

**SURVEY OF RECENT DECISIONS**  
**OF**  
**THE HONORABLE PAUL J. KILBURG**

**U.S. Bankruptcy Court  
Northern District of Iowa**

**August 27, 2002 – October 24, 2003**

**Prepared by**

**Amy M. Kilpatrick  
Law Clerk**

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The case summaries are categorized to correlate with the Key Number Classification of West's Bankruptcy Digest. West's key numbers are included in the topic headings below. Summaries of prior decisions (April 23, 1993 to present) are available on our web site, [www.ianb.uscourts.gov](http://www.ianb.uscourts.gov).

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## **I. IN GENERAL, 2001-2120**

### **D. Venue; Personal Jurisdiction, 2081-2100**

In re J.G. Robins Inc.

No. 03-01789, 2003 WL 22006015, Ch. 11, 8/22/03

28 U.S.C. § 1408

Fed. R. Bankr. P. 1014(a)(2)

Debtor filed for a Chapter 11 petition in the Northern District of Iowa even though all Debtor's assets are located in Johnson County which is in the Southern District of Iowa. Debtor's shareholders, officers, and directors reside in Johnson County. Creditor seeks dismissal or transfer based on improper venue. HELD: This Court will administer cases improperly filed in the district so long as no venue objections are lodged. In light of the objection herein, the Court is without power to retain the case. Transfer to the Southern District, rather than dismissal, better serves the interests of justice and the convenience of the parties.

## **II. COURTS; PROCEEDINGS IN GENERAL, 2121-2200**

### **B. Actions and Proceedings in General, 2151-2180**

Iowa Oil Co. v. T Mart Inc. (In re Iowa Oil Co.)

No. 03-00418, Adv. 03-9058, 2003 WL 22077865,  
Ch. 7, 8/29/03

Fed. R. Bankr. P. 7055

Fed. R. Bankr. P. 7004(b)(3)

Fed. R. Civ. P. 55, 60(b)

Defendant seeks relief from the default judgment entered against it. It asserts that it never received a copy of the summons and complaint. HELD: Where service is properly executed by mail under Bankruptcy Rule 7004(b)(3), there is a presumption that it was received. Default judgment can be set aside for good cause including mistake, inadvertence, surprise, or excusable neglect. The fact that Defendant may have a meritorious claim is also relevant. As there will not be significant prejudice to Debtor and delay will not be great, this Court will vacate a default judgment on the grounds of excusable neglect even when Defendant's internal procedures caused the lack of notice. Defendant is required to post a bond for the amount in controversy and pay Debtor's attorney fees for pursuing and defending the default judgment.

Schnittjer v. Alliant Energy Co. (In re Shalom Hospitality Inc.)

No. 02-00276, Adv. 02-9122, 293 B.R. 211, Ch. 7, 5/14/03

Fed. R. Evid. 702

11 U.S.C. § 547

Trustee seeks to exclude expert testimony regarding the use of a "weighted days" calculation in analyzing Debtor's delinquencies. HELD: The Court will admit the expert testimony. It may assist the Court in determining if the defendant has proven the payments received were in the ordinary course of business under § 547(c)(2)(C). This expert's opinion was heard by another bankruptcy court regarding a similar issue.

In re Robin & Susan Hupton

No. 02-02159, 287 B.R. 438, Ch. 7, 12/19/02

Fed R. Bankr. P. 7052

9023

Debtor seeks reconsideration of order denying exemption of annuity. HELD: A motion under Rules 7052 or 9023 is not the proper vehicle to raise applicability of law of another forum or other legal or factual arguments not previously raised.

### **III. THE CASE, 2201-2360**

#### **A. In General, 2201-2220**

In re Vernon Wayne Cooper 11 U.S.C. § 7004(e)  
No. 02-03566, Involuntary Ch. 7, 1/6/03

Debtor requests dismissal based on his assertion that the summons in this involuntary case was not timely served. HELD: The remedy for failure to timely serve a summons is issuance of a new summons, not dismissal.

