. Although the debtor obtained a bill of sale for the equipment, it did not obtain a certificate of title from the equipment dealer. The debtor argued that it obtained rightful title to the equipment under Nebraska UCC Section 2A-305 because it was a buyer in the ordinary course of business and that its seller was a merchant dealing in goods of the same kinds as the equipment. The debtor argued that since it was a buyer in the ordinary course, a certificate of title was not necessary to convey title. The bankruptcy court disagreed and the BAP affirms. The BAP concludes that neither *Dugdale of Nebraska, Inc. v. First State Bank*, 420 N.W. 273 (Neb. 1988) (holding that Nebraska UCC Section 2-403, the statutory analogue to Section 2A-305, does not require a buyer in the ordinary course to obtain a certificate of title in order to obtain title to certificated goods) nor the comments to Nebraska UCC Section 2A-305 (stating that 2A-304 should be interpreted consistently with cases interpreting Section 2-403) do not warrant a deviation from the plain language of the statute.

G. Discharge and Dischargeability

22. NON-PECUNIARY HARDSHIP WARRANTS DISCHARGE OF STUDENT LOAN

Reynolds v. Pennsylvania Higher Education Assistance Agency, 425 F.3d 526 (8th Cir. (Minn.) 10/10/05) (Gibson, J.)

In a controversial case, the Eighth Circuit Court of Appeals affirms the bankruptcy court finding of undue hardship and discharge of a student loan. The debtor, a Michigan Law School graduate, suffers from mental illness exacerbated by the stress of having a large, unpaid student loan. Her combined family income includes surplus sufficient to make monthly payments on a debt to the remaining appellants under the thirty year Ford Program. Nonetheless, applying the "totality of the circumstances" test, the bankruptcy court held that the case presented extraordinary circumstances where ability to pay was outweighed by non-pecuniary factors related to her mental illness. The lenders appealed to the district court, which affirmed. On appeal to the Eight Circuit, and reviewing the finding of undue hardship as a question of law and de novo, two of the three-judge panel agreed that the bankruptcy court properly applied the totality of the circumstances test. Under the Eighth Circuit test, a court may consider not only a financial calculation, but also "any other relative facts and circumstances." This preserves the court discretion inherent in the statutory language. Where a debtor's health and financial position are inextricably intertwined, the court may consider the effect of ongoing debt to a debtor's health, and may conclude that such effect would be an undue hardship. The dissent found no basis in the statute for considering a debtor's illness, except for its effect on income and expenses.

23. SUBJECTIVE INTENT IRRELEVANT IN DETERMINATING RETURN FOR TAX DISCHARGEABILITY

Colsen v. Internal Revenue Service (In re Colsen), 446 F.3d 836 (8th Cir. (Iowa) 5/4/06) (Arnold, J.)

The Eighth Circuit Court of Appeals affirms the Iowa bankruptcy court's determination that debtor's tax debt was dischargeable. The debtor failed to timely file tax returns for 1992 through 1998, and the IRS prepared substitutes and assessed taxes. In 1999 the Debtor filed Forms 1040 for the subject years. Four years later, he filed bankruptcy and commenced an adversary proceeding to determine the tax debt dischargeable. The IRS argued that what he filed were not "returns" within the meaning of § 523(a)(1)(B)(i), which excepts from discharge a tax for which a "return" was not filed. The IRS argued that because it had already filed tax forms and assessed tax, the documents from the Debtor could not have been an "honest and genuine endeavor" to satisfy the tax laws as required to constitute a "return." The Court of Appeals examines cases in several other Circuits, which look to the filer's subjective intent in filing a purported return to determine honesty and genuineness. The Eighth Circuit adopts the view set out in a dissent by Judge Easterbrook in the Seventh Circuit, that there is no "motive" requirement in the definition of a return. Motive may affect the consequences of a return, but not the definition. The Eighth Circuit holds that the filer's subjective intent is irrelevant in determining whether a "return" has been filed for dischargeability purposes.

24. CURE OF ASSET OMISSION EARNS DEBTOR A DISCHARGE

Ellsworth v. Bauder (In re Bauder), 333 B.R. 828 (8th Cir. BAP (Iowa) 11/14/05) (Venters, J.)

