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Recent Developments in Consumer Bankruptcy

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MISCELLANEOUS..

***Dean v. Seidel (In re Dean),* 3:20-CV-01834-X, 2021 WL 1541550 (U.S.D.C., N.D. Tex. April 20, 2021).** Issue on appeal was whether a chapter 7 trustee may grant a 30% interest in the bankruptcy estate's litigation recoveries to a creditor in the bankruptcy case in exchange for that creditor advancing funds for the litigation even if the creditor will be reimbursed for making those advances. Creditor and the trustee entered into a Litigation Funding Agreement where creditor would advance $200,000 for litigation fees to prosecute claims against third parties. All recoveries from this litigation would be used to 1) pay trustee's statutory commission and allowed expenses; 2) reimburse the creditor; 3) pay creditor a 30% investment return and 4) pay pro rata debtor's creditors. Debtor objected claiming the Agreement allowed the creditor to receive a disproportionate and larger share of distributions to be made to creditors in violation of section 507's priority scheme and the distribution equality requirements of section 726. Debtor also argued that the Agreement violated section 550 because by granting creditor a 30% interest in gross litigation proceeds, "a significant portion of any avoidance recoveries will not be for the benefit of the estate and will not be used to satisfy or pay claims of any creditors." Trustee had reached out to multiple firms to pursue the litigation on a contingency basis, and none were interested. The bankruptcy court approved the Agreement noting that trustee endeavored to obtain favorable terms but had limited options given the lack of unencumbered cash on hand and law firms' lack of interest. The district court noted that litigation funding agreements are still relatively novel funding arrangements and that there can be legitimate ethical concerns. Although the lack of any supporting case law in approval of the Agreement, the novelty of the Agreement and the Agreement's possible incompatibility with provisions of the Bankruptcy Code caused the district court concern, after careful examination of the Bankruptcy Code, the district court approved the Agreement as it was not "left with the definite and firm conviction that a mistake had been committed."

***Dean v. Seidel (In re Dean)*, No. 21-10468, 2021 U.S. App. LEXIS 36022 (5th Cir. 2021).** A Ch. 7 debtor lacks standing to appeal approval of a litigation funding agreement between a trustee and a creditor. The debtors could not demonstrate bankruptcy standing when the court order to which they were objecting did not directly affect their wallets. The order on appeal, approval of a litigation funding agreement, did not affect whether the debtor's debts would be discharged, neither did it affect the creditor's related pending case in which it objected to the debtor's bankruptcy discharge and to discharge of its claims against the debtor.

***Foster v. Holder et al (In re Foster)*[1]*,* 19-4131-ELM, 2020 WL 6390671 (Bankr. N.D. Tex. October 30, 2020).** After resolving years of litigation involving debtor (an attorney) and her family, the chapter 7 trustee obtained court approval of a final report and distribution and the bankruptcy case was closed. Nearly a year later, debtor sought to reopen the bankruptcy case, apparently to again assert claims and arguments that the bankruptcy court had denied prior to closing of the case; the bankruptcy court denied the motion to reopen. Several months after that, debtor initiated a lawsuit in state court suing the chapter 7 trustee and her counsel as well as a third-party that had purchased assets of the bankruptcy estate and debtor's husband; among the

[1] Subsequent filinf [Affirmed by]: Foster v. Aurzada, No. 4:20-cv-1357-P, 2022 U.S. Dist. LEXIS 8345 (N.D. Tex. 2022)

claims asserted by the debtor were quiet title as to property sold by the chapter 7 trustee to the third-party. The trustee moved to reopen the bankruptcy case and remove the state court lawsuit to the bankruptcy court. The trustee and her counsel moved to dismiss under the Barton Doctrine because debtor not only had not gotten court approval to pursue the claims against them but actually had been denied in prior efforts to obtain approval to bring claims against them. The court found that the debtor's complaint addressed only actions taken by the trustee and her professionals pursuant to orders from the court itself and therefore utterly failed to present any *ultra vires* acts, and dismissal was therefore appropriate under both the Barton Doctrine and immunity doctrine.