#### **C. Voluntary Cases, 2251-2280**

In re Ronald & Sharon Zuehlke 11 U.S.C. § 707 (b)  
No. 03-01398, 298 B.R. 610, Ch. 7, 8/13/03

U.S. Trustee seeks dismissal for substantial abuse. Debtors receive substantial amounts of money every month in the form of disability benefits and social security. HELD: The Court examines Debtor's ability to fund a Chapter 13 plan in determining whether substantial abuse exists under § 707(b). Debtors have stable income of over \$47,000 per year and have listed \$800 of additional unitemized expenses in "Other" on their amended schedule. Debtors have monthly disposable income of between \$700 and \$1,000 and are able to fund a Chapter 13 plan paying at least one-fourth of the \$60,000 of outstanding unsecured debt.

In re Chuck and Marie Downin 11 U.S.C. § 707(b)  
No. 02-01379, 284 B.R. 909, Ch. 7, 10/7/02

United States Trustee moves to dismiss case based upon substantial abuse of the provisions of Chapter 7. HELD: By including tax refunds as income and reducing discretionary spending, debtors could fund a Chapter 13 plan. Granting debtors Chapter 7 relief would constitute substantial abuse of the provisions of the Bankruptcy Code.

#### **E. Joint Cases, 2311-2320**

In re Vernon Cooper, In re Connie Ann Cooper Fed. R. Bankr. P. 4003(b)  
No. 02-03566, No. 03-00235, 2003 WL 1965711, 4007(c)  
Ch. 7, 4/7/03 3002(c)

Debtors are spouses who have filed bankruptcy petitions separately, one in the District of Minnesota and the other in the Northern District of Iowa. The Minnesota case was transferred and both proceedings are now pending in Iowa. Trustee seeks to consolidate the two cases, to extend deadlines to file objections to exemptions, to extend time to object to discharge, and uniform dates to file proofs of claims with respect to both cases. HELD: Trustee's request to administratively consolidate the cases is denied. While it is normally appropriate to consolidate cases of two spouses, it is not appropriate to do so if it would be detrimental to any class of creditor. Extension of the deadline to object to exemptions is not necessary at this time. Trustee does not have standing to seek extension of the deadline to object to dischargeability of debts under § 523(a). The deadline to object to discharge is extended in Connie Cooper's case to coincide with the deadline in Vernon Cooper's case. The claims deadlines are the same for both cases and will not be extended at this time.

#### **IV. EFFECT OF BANKRUPTCY RELIEF; INJUNCTION & STAY, 2361-2490**

##### **D. Enforcement of Injunction or Stay, 2461-2480**

In re Edward & Janet Alcock

11 U.S.C. § 362(a, h)

No. 02-03640, 2003 WL 22110446, Ch. 7, 9/11/03

Debtors seek sanctions against Creditor for violating the automatic stay. Creditor continued to automatically withdraw funds from Debtor's bank account after receiving notice of the bankruptcy. It had received notice of the case from the Clerk and from Debtors themselves. HELD: Where Creditor has knowledge of the bankruptcy and proceeds to collect the debt, it has violated the automatic stay. Creditor must reimburse the amounts wrongfully taken and all damages incurred by Debtors due to the violation, including attorney fees. Further, punitive damages are appropriate as the creditor refused to communicate with Debtors or their counsel and did not cure the violation.

In re Terri J. Goodfellow

11 U.S.C. § 362(a, h)

No. 02-04467, 298 B.R. 358, Ch. 7, 9/3/03

§ 524(a)(2)

Debtor seeks damages for Creditor's violation of the automatic stay and post-discharge injunction. Creditor continued to send Debtor requests for payments in the mail and made several phone calls requesting payment after receiving notice of the bankruptcy. HELD: Creditor's phone calls were persistent and harassing. Creditor is liable for actual damages, attorney fees, and punitive damages for violating the automatic stay.