In a split decision of the three-judge panel, the Eighth Circuit BAP reverses as clearly erroneous a bankruptcy court's finding that the debtor knowingly and fraudulently made a false oath when she initially failed to schedule a diamond ring owned by her and in her daughter's possession. The debtor, with limited education and attention deficit disorder, told the bankruptcy court that she failed to schedule a \$300 diamond ring as an asset because she (a) forgot it or (b) thought she must only list items in her possession. She also testified that in its battered condition, the ring was worth only a few dollars. The ring was brought to the debtor's attention at the § 341 meeting, and she amended her schedules to list it and some other things in her daughter's possession. Finding her explanations contradictory and not credible, the bankruptcy court denied her discharge. The BAP reverses. The court finds that her explanations could be reconciled and were not contradictory; that the trial court gave insufficient weight to her amendment of her schedules, which might evidence innocent intent; that the omission was not material in light of the uncontradicted testimony about the ring's value; and that compared to the debtor in a recent unpublished Eighth Circuit decision, this debtor was not sufficiently culpable to lose her discharge. The dissent notes that a reviewing court should not reverse findings of fact simply because it would have decided the case differently.

25. CONVERSION CLAIM REQUIRES ACT BY DEBTOR

Litzinger v. Estate of Victor Litzinger (In re Litzinger), 340 B.R. 897 (8th Cir. BAP (Mo.) 4/4/06) (Kressel, C. J.)

The Eighth Circuit BAP reverses a part of the Missouri bankruptcy court order allowing a claim for conversion against the debtor. Debtor's ex-husband was the personal representative of his deceased uncle's probate estate. While they were married, he held probate estate funds in a joint account with the debtor. While the funds were in that account, the debtor withdrew \$40,000 and a judgment creditor of the couple garnished \$90,000. After the debtor divorced and filed Chapter 7, the probate estate filed a claim for \$130,000 for conversion, and the bankruptcy court allowed it. On appeal, the BAP first determined

that the "probate exception" to federal jurisdiction does not apply because the claim did not "interfere" with the probate estate. The BAP then examined the Missouri law of conversion, which requires the wrongful unauthorized assumption of the right of ownership over property of another. It affirmed the debtor's withdrawal of \$40,000 as a conversion. The garnishment, however, was not a conversion. Although a defendant's knowledge, intent, and motive are not relevant to determining conversion liability, the defendant must intend to do the act which deprives the other of property. The judgment creditor garnished, and there was no act by the debtor to deprive the probate estate of funds.

26. DISTRICT COURT JUDGMENT INSUFFICIENT BASIS FOR NONDISCHARGEABILITY

Jamrose v. D'Amato (In re D'Amato), 341 B.R. 1 (8th Cir. BAP (Mo.) 4/4/06) (Venters, J.)

The Eighth Circuit BAP reverses the Missouri bankruptcy court determination that a district court partial summary judgment was collateral estoppel on § 523(a)(6) non-dischargeability. Debtors were sued in district court by the Better Business Bureau over fraudulent use of BBB reports, and the district court entered partial summary judgment against the debtors. In bankruptcy a group of consumers alleged non-dischargeability based on the district court judgment, and the bankruptcy court found collateral estoppel. On appeal, the BAP reviewed the elements of collateral estoppel under federal law: identical issue, final adjudication on the merits, same parties, and full opportunity to be heard. The BAP first addressed whether the partial summary judgment was sufficiently final for the second element of the test. The court considered the per se rule that no partial summary judgment is final for collateral estoppel purposes, but concluded that the Eighth Circuit would likely favor the more liberal view that the judgment be "sufficiently firm" to be preclusive; and the court found that there was finality. The BAP reversed, however, finding that the district court judgment did not establish the "malicious" prong of the § 523(a)(6). There was no indication that debtors targeted their conduct to these plaintiffs. More importantly, there was no evidence on the record of the existence or cause of the injuries plaintiffs alleged.

27. STATE COURT MAY DETERMINE § 523(A)(3) DISCHARGEABILITY AND NO SANCTION AGAINST CREDITOR LACKING ACTUAL KNOWLEDGE OF CASE

Everly v. 4745 Second Avenue Ltd. (In re Everly), 2006 WL 2135913 (8th Cir. BAP (Iowa) 8/2/06) (Kressel, C. J.)