***America v. Mays (In re Mays),* 852 Fed. Appx. 801 (5th Cir. 2021).** Debtor, acting as trustee for his minor daughter, misappropriated over $1.8 million in royalty revenues. When debtor filed personal bankruptcy and failed to disclose the bank accounts where the royalties were deposited and that he had been using the funds for his personal benefit, he was charged with violating 18 U.S.C. 152(3) (making false bankruptcy declaration). Debtor plead guilty and agreed to pay restitution. At sentencing, the court varied upwards from the Sentencing Guidelines and gave the debtor the maximum sentence. Debtor appealed, arguing that his guilty plea was unsupported by the proffered factual basis to the effect that he had been under no obligation to disclose his misappropriation of funds. The appellate court affirmed, finding that withdrawals from accounts for which a debtor is a trustee for a minor can fall within the definition of "income" required by question two on Official Form 7 and that debtor had failed to adequately or accurately disclose the claims his daughter had against him arising out of his misappropriation of funds.

***Griffith v. Lone Star FLCA et al (In re Griffith),* 20-4038-mxm, 2021 WL 2389671 (Bankr. N.D. Tex. June 10, 2021).** Debtor filed chapter 13 case in order to prevent foreclosure; case was dismissed for failure to file required documents. Debtor obtained reinstatement of the chapter 13 case, but not before lender foreclosed on property. Debtor then sued lender and the person who purchased the property at foreclosure. At trial on breach of contract and wrongful foreclosure claims, the court found that the debtor had waived certain of the notice provisions in the deed of trust by establishing a history of verbally changing his notice address (instead of in writing, as required under the deed of trust) and because debtor had received actual notice of the foreclosure at at least one of the addresses that he was using at the time.

***Barbknecht Firm, P.C. v. Keese (In re Keese),* 18-4057, 2021 WL 811572 (Bankr. E.D. Tex. February 28, 2021)**. Debtor involved in messy divorce failed to make payments to her divorce counsel. In order to convince divorce counsel to continue representation, debtor represented that she would pay him from proceeds from the sale of her house and the receipt of a portion of her ex-husband's pension plan. When divorce was finalized, debtor convinced attorney to allow transfer of pension plan award to go directly to her instead of through attorney. Instead of paying attorney, debtor kept all of the pension funds for herself and filed for bankruptcy. Divorce attorney sought a determination of nondischargeability and included a claim under the Texas Theft Liability Act; debtor countersued for breach of fiduciary duty. The Court found that the divorce attorney failed to prove that at the time the debtor represented that she would pay out of proceeds from the divorce she had other intentions, denied relief on the debtor's counterclaims, but awarded the debtor her reasonable and necessary attorney's fees and costs because the Texas Theft Liability Act authorizes the prevailing party to recover attorney's fees and costs.

***Rose et al v. Aaron et al (In re Rose),*[2] 4:19-cv-98, 2021 WL 3795421 (E.D. Tex. August 25, 2021).** Horse breeder seeking to liquidate her operations entered into several expansive contracts to transfer her stock to buyer who was to pay several million dollars over five years for the horse breeder to continue to keep and care for the stock on the horse breeder's farm. Horse breeder subsequently reneged on the contractual arrangement in various ways, including by forcing the buyer to pay tens of thousands of dollars in spurious charges allegedly related to caring for the horses, by refusing to comply with her obligation to provide further continued care for the horses, which caused the buyer to incur substantial costs to, among other things, upgrade their own farm in order to be suitable for keeping and maintaining the stock. After the initiation of several state court lawsuits, the horse breeder and her company filed for bankruptcy. The bankruptcy court found the horse breeder liable for breach of contract and violation of the Texas Theft Liability Act for having essentially extorted monies from the buyer by virtue of refusing to turn over the horses until the spurious charges for care were paid. The district court affirmed the holding that the horse breeder had breached the contract, but reversed the damages awarded because the costs of improving their own farm had been less than several million dollars that the buyer would have been obligated under the contract to pay the breeder for five year's care of the horses. With respect to several other parties and claims included in the appeal, the court engaged in an extended discussion of the elements and proof necessary to establish valuation of horses, liability and damages for fraudulent inducement at a no-reserve auction, and conspiracy.

