

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

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

**October 15, 2009 – October 13, 2010**

**Prepared by**  
**Amy M. Kilpatrick**  
**Law Clerk**

## TABLE OF CONTENTS

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).

- I. IN GENERAL, 2001-2120**
  - A. In General, 2001-2010
  - B. Constitutional and Statutory Provisions, 2011-2040
  - C. Jurisdiction, 2041-2080
  - D. Venue; Personal Jurisdiction, 2081-2100
  - E. Reference, 2101-2120
- II. COURTS; PROCEEDINGS IN GENERAL, 2121-2200**
  - A. In General, 2121-2150
  - B. Actions and Proceedings in General, 2151-2180
  - C. Costs and Fees, 2181-2200
- III. THE CASE, 2201-2360**
  - A. In General, 2201-2220
  - B. Debtors, 2221-2250..... 1
  - C. Voluntary Cases, 2251-2280..... 1
  - D. Involuntary Cases, 2281-2310
  - E. Joint Cases, 2311-2320
  - F. Schedules and Statement of Affairs, 2321-2330
  - G. Conversion, 2331-2340
  - H. Cases Ancillary to Foreign Proceedings, 2341-2360
- IV. EFFECT OF BANKRUPTCY RELIEF; INJUNCTION & STAY, 2361-2490**
  - A. In General, 2361-2390
  - B. Automatic Stay, 2391-2420
  - C. Relief from Stay, 2421-2460
  - D. Enforcement of Injunction or Stay, 2461-2480..... 2
  - E. Protection of Utility Service, 2481-2490
- V. THE ESTATE, 2491-2760**
  - A. In General, 2491-2510
  - B. Title and Rights of Trustee or Debtor in Possession, in General, 2511-2530
  - C. Property of Estate in General, 2531-2570
  - D. Liens and Transfers; Avoidability, 2571-2600
  - E. Preferences, 2601-2640
  - F. Fraudulent Transfers, 2641-2670
  - G. Set-off, 2671-2700
  - H. Avoidance Rights, 2701-2740
  - I. Reclamation, 2741-2760

<b>VI.</b>	<b>EXEMPTIONS, 2761-2820</b> .....	3
<b>VII.</b>	<b>CLAIMS, 2821-3000</b>	
	A. In General, 2821-2850	
	B. Secured Claims, 2851-2870	
	C. Administrative Claims, 2871-2890	
	D. Proof; Filing, 2891-2920.....	4
	E. Determination, 2921-2950	
	F. Priorities, 2951-3000	
<b>VIII.</b>	<b>TRUSTEES, 3001-3020</b>	
<b>IX.</b>	<b>ADMINISTRATION, 3021-3250</b>	
	A. In General, 3021-3060 .....	5
	B. Possession, Use, Sale, or Lease of Assets, 3061-3100 .....	5
	C. Debtor's Contracts and Leases, 3101-3130	
	D. Abandonment, 3131-3150	
	E. Compensation of Officers and Others, 3151-3250 .....	6
<b>X.</b>	<b>DISCHARGE, 3251-3440</b>	
	A. In General, 3251-3270	
	B. Dischargeable Debtors, 3271-3340.....	7
	C. Debts and Liabilities Discharged, 3341-3410.....	7
	D. Effect of Discharge, 3411-3440 .....	7
<b>XI.</b>	<b>LIQUIDATION, DISTRIBUTION, AND CLOSING, 3441-3460</b>	
<b>XII.</b>	<b>BROKER LIQUIDATION, 3461-3480</b>	
<b>XIII.</b>	<b>ADJUSTMENT OF DEBTS OF A MUNICIPALITY, 3481-3500</b>	
<b>XIV.</b>	<b>REORGANIZATION, 3501-3660</b>	
	A. In General, 3501-3530	
	B. The Plan, 3531-3590	
	C. Conversion or Dismissal, 3591-3620	
	D. Administration, 3621-3650	
	E. Railroad Reorganization, 3651-3660	
<b>XV.</b>	<b>ARRANGEMENTS, 3661.100-3661.999</b>	
	A. In General, 3661.100-3661.110	
	B. Real Property Arrangements, 3661.111-3661.999	
<b>XVI.</b>	<b>COMPOSITIONS, 3662.100-3670</b>	
<b>XVII.</b>	<b>ADJUSTMENT OF DEBTS OF FAMILY FARMER, 3671-3700</b>	
	A. In General, 3671-3680	
	B. The Plan, 3681-3700	
<b>XVIII.</b>	<b>INDIVIDUAL DEBT ADJUSTMENT, 3701-3740</b> .....	8
<b>XIX.</b>	<b>REVIEW, 3741-3860</b>	
	A. In General, 3741-3760	
	B. Review of Bankruptcy Court, 3761-3810	
	C. Review of Appellate Panel, 3811-3830	
	D. Review of District Court, 3831-3860	
<b>XX.</b>	<b>OFFENSES, 3861-3863</b>	