The Eighth Circuit BAP affirms the bankruptcy court's denial of the debtor's motion for sanctions for violation of the discharge injunction. In 2002 debtor filed a Chapter 13 and gave notice to his corporate creditor through mailing to the address of the son of the owner. The creditor's attorney filed a notice of appearance and was active in the Chapter 13. After a few months the Chapter 13 was dismissed and closed. Within a month after this, the debtor filed Chapter 7, again sending notice to the corporate owner's son (who, it was later determined, was out of town). No notice was sent to the corporate address or to the corporation's attorney. The debtor received a discharge. The next year the creditor sued the debtor in state court on its claim arising out of debtor's pre-Chapter 13 burglary and arson. Debtor's motion to reopen the Chapter 7 case—again not served on the corporate address or corporate attorney—was granted, and debtor brought a motion for sanctions. The bankruptcy court denied the motion and left to the Iowa state court the question of whether the debt was discharged.

On appeal, the BAP affirms under the abuse of discretion standard, finding that the bankruptcy court carefully reviewed the facts before concluding that the creditor did not have actual knowledge of the Chapter 7 case. The BAP also noted that the § 523(a)(3) exception to discharge for unscheduled debt is self effectuating, and if the debtor wanted the bankruptcy court to decide that issue, he should have brought an action for injunction under Bankruptcy Rule 7001(6). He did not do so, and since state courts

have jurisdiction to determine dischargeability under § 523(a)(3), it was appropriate for the bankruptcy court to leave the issue to the state court and address only the issue presented to it.

28. HARDSHIP DISCHARGE UPHELD ON TOTALITY OF CIRCUMSTANCES

Cumberworth v. US Department. of Education (In re Cumberworth), 2006 WL 2290565 (8th Cir. BAP (Iowa) 8/10/06) (McDonald, J.)

The Eighth Circuit BAP affirms the grant of a hardship discharge where the debtor and her spouse are 100% permanently disabled. The debtor, formerly a VA hospital nurse, made timely payments on her student loan for five years until she became disabled. Thereafter she renegotiated the loan amounts and continued payment for another several years, until the DOE demanded increased payments. Her husband, a Vietnam veteran is also totally disabled, and his VA-appointed fiduciary testified that he cannot pay the personal debt of a spouse without VA consent. The court found that the debtor's income is \$2,145.00 per month against her share of household expenses of \$2,074.00. The bankruptcy court considered her income and expense, her good faith attempts to pay the debt and to negotiate with the DOE, and the permanent nature of her disability, and granted the hardship discharge. On appeal, the DOE argued, among other things, that the husband's income must be counted, the court should have used "certainty of financial hopelessness" as a standard, the family expenses were unreasonable, and the court should not have considered non-economic factors such as attempts to pay and permanency of disability.

The BAP, reviewing the legal determination of undue hardship de novo and the underlying facts for clear error, affirms. It notes that the undue hardship test is fact intensive and requires consideration of the totality of the circumstances. Although courts usually consider income of the non-debtor spouse, in this case the evidence supported the finding that this spouse's disability income could not be applied toward loan repayment and was properly excluded. The BAP went on to conclude that, although some courts have superimposed a "certainty of financial hopelessness" over the required "totality of the circumstances" test, the former is unduly rigid and is not consistent with the flexibility built in to the totality of the circumstances test. The bankruptcy court conducted the appropriate fact intensive inquiry here. It did a line by line analysis of expenses and reduced those not reasonable and necessary, which the BAP discusses. It considered the testimony of the debtor and her spouse, which was the only record of their expenses and their unique circumstances. It declined to substitute the standards of an "income contingent repayment plan" for the § 523(a)(8) undue hardship standard, and the BAP noted that the latter is correct because it is more relevant and "dynamic." Finally, the BAP agrees that the lower court properly considered the other non-economic factors, such as debtor's efforts to pay, actions to reduce expenses and renegotiate, and the permanent nature of her disability. The BAP notes that the court has the flexibility to do this under the totality of the circumstances test.