***In re Sparks,* 20-50079, 2021 WL 2638602 (Bankr. N.D. Tex. June 25, 2021).** In a Subchapter V case, the debtor proposed to use proceeds from the sale of his homestead in part to purchase from the bankruptcy estate a piece of non-exempt real property and some personal property. The proposed purchase of the real property contained a discount on the fair market value attributed to the fact that no realtor would be necessary. The bankruptcy court held that the debtor could purchase the real property at the fair market value but could not give himself a discount for not needing a realtor. Because the record did not provide adequate detail to value the personal property, the court denied the debtor's proposed purchase of those items.

***In re Ramirez,* 13-52576, 2021 WL 4256790 (Bankr. W.D. Tex. September 17, 2021).** Chapter 7 trustee obtained authority from the bankruptcy court to retain counsel with an engagement agreement that permitted retained counsel to associate with other counsel in pursuit of certain litigation claims. The defendant in the litigation that ensued, who had received notice of the trustee's retention of counsel, subsequently asked the bankruptcy court to enter an order mandating that co-counsel with whom the trustee's counsel had associated could not be compensated. The bankruptcy court declined to grant the relief requested by the defendant and instead granted the trustee permission *nunc pro tunc* to retain the associated counsel on the grounds that the original retention of counsel had specified that trustee's counsel could associate with other counsel and therefore the *nunc pro tunc* relief was in essence merely reiterating what had already been approved.

***In re Mohiuddin,* 627 B.R. 875 (Bankr. S.D. Tex. 2021).** Chapter 7 trustee retained special counsel under 327(e) to pursue litigation claims; special litigation counsel had been representing a creditor, which was properly disclosed during the application to employ process. At the end of the case, special counsel filed a final fee application and the trustee simultaneously filed a

[2] Appeal pending.

supplemental application to employ seeking to retroactively expand the scope of special counsel's representation. Finding that special counsel had provided tax-related and liquidation services that were outside the specified scope of the services authorized under the original retention order, the court went on to determine that the trustee met Local Rule 2014's requirement of excusable neglect in failing to timely seek expanded employment authorization with respect to the tax-related services in that the trustee had believed that those services were covered by the original order but that retroactive expansion of the authorization could not be granted for the liquidation services because the trustee already had retained general counsel to help liquidate the estate's assets and therefore any acceptance by the trustee of assistance from special counsel in liquidating estate assets violated Sections 327 and 330.

LIENS..

***In re Reed,* 17-52875, 2021 WL 4395821 (Bankr. W.D. Tex. Sept. 24, 2021).** Holder of a statutory tax lien sought reimbursement of reasonable post-petition fees, costs and charges. The chapter 13 trustee objected, arguing that the holder of the statutory tax lien failed to comply with Rule 3002.1. Although the holder of the statutory tax lien had obtained a deed of trust from the debtor relating to the statutory tax lien, as is provided for under the Texas Tax Code, the bankruptcy court held that the underlying rights were not a security interest as defined in Rule 3002.1 because they were a statutory tax lien and that the holder therefore did not have to comply with Rule 3002.1 in order to be entitled to reimbursement of post-petition claims.

EXEMPTIONS – STATE...

***Matter of Morgan,* 848 Fed. Appx. 629 (5th Cir. 2021).** Debtor resided at one property at the time of his marriage. Shortly after marrying, debtor and his wife purchased a home together, but debtor did not move there. Debtor remained at the first property (which he also purchased, but solely in his name) and shortly thereafter separated from his wife. Upon filing for bankruptcy, the debtor claimed the home purchased with his wife as his homestead. A creditor objected and the bankruptcy court sustained the objection over the debtor's argument that he intended to reconcile with his wife and move to the home he had purchased with her. The circuit court affirmed, noting that the fact that the debtor resided at the home on weekends and moved some of his belongings there was insufficient to imbue the home with homestead character in light of his continued residence at the property that he had purchased solely in his own name.

AUTOMATIC STAY (SEE ALSO TURNOVERS/PROP. OF ESTATE)..