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

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

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

**B. Debtors, 2221-2250**

In re Lochner, No. 09-02558, 2009 WL 3448433 (Bankr. N.D. Iowa Oct. 26, 2009);  
In re Kehde, No. 09-02557, 2009 WL 3450956 (Bankr. N.D. Iowa Oct. 26, 2009)  
(concluding exigent circumstances excuse Debtor's failure to receive credit counseling  
prepetition)

Debtor requests that the Court reconsider its order dismissing the case based on Debtor's failure to file a Credit Counseling Certificate and payment advices. Debtor received credit counseling postpetition. U.S. Trustee filed a comment noting that § 109(h)(1) requires debtors to receive counseling prepetition. HELD: Sufficient exigent circumstances exist to satisfy § 109(h)(3). The Court grants the Motion to reconsider dismissal and reinstates the case.

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

In re Ayer, No. 09-03532, 2010 WL 1640438 (Bankr. N.D. Iowa April 22, 2010) (finding no "excusable" neglect as required to reconsider order dismissing case)

The Court dismissed Debtors' case for failure to pay filing fee installments. Counsel for Debtors asks the Court to reconsider dismissal, asserting the failure to pay was due to his absence from his office and an oversight. HELD: The neglect in this case is not "excusable" under Pioneer. No grounds exist for the Court to reconsider its order dismissing the case for failing to pay filing fees.

In re Pfeiler, No. 09-02815, 2010 WL 889882 (Bankr. N.D. Iowa March 10, 2010) (finding no grounds to dismiss after Debtors rescind objectionable reaffirmation agreement)

The U.S. Trustee requests dismissal under §707(b), arguing creditors should not be required to subsidize Debtors' reaffirmed debt secured by two ATVs. After the hearing, Debtors rescinded the reaffirmation agreement and indicated their intent to surrender the ATVs to the secured creditor. HELD: Since Debtors have rescinded the objectionable Reaffirmation Agreement, the U.S. Trustee's § 707(b) Motion has little, if any, support in the record. After reviewing the totality of the circumstance, the Court concludes that grounds do not exist to dismiss this case under § 707(b)(1) or (3).

In re Honkomp, In re Hayes, Nos. 09-02151, 09-01643, 416 B.R. 647 (Bankr. N.D. Iowa

2009) (denying § 707(b) dismissal where Debtors rescinded Reaffirmation Agreements regarding luxury debt)

U.S. Trustee asserts that, by filing Reaffirmation Agreements for debt secured by luxury property, i.e. a boat and a camper, Debtors are evidencing bad faith for purposes of § 707(b)(3)(A). U.S. Trustee argues the amounts Debtors agreed to pay for the boat or camper could generate significant payment to creditors in a Chapter 13 case. Debtors in both cases rescinded the Reaffirmation Agreements prior to the hearing. HELD: The Court agrees with the cases which conclude that reaffirmation of luxury debt can be grounds for dismissal for bad faith or under the totality of the circumstances. Debtors explained they realized they made poor decisions when they decided to reaffirm luxury debt. U.S. Trustee has not raised any factors other than reaffirming luxury debt to support dismissal for abuse. Debtors have now rescinded the Reaffirmation Agreements. In these circumstances, dismissal under § 707(b)(3) is not appropriate.