29. FORGING ESTRANGED SPOUSE'S SIGNATURE TO A CREDIT APPLICATION IS WILLFUL AND MALICIOUS

Olson v. Olson (In re Olson), ADV 05-3234 (Bankr. D. Minn. 2006) (O'Brien, J.)

Susan Olson was the proud holder of a Chase credit card. When she separated from her husband, Randy, she requested a form from Chase in order to add Randy's name to the card. She filled out the form and forged Randy's name, submitted it, thereby adding Randy as a obligor on the credit card. She ran up the amount on the card and filed bankruptcy. Chase released Susan from her obligation under the card and started trying to collect the balance of \$19,500.00 from Randy. Randy brought this adversary proceeding against Susan, claiming he had a claim against her which was nondischargeable. Judge O'Brien agreed and concluded that Susan's actions were willful and malicious and therefore her obligation to hold Randy

harmless was excepted from her discharge. In a footnote, Judge O'Brien wondered why Randy had not raised the forgery as a defense to Chase's collection attempts. Perhaps he his working on it.

30. THE DISTRICT COURT AGREES THAT A DEBTOR ONLY GETS SO MANY CHANCES TO FESS UP

Barnett v. Fokkena, 2006 WL 738064 (D. Minn. 2006) (Tunheim, J.)

The debtor in this case got caught filing schedules that grossly understated assets and past income. The trustee tried to resolve various discrepancies between the schedules and testimony at the meeting of creditors and asked for documents, only some of which were forthcoming. Eventually, the U.S. Trustee filed a complaint to deny the debtor's discharge. While the debtor originally contested the complaint, he later discharged his lawyer and filed a withdrawal of his Answer. The U.S. Trustee then moved for default or summary judgment. A new attorney appeared on behalf of the debtor at the hearing, indicated that the debtor now lived in Nevis, and wanted now to reinstate his answer. Chief Judge Kishel denied him that opportunity and granted summary judgment, denying the debtor's discharge under § 727(a)(5) based on his failure to satisfactorily explain the loss or deficiency of assets, under § 727(a)(4)(a) based on his false schedules, under § 727(a)(4)(d) for failure to keep adequate records and under § 727(a)(7) for various acts regarding an insider's bankruptcy case. Judge Tunheim affirmed both Chief Judge Kishel's refusal to allow the debtor to interpose an answer at such a late date and his grant of summary judgment.

31. INCURRING A MORTGAGE IN VIOLATION OF A STATE FAMILY COURT INJUNCTION DOES NOT NECESSARILY GIVE RISE TO FRAUD

Schomburg-Osland v. Osland (In re Osland), 2006 WL 503240 (D. Minn. 2006) (Montgomery, J.)

The debtor in this case had taken out a mortgage on real estate while a divorce was pending in violation of the family court order. When he filed bankruptcy, the debtor's spouse objected to the exemption claim to the extent that he had encumbered the property with a second mortgage in violation of the state court order. Apparently, the theory was that there was a transfer with the intent to hinder, delay, or defraud creditors, which would entitle the court to reduce the exemption claim. It is difficult from the facts in the opinion to indicate how this would apply since the creation of the mortgage *reduced* the amount of the debtor's exemption, rather than increased it. In any case, Chief Judge Kishel overruled the exemption and Judge Montgomery affirmed.

H. Dismissal and Conversion

32. CIRCUMSTANCES DO NOT MERIT WAIVER OF PRE-PETITION CREDIT COUNSELING REQUIREMENTS

Dixon v. LaBarge (In re Dixon), 338 B.R. 383 (8th Cir. BAP (Mo.) 1/31/06) (Kressel, C.J.)

In the first appellate decision addressing the issue, the Eighth Circuit BAP affirms the bankruptcy court's dismissal of an individual debtor's case for failure to establish exigent circumstances meriting a waiver of the pre-petition counseling requirements. The alleged exigent circumstances were that the debtor's residence was scheduled for a foreclosure sale the same day he filed bankruptcy. The debtor had sought credit counseling after contacting an attorney the previous day, but was unable to obtain counseling and had to file a Chapter 13 in order to avert the foreclosure sale. The bankruptcy court observed that Missouri law requires twenty days notice of a foreclosure sale and that in the face of such notice, the alleged exigent circumstances did not merit a waiver of the pre-petition credit counseling requirements.