In re Robert & Diane Graves

11 U.S.C. § 362(a, h)

No. 02-04233, 2003 WL 21781968, Ch. 7, 7/29/03

Debtors seek sanctions against Creditor for violation of the automatic stay. Creditor made several phone calls and sent several letters to Debtors demanding payment after receiving notice of the bankruptcy.

Creditor has not filed an appearance or contacted Debtors' counsel. HELD: Creditor willfully violated the automatic stay and Debtors are entitled to \$500 in actual damages, \$400 for attorney fees, and \$1,500 for punitive damages.

In re Jonas & Julia Bandy

11 U.S.C. § 362(a, h)

No. 03-00753, 2003 WL 21781995, Ch. 7, 7/29/03

Debtors seek sanctions against Creditor for violating the automatic stay. Creditor is undersecured and possesses a second mortgage on Debtor's home. After Debtors filed their bankruptcy petition, the Creditor made at least 21 phone calls and sent at least six letters to Debtors demanding payment. Creditor did not file an appearance in this matter. HELD: Creditor's postpetition contacts with Debtors violated the automatic stay. Furthermore, now that discharge has entered, any post-discharge contact by this undersecured creditor must be minimal, unobtrusive, polite, and with no greater frequency than a debtor not in bankruptcy would reasonably expect. Debtors are entitled to actual damages of \$500, attorney fees of \$400, and punitive damages of \$1,500.

In re Robert & Diane Graves

11 U.S.C. § 524(a)

No. 02-04233, 2003 WL 21277169, Ch. 7, 5/30/03

Debtors seek sanctions against Creditor for civil contempt for violations of the post-discharge disjunction. HELD: The motion is denied because the attempts to collect the debt by Creditor occurred prior to discharge. Debtor is not precluded from bringing a motion for sanctions for violating the automatic stay under § 362(h).

In re Jonas & Julia Bandy

11 U.S.C. § 524(a)

No. 03-00753, 2003 WL 21277167, Ch. 7, 5/30/03

Debtors seek sanctions against Creditor for civil contempt for violations of the post-discharge disjunction. HELD: The motion is denied because the attempts to collect the debt by Creditor occurred prior to discharge. Debtor is not precluded from bringing a motion for sanctions for violating the automatic stay under § 362(h).

## **V. THE ESTATE, 2491-2760**

### **C. Property of Estate in General, 2531-2570**

In re Robin & Susan Hupton

11 U.S.C. § 541(c)

No. 02-02159, 287 B.R. 438, Ch. 7, 11/25/02

Iowa Code § 633.2101

Trustee objects to debtor's exemption of her interest in an annuity contract and seeks turnover of the property. HELD: The annuity payments do not fall within the Iowa exemption for payments under a pension, annuity, or similar plan or contract. The annuity's origin as an individual retirement annuity does

not qualify it for exclusion from the bankruptcy estate based on the Supreme Court's Patterson decision and its progeny. Furthermore, it is not a spendthrift trust under Iowa law.

#### **D. Liens & Transfers; Avoidability, 2571-2600**

Schnittjer v. John Deere Community Credit Union  
(In re Kohlmeyer), No. 02-01557, Adv. 02-9078,  
2003 WL 21212609, Ch. 7, 5/14/03

Iowa Code § 321.50(6)

Trustee seeks to avoid Creditor's lien on Debtors' vehicle because the lien was not recorded on the certificate of title within 30 days after the date on which the security agreement refinancing Debtors' vehicle was executed. HELD: Creditor's lien is valid. In these circumstances, the 30-day time limit for perfection began on the day that Creditor received the certificate of title, not the day on which the previous lienholder released its lien or the date the security agreement was executed.

Youngblut v. John Deere Community Credit Union  
(In re Kohlmeyer), No. 02-01557, Adv. 02-9078,  
2002 WL 31324150, Ch. 7, 9/17/02

11 U.S.C. § 544(a)  
Iowa Code § 321.50(6)

Trustee seeks to avoid lien on debtor's automobile and requests summary judgment. HELD: The Iowa statute requiring creditors to perfect liens in automobiles within 30 days, does not apply to creditor's lien on debtor's vehicle arising from refinancing of an earlier loan. Summary judgment denied.