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

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

Swensen v. United States (In re Swensen), Ch. 7, No. 05-00210, Adv. 10-09009, 2010 WL 3123293 (Bankr. N.D. Iowa Aug. 2, 2010) (dismissing complaint to allow Debtor to pursue administrative remedies against the IRS)

The IRS moves to dismiss Debtor's adversary complaint asserting a violation of the § 524 discharge injunction. It asserts Debtor failed to exhaust administrative remedies. HELD: Debtor must comply with the jurisdictional prerequisites of 26 U.S.C. § 7433, and related regulations, in order to bring a § 524 petition against the IRS. Because Debtor has not filed an administrative claim, his complaint for damages is not ripe for adjudication. The adversary proceeding is dismissed without prejudice to allow Debtor to pursue the required administrative remedies.

In re Edmonds, No. 09-01328, 2009 WL 3787191 (Bankr. N.D. Iowa Nov. 10, 2009) (concluding settlement agreement forecloses Debtors' Motion to have creditor held in contempt for stay violations)

Debtors assert the Credit Union should be held in contempt for violations of the automatic stay. The Credit Union argues any alleged violations are encompassed in the parties' prior Settlement Agreement. HELD: A clause in the Settlement Agreement releasing the Credit Union is global in scope and forecloses Debtors' motion regarding any activities by the Credit Union before the date of the agreement.

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

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

In re Westmeyer, No. 09-03590, 2010 WL 2103571 (Bankr. N.D. Iowa May 24, 2010) (finding Debtor did not abandon his homestead and the exemption exists in sales proceeds for one year)

Trustee asserts Debtor is not entitled to claim a homestead exemption because he was not residing in the home when he filed his bankruptcy petition. In the alternative, Trustee asserts the homestead is not exempt to the extent of unpaid support obligations. Debtor argues his homestead exemption is properly claimed. He seeks to avoid a judgment lien that he claims impairs his homestead exemption. HELD: In these unusual circumstances, the Court finds Trustee has not proved that Debtor intended to abandon his homestead. Debtor was required to sell his home to pay dissolution debts. Any net proceeds he receives from the sale are exempt to the extent he reinvests them in a new homestead within a year of the sale. A judicial lien from a confession of judgment in a non-dissolution proceeding does not attach to the homestead.

In re Timmer, No. 09-02969, 2010 WL 598673 (Bankr. N.D. Iowa Feb. 17, 2010) (concluding Credit Union may not foreclose on homestead to satisfy business debt)

Credit Union wishes to foreclose on a security interest in Debtors' homestead real estate to satisfy business debt. Debtors assert they have paid off the relevant loan for which their home was security and Credit Union has improperly refused to release the lien. In addition, Debtors argue Credit Union is adequately protected by a lien on business real estate worth more than the total business debt. HELD: The debt Credit Union is attempting to satisfy from Debtors' homestead property is business debt which Debtors personally guaranteed. Under Iowa law, Credit Union must first proceed against any non-homestead property which is liable for the debt. The record indicates that business real estate is available to satisfy the business debt. The language of the homestead waiver fails to specifically stipulate that Debtors' specific homestead is liable for the debt. It is appropriate to grant relief Credit Union relief from the co-debtor stay of § 1301(c) to enforce its rights against real estate owned by the business. Credit Union has failed, however, to prove cause exists to allow it to proceed against Debtors' homestead real estate.