On appeal, the BAP found that "a review of the reported decisions on facts similar to these, discloses that most courts have come to the same conclusion" and that as a reviewing court it is not in a position to substitute its judgment for that of the bankruptcy court.

33. FAILURE TO RECEIVE CREDIT COUNSELING OR FILE SATISFACTORY CERTIFICATE OF EXIGENT CIRCUMSTANCES RESULTS IN DISMISSAL OF CASE

Hedquist v. Fokkena (In re Hedquist), 342 B.R. 295 (8th Cir. BAP (Minn.) 04/21/06) (Federman, J.)

The Eighth Circuit BAP affirms the bankruptcy court's dismissal of debtors' Chapter 11 case for failure to comply with the 11 U.S.C. § 109(h) credit counseling requirements. Husband and wife debtors filed for relief under Chapter 11 on the eve of a foreclosure after failing to negotiate a settlement with their mortgage company. The debtors did not obtain credit counseling prior to filing their petition. Debtors filed an affidavit indicating that credit counseling was not received because they were attempting to negotiate with the mortgage company. The case was immediately dismissed because the debtors had failed to comply with 11 U.S.C. § 109(h) in that debtors had not received credit counseling and had not filed a satisfactory certificate of exigent circumstances. The bankruptcy court determined that the affidavit did not satisfy the requirements for the certificate. The certificate must satisfy three requirements in requesting a 30-day exemption from the credit counseling requirements: (1) the certificate must describe exigent circumstances that merit a waiver of the briefing requirement; (2) the certificate must state that the debtors requested credit counseling services from an approved agency but were unable to obtain the services within five days; and (3) the certificate must be satisfactory to the court. The BAP holds that waiting until the eve of a mortgage foreclosure does not constitute exigent circumstances. See *In re Dixon*, 338 B.R. 383, 388 (8th Cir. BAP 2006). The BAP also agrees that the dismissal was appropriate before the 30-day exemption period expired because the debtors are only entitled to the 30-day exemption after they have filed a certificate satisfactory to the bankruptcy court, which in this case the debtors failed to do. The BAP further holds that the credit counseling requirements for individuals did not violate the debtors' equal protection rights under the Fourteenth Amendment because the credit counseling requirement is intended to educate individuals and assist in promoting their financial health, which does not impermissibly discriminate against individuals, as opposed to corporations, for an invalid reason. Finally, the BAP holds that the credit counseling requirements did not violate the debtors' Fifth Amendment right to due process because individuals are not a suspect class and a discharge under the Bankruptcy Code is not a fundamental right that is burdened by the credit counseling requirement.

34. CREDIT COUNSELING BRIEFING OR EXIGENT CIRCUMSTANCES ARE PREREQUISITES TO BEING AN ELIGIBLE DEBTOR; DISMISSAL REQUIRED

In re LaPorta, 332 B.R. 879 (Bankr. D. Minn. 2005) (Kishel, C.J.)

In this case filed after the effective dates of BAPCPA, the debtor did not obtain a briefing from a credit counseling agency, but rather filed a three paragraph, unverified, unsigned statement that began "As far as credit counseling goes . . ." She said she could not find an agency that was accessible to her at a cost she could afford. She also filed another statement labeled "URGENT" indicating that her car was on the verge of being repossessed. Chief Judge Kishel held that the certification required by the statute needed to be subscribed to under penalty of perjury in order to qualify as a certification. He also held that her statement of exigent circumstances were not satisfactory to the court. He concluded that the debtor was therefore ineligible to be a debtor and that dismissal was required.

35. MORE EXIGENT CIRCUMSTANCES NOT JUSTIFYING AN EXEMPTION FROM BRIEFING

In re Wallert 332 B.R. 884 (Bankr. D. Minn. 2005) (Kishel, C.J.)

Another debtor whose home was on the verge of foreclosure filed a petition without a certificate from a credit counseling agency that she had obtained the statutory briefing. The stated exigent circumstances were that her home was under threat of mortgage foreclosure. While Judge Kishel acknowledged that perhaps her circumstances were exigent, the debtor had failed to explicitly indicate that she was unable to obtain the briefing within five days of her request. Again, he dismissed her case.