#### **VI. EXEMPTIONS, 2761-2820**

In re Lawrence & Janet McCabe  
No. 02-00250, 299 B.R. 564, Ch. 7, 9/3/03

Iowa Code § 561.20

Creditors object to Debtors' claimed homestead exemption because it is larger than the one-half acre allowed by Iowa law. Debtor's assert that the excess property is de minimis in size and has little or no value to the creditors. HELD: The plain language of Iowa's homestead statute provides for one-half acre in city limits and there are no exceptions to the maximum size. The excess property has value to either Debtors themselves or adjacent landowners.

In re Charlene D. White  
No. 02-04050, 293 B.R. 1, Ch. 13, 4/17/03

Iowa Code § 561.16  
§ 561.20

Creditor objects to Debtor's homestead exemption claiming that all debts constitute pre-acquisition debt. HELD: The objection is denied and the homestead is exempt from Creditor's claim. Debtor did not abandon the homestead by temporarily living in an apartment while a new home was being constructed. Placing funds from the sale of the homestead in a bank account does not terminate the exemption so long as

the funds can be traced. As to existing debts, the homestead exemption transfers to a new property to the extent of the value of the previously owned property.

In re Mary Buelow

11 U.S.C. § 522(h)

No. 02-01388, 287 B.R. 446, Ch. 7, 12/19/02

Chapter 7 trustee objects to debtor's claim of an exemption in her vehicle and seeks turnover. HELD: Debtor voluntarily granted a lien on the vehicle which the creditor failed to perfect and so was properly avoided by trustee. Debtor cannot exempt the vehicle to the extent of the voluntary, avoided lien. Under Iowa law, Debtor may exempt up to \$5,000.00 of the remaining value of the vehicle, if any, not subject to the lien.

In re Gordon & Dixie Powers

11 U.S.C. § 522

No. 98-03616, 286 B.R. 726, Ch. 7, 12/2/02

Iowa Code § 561.21

Debtor-wife moves to avoid judgment lien as impairing her state law homestead exemption. HELD: Under Iowa law, homestead property is not subject to a judgment lien held by a creditor of debtor-husband, notwithstanding any abandonment of homestead by him when he took up residence in apartment. Debtor-wife continued to occupy the property as her home from a date prior to entry of a small claims judgment against her husband. Judgment liens cannot attach to real estate claimed exempt under the Iowa homestead statute.

## **VII. CLAIMS, 2821-3000**

### **C. Administrative Claims, 2871-2890**

In re Tama Beef Packing Inc.

Fed. R. Bankr. P. 9023

No. 01-03822, 284 B.R. 889, Ch. 7, 9/10/2002

rev'd 290 B.R. 90 (B.A.P. 8th Cir. 2003)

appealed to Court of Appeals

Creditor applied for payment of administrative expense claim in Chapter 7 case that had been converted from Chapter 11. The court, 283 B.R. 274, denied the application, and creditor filed motion to alter or amend. HELD: The court's prior order is not based on manifest errors of law or fact.

### **E. Determination, 2921-2950**

In re Internet Navigator, Inc.

Fed. R. Bankr. P. 3001(f)

No. 01-02353, 293 B.R. 198, Ch. 11, 4/22/03

Iowa Code § 490.852

appealed to B.A.P. 8th Cir.

Proponent of confirmed plan objects to allowance of claim of Bradley & Riley Law Firm. Prepetition, the law firm represented the debtor corporation and three of its directors in previous lawsuits brought by three other corporate directors. HELD: The claim of Bradley & Riley is valid and shall be paid in full pursuant to the Chapter 11 plan. The objecting party has the burden to prove that a claim is invalid. The former president of the corporation had authority under corporate bylaws to contract with Bradley & Riley for the services rendered. Even though Bradley & Riley ceased representation upon the objection of the plaintiffs due to a possible conflict of interest, the firm is entitled to the attorney fees incurred. The defendant directors were "wholly successful" in the previous lawsuits because they incurred no personal liability. Iowa Code § 490.852 requires a corporation to indemnify directors in lawsuits when they are "wholly successful."