In re Skillen, No. 09-00346, 2009 WL 4823802 (Bankr. N.D. Iowa Dec. 14, 2009) (finding liens not avoidable as impairing an exemption where Debtors failed to prove they are "engaged in farming")

Debtors seek to avoid liens on a 1999 Ford pickup truck, a 350 spreader and apron, a John Deere 4430 tractor, a John Deere lawn mower, and a 2004 skid loader. Debtors claim these items exempt as farming equipment. The United States for the Farm Service Agency ("FSA") objects. It asserts that Debtors are not engaged in farming, rendering them ineligible to avoid liens on farming equipment. HELD: The Court concludes that Debtors may not

avoid liens under § 522(f)(1)(B) on the five pieces of equipment at issue. There is little indication of the length of time Debtors were engaged in farming prior to filing the Chapter 7 petition. Both Debtors are now employed in non-farm jobs. Debtors have not demonstrated a subjective intent to return to farming together or a framework for how Mr. Skillen might finance a farming operation.

In re Thompson, No. 09-02454, 2009 WL 4332862 (Bankr. N.D. Iowa Nov. 30, 2009) (finding failure to correctly calendar hearing is not excusable neglect)

Debtor seeks reconsideration of an Order granting an Objection to Exemptions. Counsel states the hearing was listed on the wrong date on his calendar and a number of facts were not available to the Court based on this scheduling error. HELD: A mistake in noting a hearing on counsel's calendar is not the type of neglect which is excusable under Rule 60(b). The application to reconsider the Order granting the Objection to Exemptions is denied.

In re Malatek, No. 03-02281, 2009 WL 3754234 (Bankr. N.D. Iowa Nov. 9, 2009) (finding lien not avoidable where the debt arose before Debtor intended to permanently reside at homestead property)

Debtor seeks to avoid judgment liens, claiming they impair his homestead exemption of farm property. The Creditor asserts the homestead is not exempt from its judgment which arose from debt predating Debtor's acquisition of his homestead. HELD: The Court finds that the debt was contracted with the agreement between Debtor and the Creditor dated October 22, 1996. Between October 1996 and April 1997, Debtor lived with his wife at another address. He did not intend to live on the farm property until late 1998. Therefore, the farm real estate is not exempt from the pre-existing debt. The Creditor's lien does not impair Debtor's homestead exemption.

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

### **D. Proof; Filing, 2891-2920**

In re Heyer, No. 09-01518, 2009 WL 3380391 (Bankr. N.D. Iowa Oct. 20, 2009) (untimely requests to extend time to file claim and to file dischargeability complaint may not be granted)

After the deadlines expired, Creditor sought extension of deadlines to file a claim and to file a dischargeability complaint. Debtors resist, arguing Creditor and its former counsel had notice of the case in time to meet the deadlines. HELD: The Bankruptcy Rules allow the deadlines to file a dischargeability complaint and to file a proof of claim to be extended if a request is made before the deadline expires. A party's excusable neglect in failing to meet the deadline is not a basis for granting an untimely request. Creditor filed its Motions requesting enlargement of time after the deadlines had already expired. Under the Rules, these requests are untimely and may not be granted. Even if the Court could consider

“excusable neglect,” Creditor’s explanation for its failure to meet the deadlines is not sufficient to meet that standard.

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

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

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

In re Miell, No. 09-01500, 2009 WL 5178009 (Bankr. N.D. Iowa Dec. 29, 2009) (allowing Trustee to use accrued net rents as an administrative surcharge under § 506(c) for expenses other than property taxes)

Trustee seeks to retain accrued net rents from the Bank’s collateral real estate as an administrative surcharge under § 506(c). The Bank asserts Trustee should pay related property taxes with the net rents. HELD: The Bank has no right to an order requiring Trustee to pay property taxes out of accrued net rents. The rents may be retained by Trustee as a reasonable and necessary charge against the Bank’s collateral under § 506(c) for expenses other than property taxes.