***Gates v. RAC Acceptance, LLC (In re Gates),* 621 B.R. 129 (Bankr. W.D. Tex. 2020).** Fourteen days prior to filing chapter 7 petition, debtor entered into rental-purchase agreement for a mattress and sofa. Debtor's schedules did not properly list the debt, identify the rental-purchase agreement, or include a Statement of Intention with respect to the mattress and sofa. 11 U.S.C. 362(a)(1), (3), and (6). When lower level employees of creditor contacted debtor inquiring as to when she would be making-up missed payments, she informed them of her bankruptcy and that she intended to reaffirm the debt but asked that they not contact her any more. Lower level employees made several future contacts. Debtor sued for violation of the automatic stay and sought large damages relating to emotional distress and losing her job. The court found that debtor's own evidence was

that she had already been getting poor work performance reviews and that debtor failed to present credible evidence of harassment or coercion by the creditor. Because the evidence indicated that the creditor's failure to observe the automatic stay resulted from mistake and inadequate employee training, the court declined to award punitive damages. The court did find $110 in actual damages supported by the evidence and awarded the same to debtor.

***Vaidya v. Choudhary (In re Vaidya),* 19-3592, 2021 WL 389086 (Bankr. S.D. Tex. February 3, 2021).** Debtor filed chapter 11 (later converted to chapter 13) while divorce proceedings were pending. Divorce decree was entered shortly thereafter without relief having been granted from the automatic stay. Ex-husband proceeded to force disposition of a piece of real property pursuant to the divorce decree but in violation of the automatic stay; debtor voluntarily participated in disposition of the real property. The sale netted approximately $45,000. Debtor sued the ex-husband for violation of the automatic stay and, proceeding *pro se*, alleged various forms of damages. The court held that husband had willfully violated the automatic stay, but was only able to award a small amount of actual damages because of lack of supporting evidence but did award punitive damages at a 10:1 ratio to the actual damages based on its finding that the ex-husband had acted in actual defiance of the automatic stay.

***Chow v. Lee (In re Lee)*, Nos. 18-42066 (Chapter 7), 20-4036, 2021 Bankr. LEXIS 3397 (Bankr. E.D. Tex. 2021).** In an avoidance action, the court finds that the use by the debtor's non-debtor spouse of debtor's carry-forward tax attributes to reduce the non-debtor spouse's tax liability was improper. The trustee can require the amendment of the tax return. The 2018 Tax Refund was not property of the bankruptcy estate under 11 U.S.C.S. § 541(a)(2) and was not subject to turnover to the Chapter 7 trustee because the sole source of income attributable to the 2018 Tax Refund was derived from the employment of the non-debtor spouse; nonetheless, the debtor and his spouse did not have authority to use the net operating losses, which were the debtor's pre-bankruptcy tax attributes, in their 2018 Tax Return, and those attributes belonged to the debtor's bankruptcy estate. The evidence established that the down payment for the house was a gift to the debtor's parents, and because the debtor held only a legal interest in the house as a co-owner subject to a resulting trust for his parents, it was not property of his bankruptcy estate, and the Chapter 7 trustee failed to establish grounds for turnover under 11 U.S.C.S. § 542. Payments to debtor's parents were constructively fraudulent.

EXEMPTIONS IN BANKRUPTCY...

***Cyr v. SNH MTG Properties 2 Trust (In re Cyr),* SA:19-CV-0911-JKD, 2020 WL 7048603 (U.S.D.C. W.D. Tex. November 30, 2020).** Whether debtors' homestead exemption in a living trust was a "qualifying trust" under section 41.0021(a) of the Texas Property Code. Bankruptcy ourt held that under the Texas Property Code, a trust instrument must include the phrase "at no cost" to preserve the homestead designation with respect to a living trust. The district court disagreed. The debtors' living trust contained the phrase "rent free and without charge." The district court determined that section 41.0021(a) of the Texas Property Code does not require the phrase "at no cost" be included for a trust instrument to constitute a "qualifying trust." Requiring a trust instrument to include the phrase "at no cost" elevates form over substance. What matters is whether the trust instrument expresses intent to preserve the homestead designation. This

interpretation is consistent with the statute's purpose which is to allow a trustee to transfer a homestead into a living trust without affecting the homestead designation of the property and continuing to allow the residence homestead protection. The debtors' living trust evidenced intent to preserve the homestead designation and was therefore a "qualifying trust" under the Texas Property Code.