36. BANKRUPTCY COURT DID NOT ABUSE DISCRETION IN DENIAL OF DEBTOR'S MOTION TO CONVERT OR DISMISS CHAPTER 7 CASE

In re Willis, 345 B.R. 647 (8th Cir. BAP (Ark.) 06/29/06) (Federman, J.)

The Bankruptcy Appellate Panel for the Eighth Circuit affirms the bankruptcy court's denial of debtor's motion to convert or dismiss Chapter 7 case. Debtor's case was originally filed without debtor's signature or authority as a Chapter 13 case. The case was converted from Chapter 13 to Chapter 7. After numerous continuations of the 341 Meeting and several months delay, the debtor finally revealed that she did not sign her petition. After creditors and the trustee sought turnover of property and documents, as well as numerous creditors sought relief from the stay, debtor filed a motion to convert to Chapter 11 or for a dismissal premised on the fact that she did not sign her petition. The BAP determines that the bankruptcy court correctly found that the debtor was equitably estopped from claiming that her failure to sign her petition was grounds for a dismissal because the debtor had enjoyed the benefits of bankruptcy and the automatic stay for months without the burdens of being a debtor such as turnover of property and information to the trustee, while knowingly failing to bring the deficient petition to the court's attention or correcting the deficiency. In addition, the trustee in opposing the motion to convert or dismiss had presented evidence of debtor's fraudulent, evasive and uncooperative behavior. The BAP determines that the bankruptcy court did not abuse its "broad discretion" in determining to not dismiss the case. Debtor could not convert her case to Chapter 11 as of right pursuant to 11 U.S.C. §706(a) because the case had previously been converted from Chapter 13 to Chapter 7.

I. Professionals and Fees

37. EIGHTH CIRCUIT REDUCES SANCTIONS FOR ATTORNEY FILING CHAPTER 13 WITHOUT CLIENT CONSENT

Briggs v. Labarge (In re Phillips), 433 F.3d 1068 (8th Cir. (Mo.) 1/09/06) (Beam, J.)

The Eighth Circuit Court of Appeals finds that the bankruptcy court abused its discretion in heavily sanctioning an attorney who filed a Chapter 13 without first consulting with his client, where the attorney acted with good intentions. Appellant was a new attorney with a firm that previously filed a Chapter 13 for the debtor, which was dismissed. As foreclosure on her home loomed and her calls to the firm escalated, he electronically filed a Chapter 13 for her based on previous signatures and without contacting her. Due to an error in her address, the debtor never received any notices and the Chapter 13 was dismissed. When this came to the bankruptcy court's attention, the court found a violation of Rule 9011, assessed monetary sanctions, and referred the attorney for professional discipline and criminal prosecution. On appeal, the Eighth Circuit agrees that an attorney violates Rules 9011 when he fails to make reasonable inquiry of his client regarding the factual and legal basis for the bankruptcy filing. The court finds, however, that the attorney acted with good intentions and is not responsible for the errors that

occurred in the first case, before he was hired by the firm. Therefore, the court's onerous sanctions were not appropriate.

38. CONFLICT REQUIRED DISGORGEMENT OF ATTORNEY FEES

Briggs v. LaBarge (In re McGregory), 340 B.R. 915 (8th Cir. BAP (Mo.) 03/24/06) (Federman, J.)

The Eighth Circuit BAP affirms the bankruptcy court's finding that the debtor's attorney's representation of a Chapter 13 debtor and a finance company in the refinance of debtor's home was an actual conflict and affirmed the bankruptcy court's order on disgorgement of the debtor's attorney's fees. The debtor's attorney assisted a debtor file a Chapter 13 case, and the debtor's attorney was compensated \$1,700.00 for attorney's fees during the course of the case. The debtor's attorney subsequently entered into the employment of a finance company assisting the finance company arrange for the refinancing of homes for Chapter 13 debtors that permit Chapter 13 debtors to exit Chapter 13 early. The debtor's attorney offered this service to the particular Chapter 13 debtor that he was representing. The bankruptcy court approved the new debt, which entitled the debtor's attorney to a commission from the finance company, but also determined that the debtor's attorney's employment with the finance company and representation of the Chapter 13 debtor was an actual conflict of interest and the debtor's attorney would therefore be precluded from receiving his attorney's fees in the bankruptcy case and would be required to disgorge those fees already paid through the case. The BAP affirms the bankruptcy court's finding that the debtor's attorney had an actual conflict and that any waiver of this type of conflict by a Chapter 13 debtor would be ineffective because the conflict simply could not be waived. The BAP further affirms the disgorgement of the debtor's attorney's fees because disgorgement of professional fees is appropriate in a bankruptcy case if the professional represents a party that has an interest adverse to the bankruptcy estate, even if no harm can be shown to the debtor.