In re Best Value, Inc., No. 09-00591, 2009 WL 4840144 (Bankr. N.D. Iowa Dec. 15, 2009) (denying application for writ of habeas corpus ad testificandum)

Debtor asks for a Writ allowing Shalom Rubashkin, who is currently incarcerated, to appear to give testimony at a hearing. It asserts Mr. Rubashkin’s live testimony is required on the matters raised in its Motion to authorize payment of wages to Mr. Rubashkin. HELD: This Court holds hearings in a private office building rather than in a secure federal courthouse. The matter at issue, payment of four months wages, is important to Mr. Rubashkin but not at a level which leads the Court to abandon other considerations. The Court sees no reason that Mr. Rubashkin’s testimony could not be presented by deposition. The Court concludes, in its discretion, that a testimonial writ is not appropriate in these circumstances.

#### **B. Possession, Use, Sale, or Lease of Assets, 3061-3100**

Holsinger v. Hanrahan et al (In re Miell), Ch. 7, No. 09-01500, Adv. 10-09043, 2010 WL 2743016 (Bankr. N.D. Iowa July 9, 2010), appeal pending, No. 10-6060 (B.A.P. 8th Cir.) (finding junior lienors had no interest in real estate after sale free of liens)

Plaintiffs’ complaint asserts their lien on real estate was not affected by Trustee’s sale of the real estate to a senior creditor. The creditor moves to dismiss the complaint, asserting Plaintiff received sufficient notice and its junior lien was extinguished through the sale. Trustee joins in the Motion to Dismiss and states there were no proceeds from the sale of the real estate. HELD: Plaintiffs had notice of the Motion to sell and the order approving the

motion. Under § 363(m), Plaintiffs' attempt to preserve their lien on real estate sold, which is no longer property of the estate, is moot. There are no sale proceeds to which their lien can attach. The adversary proceeding is dismissed.

In re Miell, No. 09-01500, 2010 WL 1258196 (Bankr. N.D. Iowa March 29, 2010), appeal pending, No. 10-6019 (B.A.P. 8th Cir.) (determining amount of vendor's lien and approving sale of real estate with lien attaching to proceeds)

Vendor of real estate contracts with Debtor objects to the sale of the properties by Trustee. He asserts the sales price is less than fair market value. He also argues Trustee should assume the contracts and pay the full balance remaining due, including debt from a Promissory Note dated after the date of the original contracts, which he characterizes as advances under the contracts. HELD: Vendor's lien is limited to the remaining principal balances due on the contracts plus accrued advances and post-petition advances of property taxes. The total sale price is greater than the amount of this lien. The lien will attach to the proceeds of the sale. The Court finds the proposed sale is in good faith and for a fair and reasonable price in the circumstances.

In re Miell, No. 09-01500, 2010 WL 889886 (Bankr. N.D. Iowa March 10, 2010) (approving sale of portfolio of real property)

Trustee moves to sell the portfolio of real property which is collateral for mortgages held by Bank Iowa. Bank Iowa, as purchaser, will pay \$1.9 million plus a surcharge to the bankruptcy estate of \$100,000. Debtor objects to the sale. He contends the real property has an aggregate fair market value of \$4,250,000. HELD: In the absence of competing offers, and in light of the cash value of Bank Iowa's offer, the Court concludes that the proposed sale is in good faith and for a fair and reasonable price. Debtor believes more marketing efforts could bring a better return for the estate. This belief, however, is not supported by the record. In addition, Debtor's arguments fail to take into account Trustee's need to meet a May 11 deadline, the effect of the cross-collateralization of debt, and the effect of capital gains and other taxes and costs on the bottom line.

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

In re Agriprocessors, Inc., No. 08-02751, 2009 WL 4823808 (Bankr. N.D. Iowa Dec. 8, 2010) (denying, in part, fees requested by counsel for Unsecured Creditors Committee)

Counsel for the Unsecured Creditors Committee applies for final compensation. U.S. Trustee objects that some of the fees are not reasonable and necessary. HELD: Counsel will not be compensated for preparation of and requests to compel payment of attorney compensation. Also troubling are duplicative billings for intra-office and co-counsel conferences. It is difficult to determine what counsel accomplished on behalf of the Committee. Counsel, who failed to appear at the hearing, has failed to meet the burden to

justify the fees requested. Fees beyond those already paid pursuant to a negotiated cash collateral agreement are denied.