***In re Sparks,* 20-50079, 2020 WL 7133170 (Bankr. N.D. Tex. Dec. 3, 2020).** Bankruptcy court denied U.S trustee's objection to debtor's homestead claim. U.S. trustee objected to debtor's homestead exemption claiming debtor "has simultaneously claimed a home located in Lubbock proper and an *intent* to claim rural property known as the Ellison Place as his homestead. Debtor had indeed claimed his residence in Lubbock as his homestead but had also stated in his Subchapter V Status Report that he intended to sell his home in Lubbock and move to the Ellison Place property and use the "net proceeds" from the sale of his Lubbock homestead to pay down debt on the Ellison Place. The U.S. trustee argued that debtor intended to move to the Ellison Place and use the proceeds from the sale of his Lubbock house to pay-down debt secured by the Ellison Place and thus realize $100,000 more in equity than the equity he currently had in his Lubbock residence—all to the potential detriment of his creditors. The bankruptcy court noted that debtor, as he is entitled to do, claimed one residential homestead. Upon sale, the net proceeds would likewise be exempt under Texas law for 6 months. What debtor intended to do with the proceeds was not currently before the court. Further, debtor was not simultaneously asserting two homestead exemptions. His intentions as to the proceeds from the sale of the Lubbock property did not constitute an exemption claim. Last, a review of the tracts that supposedly made up the Ellison Place property reflected a total acreage that well exceeded any rural homestead claim. Any issue of whether the Lubbock residence or the Ellison Place property was the proper homestead was not presently before the court.

JURISDICTION AND VENUE…..

***Foster v. Holder et al (In re Foster),* 19-4131-ELM, 2020 WL 6127915 (Bankr. N.D. Tex. October 15, 2020).** After resolving years of litigation involving debtor (an attorney) and her family, the chapter 7 trustee obtained court approval of a final report and distribution and the bankruptcy case was closed. Nearly a year later, debtor sought to reopen the bankruptcy case, apparently to again assert claims and arguments that the bankruptcy court had denied prior to closing of the case; the bankruptcy court denied the motion to reopen. Several months after that, debtor initiated a lawsuit in state court suing the chapter 7 trustee and her counsel as well as a third-party that had purchased assets of the bankruptcy estate and debtor's husband; among the claims asserted by the debtor were quiet title as to property sold by the chapter 7 trustee to the third-party. The trustee moved to reopen the bankruptcy case and remove the state court lawsuit to the bankruptcy court; the debtor objected to the removal of the state court lawsuit. The bankruptcy court held that timeliness of removal depends on the timing of receipt by the removing party of the lawsuit for which removal is sought and not the date that the summons was issued. Addressing subject matter jurisdiction, the bankruptcy court held that it did not have subject matter jurisdiction with respect to the third-party that had purchased assets of the estate and debtor's husband because the nature of the claims were too tenuous to qualify under the court's related to

jurisdiction, but that it did have subject matter jurisdiction over the quiet title question because that involved the appropriateness of the disposition of an asset of the bankruptcy estate. Accordingly, the court retained the claims against the trustee and her counsel and all quiet title claims but sent the other claims against the third-party purchaser and the debtor's husband back to state court. 28 U.SC. 1334, 1452, 1446, Bankr. R. 9027.

***Goel et al v. Tucker,* 19-3005, 2021 WL 683461 (S.D. Tex. February 2, 2021).** Judgment was entered against a defendant that failed to appear at trial. The defendant appealed. After defendant appealed, the bankruptcy court learned that defendant's counsel had sent the notice of the trial setting to the wrong address and as a consequence the defendant did not have notice of the trial setting. While the appeal of the judgment was still pending, the bankruptcy court granted a Rule 60(b) motion to set aside the judgment. The plaintiff appealed that order vacating the judgment, arguing that the bankruptcy court did not have jurisdiction to enter it because the judgment was on appeal. The district court agreed that the bankruptcy court lacked jurisdiction to vacate the judgment because the judgment was on appeal at the time, but remanded to the bankruptcy court with a note that upon remand the bankruptcy court would have jurisdiction to vacate the judgment.

PROCEDURE ……………… ....

***Berry Contracting, LP et al v. Schmidt (In re Schmidt),*[3] SA-20-CV-1234-FB, 2021 WL 1134417 (W.D. Tex. Feb. 26, 2021).** Creditors moved for extension of deadline to file objections to discharge and dischargeability of chapter 7 debtor. Prior to hearing on the motion, creditors filed their adversary objection to discharge and dischargeability. At hearing, the creditors/plaintiffs asked the court to mark the motion moot, despite fact that court and opposing counsel expressed concern that doing so would render the adversary complaint untimely. Upon creditors'/plaintiffs' insistence, the court entered an order mooting the motion to extend. The debtor promptly filed a motion to dismiss the adversary arguing that it was untimely, and the bankruptcy court dismissed the adversary on the grounds that without an order extending the deadline to object, the adversary was untimely. The district court easily affirmed.