In re Internet Navigator, Inc.

No. 02-01388, 289 B.R. 133, Ch. 11, 1/28/03

11 U.S.C. § 502

Fed. R. Bankr. P. 3001(f)

Objections were filed to proofs of claim submitted by Chapter 11 debtor's former principals and shareholders, both as to the amount of such claims and to their characterization as debt rather than as equity. HELD: Funding that claimants had provided to debtor prior to commencement of its Chapter 11 case do not constitute capital contributions. The objector failed to rebut the prima facie validity of the claim.

## **VIII. TRUSTEES, 3001-3020**

## **IX. ADMINISTRATION, 3021-3250**

### **A. In General, 3021-3060**

In re R.J. Manufacturing Inc.

No. 01-04214, 2003 WL 1943322, Ch. 11, 4/22/03

Fed. R. Bankr. P. 9019

Trustee seeks Court approval of a compromise of Debtor's litigation pending in U.S. District Court. Debtor objects to the compromise and instead would prefer to proceed with litigation in hopes of a higher recovery. No creditors object to the compromise. HELD: The motion for approval of compromise is granted. The compromise will avoid the expense, burdens and uncertainty associated with litigation. Further, attorney fees for Debtor's trial lawyers are approved as there is no objection and the fees are in line with the fee agreement. Compensation and expense reimbursement to Debtor's president for actual and necessary expenses incurred for the preservation of the estate are approved as an administrative expense.

### **E. Compensation of Officers and Others, 3151-3250**

In re Bruce & Deanna Nilges

11 U.S.C. § 330(a)

No. 99-00326, 2003 WL 22328237, Ch. 12, 9/15/03

Debtor's attorneys seek approval of fees incurred subsequent to plan confirmation. Debtor, acting upon the advice of the attorneys, sold encumbered breeding stock in order to purchase feeder pigs without seeking approval of the lienholder. A substantial portion of the legal fees sought were incurred defending against the lienholder's motion for relief from stay that was filed by the lienholder upon learning of the sale of collateral. HELD: Creditors are entitled to notice of debtor's sale of estate property other than in the ordinary course of business. This Court is granted broad discretion in approving attorney's fees. The attorney must prove that such fees are reasonable. The Court uses the lodestar method in determining reasonable attorney fees. The Court will not approve fees incurred due to an attorney's poor advice or those incurred for services not requiring an attorney.

## **X. DISCHARGE, 3251-3440**

### **C. Debts and Liabilities Discharged, 3341-3410**

Lee v. O'Shaughnessy (In re O'Shaughnessy) 11 U.S.C. § 523(a)(15)  
No. 02-02624, Adv. 02-9159, 2003 WL 22339206, Ch. 7, 10/7/03

In the parties' dissolution action, they entered into a settlement agreement stipulating that each of them would pay one-half of a debt to Plaintiff's father for a loan arising during the marriage. Plaintiff seeks to have the debt excepted from discharge. HELD: Debt owed to Plaintiff's father by Debtor falls under § 523(a)(15). The stipulation in the dissolution action is a contract that creates a new obligation owed by Debtor. The Court will not consider potential gifts that either party may receive in examining their income or standard of living. Debtor and her spouse have significant income and a higher standard of living than Plaintiff. The exceptions to nondischargeability under § 523(a)(15) are not established.

Groth Services v. McDowell (In re McDowell) Fed. R. Civ. P. 12(b)(6)  
No. 03-00717, Adv. 03-9123, 2003 WL 22076527, Fed. R. Bankr. P. 7012(b)  
Ch. 7, 8/20/03 11 U.S.C. § 523(a)

Plaintiff seeks to have debt owed for installing a wastewater system excepted from discharge. Plaintiff asserts that state and county laws require that a maintenance agreement be in place regarding such systems. Because Debtor has not paid for the installation, the service agreement is void and Debtors will be in violation of state and county laws. HELD: Plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted. The pre-petition debt is discharged and Plaintiff is under no duty to provide further services for Debtors. Plaintiff cited no authority within § 523(a) as to why the debt should not be discharged.