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

### **B. Dischargeable Debtors, 3271-3340**

Fokkena v. Stevenson (In re Stevenson), No. 08-01720, Adv. 08-09146, 2009 WL 4330591 (Bankr. N.D. Iowa Nov. 30, 2009) (substituting a creditor as plaintiff in adversary proceeding to deny discharge rather allowing dismissal of complaint)

Lakes Gas Company, a creditor, objects to dismissal of the U.S. Trustee's complaint seeking denial of discharge. It seeks to be substituted as Plaintiff. Debtor objects, asserting that Lakes Gas did not timely file either its own complaint objecting to discharge or an objection to the dischargeability of its claim. HELD: The Court concludes that dismissal should be denied and Lakes Gas' Motion for Substitution should be granted. Now that the U.S. Trustee has asked that the case be dismissed, Lakes Gas should be given an opportunity to step into the U.S. Trustee's shoes as Plaintiff to pursue the Complaint to Deny Discharge. Lakes Gas may not amend the complaint or otherwise reposition itself to "materially improve its position" over that of the U.S. Trustee.

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

Citizens State Bank v. Ruebel (In re Ruebel), No. 09-01830, Adv. 09-09137, 423 B.R. 534 (Bankr. N.D. Iowa Feb. 17, 2010) (requiring Plaintiff to amend complaint to include circumstances of fraud with particularity)

Debtors/Defendants move to dismiss the complaint or for more specific statement. HELD: Dismissal is not appropriate but Plaintiff should amend the complaint. The circumstances of fraud should be set out with particularity, including the "who, what, when, where and how" of the underlying fraud.

### **D. Effect of Discharge, 3411-3440**

In re Nouchanthavong, No. 09-02181, 2009 WL 4059051 (Bankr. N.D. Iowa Nov. 13, 2009) (denying approval of Reaffirmation Agreement related to unsecured debt from a loan co-signed by Debtor's mother)

Debtor entered into a Reaffirmation Agreement related to unsecured debt from a loan co-signed by Debtor's mother. The presumption of undue hardship arose because Debtor had insufficient monthly net income to pay the debt. HELD: As is typical with any unsecured debt, repaying this debt gives Debtor no financial or economic benefit. Thus, the Agreement is not in Debtor's best interests under § 524(c)(6)(A)(ii). If Debtor wishes to repay the debt

in order to protect her mother's financial interests, the Bankruptcy Code allows such payments, even though Debtor is no longer personally liable after she receives her bankruptcy discharge. Approval of the Reaffirmation Agreement is denied.

**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**

**XV. ARRANGEMENTS, 3661.100-3661.999**

**XVI. COMPOSITIONS, 3662.100-3670**

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

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

In re Cockhren, Ch. 13, No. 08-01382 (Bankr. N.D. Iowa Oct. 7, 2010) (granting motion to dismiss Chapter 13 case for defaults regarding treatment of secured claim)

Secured creditor seeks dismissal of Chapter 13 case for unreasonable delay and material default by Debtor of terms of the confirmed plan. It argues Debtor has failed to comply with the plan regarding the treatment of the Bank's claim. Debtor resists. She acknowledges that unforeseen financial difficulties have resulted in her failure to make some payments. Debtor asserts she has complied with other requirements of the plan. HELD: The case should be dismissed. Debtor has caused unreasonable delay which is prejudicial to Creditor's interests and has materially defaulted on the plan under § 1307(c)(6). Debtor's proposed change in treatment of the secured claim violates the binding effect of the confirmed plan.

**XIX. REVIEW, 3741-3860**

**XX. OFFENSES, 3861-3863**