***Curtis v. The Chapman Family Trust et al (In re Chapman),* 628 B.R. 512 (Bankr. S.D. Tex. 2021).** Defendants in preference actions brought by Chapter 7 trustee moved to dismiss, arguing that they were not insiders and that complaint failed to plead facts necessary to establish liability. During running family dispute, debtor and children of his deceased wife had fought over issues relating to a trust that debtor and his deceased wife had created many years before to hold their business assets. During ongoing state court litigation, debtor had filed a chapter 11 that was subsequently dismissed with prejudice after bankruptcy court remanded the state court litigation. Debtor then settled with the children of his deceased wife in a way that enabled him to reopen his bankruptcy case to get permission to file a chapter 7 case. The chapter 7 trustee sued the children under Sections 547, 548, and Texas fraudulent transfer law. While agreeing that under Texas law and the Bankruptcy Code the children ceased to be relatives of their stepfather when their mother

[3] Appeal [Affirmed by]: *Schmidt Oilfield Servs. Venture v. Schmidt (In re Walker M. Schmidt Berry Contracting, L.P.)*, No. 21-50230, 2021 U.S. App. LEXIS 37291 (5th Cir. 2021)

passed away and therefore were not *per se* insiders, the court concluded that the allegations supported the stepchildren as being non-statutory insiders as a result of the community property interests that connected their claims to the debtor. The court declined to conclude at that stage that the settlement had been transacted at arm's length. Finding that the trustee had met all of the other pleading requirements except for successfully alleging under fraudulent transfer theory that there was no reasonably equivalent value given to the debtor, the court granted the trustee permission to amend her complaint to include the reasonably equivalent value allegation and denied the remainder of the motion to dismiss.

***In re Wigington,* 18-42230, 2021 WL 2134651 (Bankr. E.D. Tex. May 25, 2021).** Chapter 13 debtor was in dispute with mortgage holder over amount of claim. Debtor confirmed a chapter 13 plan, but trustee moved to dismiss when it became apparent that debtor's plan was grossly underfunded. The debtor, a licensed attorney proceeding *pro se*, failed to appear at the hearing on the motion to dismiss. When the court dismissed the case, the debtor filed a motion to vacate one week after the 14-day appeal deadline. Debtor had not made any mortgage payments since he filed his bankruptcy case. The court found that debtor's excuse for failing to appear at the hearing on the motion to dismiss (i.e. that he had inadvertently deleted it from his calendar) did not constitute excusable neglect and denied the motion to vacate.

***Johnson v. Steen, (In re Steen),* 20-5004, 2021 WL 267671 (Bankr. N.D. Tex. Jan. 25, 2021).** Chapter 13 debtor's ex-wife filed complaint to except debt owed her from discharge on "embezzlement" theory under section 523(a)(4) and debtor moved to dismiss. Court held that (1) allegations in ex-wife's complaint, that debtor, after being directed to sell one of the parcels of real property awarded to him (Green Street property) and to remit half of the proceeds to his wife, had sold the property for a price insufficient to generate any proceeds, did not state "embezzlement' claim, and (2) allegation that debtor, after being awarded property subject to owelty-of-partition (14th Street Property) in favor of ex-wife, had transferred the property to his mother for $10,000 without accounting back to ex-wife for her share of sales proceeds likewise did not state "embezzlement" claim. The divorce decree stated with respect to the Green Street Property that debtor was to compensate ex-wife for her interest in the property in one of two ways: debtor was to either pay ex-wife $6,420 or sell the property and split the proceeds evenly. Debtor then sold the property and realized no proceeds from the sale; there was nothing for debtor to split with ex-wife and the allegations failed to assert a claim. With respect to the 14th Street Property, the divorce decree expressly stated that ex-wife "is divested of all right, title, interest, and claim in and to [the] property." The monetary award granted to ex-wife was ostensibly secured by an owelty lien that was never documented and filed of record, thereby allowing the debtor to sell the property without compensating her. The court acknowledged that within the Fifth Circuit, courts have held that a security interest in property is an insufficient interest to create an embezzlement claim under section 523(a)(4). As such, the court could see no reason why an owelty lien should be treated any differently. Ex-wife did not have an ownership interest in the 14th Street Property, and her unrecorded lienholder status did not create a property interest sufficient to support an embezzlement claim.