Mulherin v. Sallie Mae Serv. Corp. (In re Mulherin) 11 U.S.C. § 523(a)(8)  
No. 02-00463, Adv. 02-9069, 297 B.R. 559, Ch. 7, 6/27/03

Debtor seeks to have student loans discharged based on undue hardship. HELD: Debtors have not demonstrated a "certainty of hopelessness" required to discharge student loans. This Court examines Debtors' past, present and reasonably reliable future financial resources, Debtors' living expenses, and all other relevant information in evaluating the totality-of -the-circumstances under § 523(a)(8). Debtors have substantial income. Also, Debtor's ability to pay will increase in the near future as other obligations are fulfilled.

In re Kevin Harbaugh

No. 02-04484, 2003 WL 21057065, Ch. 7, 5/8/03  
appealed to B.A.P. 8th Cir.

Local Rule 5005-4(b)  
Fed. R. Bankr. P. 4007(c)

Judgment creditor seeks enlargement of time to file and serve an adversary complaint objecting to the discharge of her claim. Creditor's attorney faxed an objection to the discharge that was not captioned as an adversary complaint on the last day to file a complaint or request an extension of time. HELD: Creditor's request for more time must be denied. This Court pursuant to Local Rule 5005-4(b) will only accept pleadings via facsimile in limited emergencies and with the express authorization of the Court. Rules regarding the time to file are akin to statutes of limitations and must be strictly construed. After the deadline passes, the Court has no discretion to enlarge the time to file a complaint or to permit an untimely filing.

Brewer v. Bartmess (In re Bartmess)

No. 02-02265, Adv. 02-9132, 2003 WL 1943330, Ch. 7, 4/23/03

11 U.S.C. § 523(a)(15)

Debtor's former spouse seeks to except from discharge Debtor's obligation to pay one-half of a credit card debt under their dissolution decree. Plaintiff also seeks to have attorney fees awarded to her by the appellate court in the divorce proceeding excepted from discharge. HELD: Both obligations are nondischargeable under § 523(a)(15). Debtor's income is higher now than it was during the marriage and his standard of living is not less than that of Plaintiff's. He has failed his burden of proof as to the exceptions to § 523(a)(15) nondischargeability. The Court considers the income of Debtor's live-in companion in determining his ability to pay.

Sturtz v. Sturtz (In re Sturtz)

No. 02-02057, Adv. 02-9099, 2003 WL 1943325, Ch. 7, 4/22/03

11 U.S.C. § 523(a)(5)  
§ 523(a)(15)

Debtor former wife seeks to except from discharge debts arising from the parties' dissolution action. HELD: The portion of the debt which is attributable to the unpaid pre-settlement support obligation is nondischargeable under § 523(a)(5) because it was intended to be in the nature of support.. The remaining portion of the property settlement is nondischargeable under § 523(a)(15). Debtor has the ability to pay although his income has recently decreased. The Court looks at Debtor's potential for earning income in determining his ability to pay. The nonsupport dissolution debt is excepted from discharge.

Hamdorf v. Gritton (In re Gritton)

No. 02-03266, Adv. 02-9152, 2003 WL 1395566, Ch. 7, 3/13/03

11 U.S.C. § 523(a)(2)(A)  
§ 523(a)(4)

Debtor purchased two lawn mowers from his neighbor and agreed to pay for them as soon as he obtained a loan from the bank. Debtor testified that he was going to use funds from his fiancée's construction loan to pay for the mowers. Debtor failed to pay for the mowers and the creditor seeks to except the debt from discharge. HELD: Section 523(a)(4) is not applicable because Debtor was not a fiduciary of Plaintiff, there was no embezzlement, and there was no larceny because Debtor's possession was lawful. However, the debt is nondischargeable under § 523(a)(2)(A) because Debtor obtained credit from Plaintiff through false representations. Debtor lied about his ability to repay the debt and Plaintiff justifiably relied on that misrepresentation.