39. ATTORNEY SANCTIONED FOR FRIVOLOUS APPEAL

Tina Livestock Sales, Inc. v. Schachtele (In re Schachtele), 343 B.R. 661 (8th Cir. BAP (Mo.) 5/11/06) (Federman, J.)

The Eighth Circuit BAP orders appellant's attorney to pay the debtors' attorney fees on appeal where the appellant, among other things, lacked standing to appeal. Before their Chapter 13, debtors paid a creditor with a bad check, which they partially repaid before filing. Their lender objected to confirmation of the plan and the creditor joined in the objection. The lender later withdrew its objection, but the creditor did not, and the court overruled it at confirmation. The creditor then failed to file a proof of claim in the case. When the debtors filed a modified plan changing the treatment of their secured claim only, the creditor again objected on the same grounds as before and appealed the court's order allowing the amendment. After making its objection, it also failed a late proof of claim. While the appeal was pending, the debtors again moved to modify the treatment of the secured claim only, and the creditor again objected on the same grounds. The court allowed the amendment and also allowed the creditor's claim, but to be paid after all other creditors were paid 100%. The creditor appealed both orders and all of the appeals were consolidated. After oral argument, the creditor dismissed its appeals, but the BAP issued an order to show cause why the appellant should not be sanctioned for frivolous appeal under Rule 8020. The BAP concludes that the appeal was frivolous because the result was obvious and appellant's argument was wholly without merit. No finding of bad faith is required. First, having not filed a proof of claim, the creditor had no standing to object to plan modifications. In addition, the modifications did not adversely affect the payout to unsecured claims so confirmation of the original plan was res judicata as to the creditor's issues. Finally, the objections to the plans were without merit. The creditor made no showing that the debtors lacked a good faith, or that its debt would be non-dischargeable in Chapter 7. The result of the appeals was obvious and the appeals were frivolous.

40. AN ATTORNEY WHO ELECTRONICALLY FILES AN ANSWER FOR A DEFENDANT IS DEEMED TO HAVE SIGNED THE ANSWER AND BECOMES THE DEFENDANT'S LAWYER

Levine v. Levine (In re Levine), ADV 05-3046 (Bankr. D. Minn. August 5, 2005) (Kishel, C.J.)

A lawyer who was a registered participant in the court's electronic records system filed an answer on behalf of an adversary proceeding defendant who was purportedly *pro se*. Chief Judge Kishel held that even though the lawyer had not otherwise signed the answer, that the filing of a document by the attorney constituted the attorney's signature and therefore obligated him as the defendant's attorney.

J. Miscellaneous

41. NO ERROR IN FACTS OR LAW DISMISSING COMPLAINT AGAINST MORTGAGEE

Dale v. HomeEq Servicing Corporation (In re Dale), 332 B.R. 574 (8th Cir. BAP (Mo.) 11/04/05) (Schermer, J.)

After a unique procedure at the trial court, the Eighth Circuit BAP holds that the trial court did not err in finding facts or applying law when it dismissed the debtor-plaintiff's complaint. Following a series of bankruptcy filings and renegotiations of her mortgage, and this Chapter 13 filing, the debtor sued her mortgagee for 15 counts of statutory and other wrongdoing. The parties agreed that the debtor would do her discovery and present her case, and the defendant would move for judgment on partial findings under Rule 52. If any claims remained, the defendant would conduct discovery and those claims would go to trial. After the hearing on the debtor's case and Rule 52 motions, the bankruptcy court entered judgment for the defendant on all counts. On appeal, the BAP finds no error in fact or law, adopts the bankruptcy court's findings and conclusions, and affirms.