In re Morgan and Judith Heister

11 U.S.C. § 523(a)(4, 6)

No. 01-03094, Adv. 01-9244, 290 B.R. 665, Ch. 7, 2/27/03

Retired farmer supplied Debtor with antique tractors to fix up for sale, pursuant to oral contract requiring Debtor to remit portion of sales proceeds. Creditor seeks to except debt from discharge after Debtor failed to remit sales proceeds as promised. HELD: Oral contract pursuant to which farmer transferred tractors to Debtor is an outright sale rather than a consignment. Debtor did not stand in fiduciary relationship with farmer. Debtor did not misappropriate any property belonging to farmer, but merely failed to pay a debt, which failure did not rise to level of embezzlement or larceny. While Debtor acted "willfully" in failing to remit portion of sales proceeds, his actions were not "malicious," as required to except his debt to farmer from discharge as one for Debtor's willful and malicious injury.

Mesenbrink v. Eiklenborg (In re Eiklenborg)

11 U.S.C. § 523(a)(5)

No. 01-02297, Adv. 01-9213, 286 B.R. 718, Ch. 7, 11/25/02

§ 523(a)(15)

Debtor's former husband seeks determination that divorce-related debts are excepted from discharge. HELD: Debtor failed to establish either her inability to pay the nonsupport property settlement award, or that the benefit to her of discharging the debt would outweigh the detriment to creditor, and so such debt was excepted from discharge. Debtor's obligations to provide child support, pay past and future health expenses, and maintain life or accident insurance are in the nature of nondischargeable support. Issue of whether debtor's obligation to cover post-secondary education costs is nondischargeable support is not ready for resolution.

Citibank South Dakota v. Meseck (In re Meseck)

11 U.S.C. § 523(a)(2)

No. 01-00847, Adv. 01-9139, 284 B.R. 901, Ch. 7, 10/7/02

Credit card issuer seeks to except credit card debt from discharge on the basis of fraud. HELD: Debtor did not have the intent to repay card issuer. Creditor justifiably relied to its detriment on debtor's misrepresentations when it extended credit to her.

Zio Johnos Inc. v. Ziadeh (In re Ziadeh)

11 U.S.C. § 523(a)(2, 4)

No. 01-01059, Adv. 01-9185, 284 B.R. 893, Ch. 7, 9/18/02

§ 523(a)(6)

Creditor seeks to except from discharge a judgment debt arising from debtor/general contractor's misappropriation of funds earmarked for creditor's remodeling project. HELD: Debt falls within the discharge exceptions for false pretenses, a false representation, or actual fraud and for willful and malicious injury. Parties' relationship was merely contractual, not fiduciary, and so judgment debt does not fall within the discharge exception for fiduciary fraud. The state court's damages award representing funds that debtor misappropriated for non-business expenditures is nondischargeable.

Yang v. Qin (In re Qin)

11 U.S.C. § 523(a)(4)

No. 00-02997, Adv. 01-9042, 285 B.R. 292, Ch. 7, 9/6/02

Creditor seeks to except debts from discharge, as debts for debtor's fraud while acting in "fiduciary capacity." HELD: Debtor was not acting in fiduciary capacity under express trust when he received funds from creditor, and thus discharge exception for fiduciary fraud or defalcation does not apply.

Fairfax State Savings Bank v. McCleary (In re McCleary)

11 U.S.C. § 523(a)(2)

No. 01-02003, Adv. 01-9178, 284 B.R. 876, Ch. 7, 8/28/02

Bank seeks a determination that debts owed by Chapter 7 debtor, the owner of a construction business, are excepted from discharge. HELD: The discharge exception for false statements respecting a debtor's financial condition, rather than discharge exception for actual fraud, applies in this case. With respect to debtor's initial loans, debtor did not make a materially false statement by failing to disclose a \$6,000 debt to a supplier or outstanding lease obligations for some of his equipment. The bank's reliance on debtor's financial documents was not reasonable. The bank failed to prove that debtor had the requisite intent to deceive; and, with respect to debtor's subsequent loan, bank's reliance on debtor's financial documents was unreasonable.

## **XI. LIQUIDATION, DISTRIBUTION, AND CLOSING, 3441-3460**

## **XII. BROKER LIQUIDATION, 3461-3480**

## **XIII. ADJUSTMENT OF DEBTS OF A MUNICIPALITY, 3481-3500**

## **XIV. REORGANIZATION, 3501-3660**

### **B. The Plan, 3531-3590**

In re Internet Navigator, Inc.

11 U.S.C. § 1129

No. 02-01388, 289 B.R. 128, Ch. 11, 1/22/03

Confirmation hearing was held on competing Chapter 11 plans filed by debtor and party seeking to take over its business. HELD: Both plans are confirmable. The competing party has cash in escrow to pay all

allowed claims in full immediately. Debtor's plan pays less than 100% of allowed claims over approximately 5 years. The Court confirms the plan of the competing party.

### **C. Conversion or Dismissal, 3591-3620**

In re Midwest Communications, Inc.  
No. 02-00431, Ch. 11, 1/8/03

11 U.S.C. § 1112(b)

Secured creditors seek to convert to Chapter 7, asserting Debtor engaged in improper conduct postpetition, bad faith, continuing loss to the estate and no chance of reorganization. HELD: Debtor has been experiencing losses. After 10 months, no confirmable plan is on file. Debtor's president has acted improperly, pursuing his own self-interest. The case is converted to an operating chapter 7 case.

### **XV. ARRANGEMENTS, 3661.100-3661.999**

### **XVI. COMPOSITIONS, 3662.100-3670**

### **XVII. ADJUSTMENT OF DEBTS OF FAMILY FARMER, 3671-3700**

#### **B. The Plan, 3681-3700**

In re Vincent W. Michels  
No. 03-00316, 2003 WL 22328856, Ch. 12, 9/19/03  
appealed to B.A.P. 8th Cir.

11 U.S.C. § 1225(a)

Creditor bank objects to Debtor's reorganization plan because it removes the bank's liens on certain farm machinery. HELD: Even though the Bank was substantially oversecured and would continue to be so under the plan, Debtor can not remove or transfer the Bank's lien unless the debt is completely satisfied, the encumbered property is surrendered to the Bank, or the Bank approves of the lien removal. Section 1225(a)(5) is to be strictly construed.

In re Richard & Shelby Weber  
No. 02-00250, 297 B.R. 567, Ch. 12, 7/22/03

11 U.S.C. § 1225(a)  
§ 1208(c)(1)

U.S. Trustee, Chapter 12 Trustee, and Creditors join in their objection to Debtor's Fourth Amended Plan. Debtor has failed to provide financial statements to Trustee, overestimated income, and failed to provide for ongoing expenses in the plan. Debtor borrowed \$17,900 from his son prior to the hearing without consulting Trustee. HELD: Confirmation is denied. Income projections are much higher than in the past and expenses are understated. The case is dismissed due to the unreasonable delay caused by Debtors' failure to submit a confirmable plan.

Creditor seeks to have Chapter 12 case dismissed because Debtor is not a "farmer" as defined by § 101(18). HELD: The motion to dismiss is denied. Debtor has satisfied all the requirements in order to be classified as a "family farmer." The Court applies the "totality of the circumstances" test to determine if the person is engaged in farming. The Court looks at Debtor's intent to resume farming and the intent must be realistic. Debtor owns farmland and machinery and is currently leasing the land to relatives which suggests that Debtor will be personally active in farming once his financial situation is stabilized.

**XVIII. INDIVIDUAL DEBT ADJUSTMENT, 3701-3740**

**XIX. REVIEW, 3741-3860**

**XX. OFFENSES, 3861-3863**