***In re Nawab*, No. 21-10462-tmd, 2022 Bankr. LEXIS 20 (Bankr. W.D. Tex. 2022).** A Ch. 7 debtor filed bankruptcy due to business debts, which were a majority in number of his debts. He also had consumer debts, primarily a mortgage and car note, which he did not seek to discharge.

The consumer debs were a majority in amount of his debts. The court rejects the debtor's argument that his debts are primarily business debts. The debtor's bankruptcy case under Chapter 7 was dismissed because the majority view regarding 11 U.S.C.S. § 707(b) appeared to be that only the dollar amount of a debtor's debts should be used to evaluate whether a debtor had primarily consumer debts; and the debts of the debtor were primarily consumer in nature as the debtor's total amount of consumer debt was larger than the total amount of business debt.

CLAIMS……………………………………………………………………………………..

***In re Orosco,* 19-60038-rlj13, 2020 WL 6054695 (Bankr. N.D. Tex. Oct. 9, 2020).** Debtors sought court approval of a late-filed claim. Because the debtors did not mention excusable neglect in their motion, court denied motion to deem their late-filed claim as timely under Rule 9006. However, circumstances in this case warranted a rare allowance of the creditor's late-filed claim. Here, the case had been dismissed for over 50 days and was reinstated with no more than 11 days left for creditor to timely file its claim. The creditor had filed its claim one day after the original bar date. As such, court nullified the bar date and determined that the creditor's claim was timely filed.

***In re McKendrick,* 20-51569-rbk, 2021 WL 276824 (Bankr. W.D. Tex. Jan. 22, 2021).** Debtor (as guarantor) objected to lessor's proof of claim asserting that appx. $48,000 for unpaid rent and other expenses incurred as a result of debtor's company's breach of the lease was excessive because it did not account for rent received by lessor from subsequent tenants during the debtor's company's lease term. Court held that under the lease agreement and under Texas law, the debtor's company was entitled to a credit for the amount of rent paid by subsequent tenants in excess of the amount that would have been due from debtor's company for the remainder of the lease term in absence of breach. Because the debtor, as guarantor, could only be liable to the same extent as debtor's company, lessor's claim was reduced by the amount of this credit. Lessor was entitled, however, to its claim for late fees on rent, building cost true-up amounts, electrician and locksmith fees, the amount of a brokerage commission, legal fees and interest.

DISCHARGE - OVERALL-EFFECT OF DISCHARGE ....

***Hale v. Hilton, (In re Hilton),* 19-11101-tmd, 2021 WL 181519 (Bankr. W.D. Tex. May 5, 2021).** Debtor and plaintiff had entered into a settlement agreement to separate their business dealings which ultimately devolved into litigation in state court with allegations of settlement non-compliance on both sides. Based on the failed settlement and the litigation, plaintiff alleged that debtor owed her over $54,000 in damages, attorney fees, and sanctions. While the state court suit was pending, debtor filed for bankruptcy. Plaintiff filed this adversary proceeding alleging multiple grounds for non-dischargeability. Plaintiff failed to carry her burden on claims under sections 523(a)(2)(A) and 523(a)(6) and because plaintiff was advised by two lawyers and an accountant, and because "income" is a difficult term, the varying figures debtor disclosed for income on her schedules did not establish a claim under section 727(a)(4). Therefore, the only claims taken under advisement were under sections 727(a)(2)(A) and 727(a)(3). Plaintiff brought evidence that debtor withdrew tens of thousands of dollars from her business account both before

and after bankruptcy. Debtor argued that the court should not consider the activity in the business account because the business account belonged to debtor's wholly owned business. The court found that debtor did not observe the formal division between herself and her company, as evidenced by personal expenses drawn from the business account, and was not entitled to the benefits of that division and analysis of her business account was proper. Plaintiff had shown that at least $35,000 was withdrawn in cash from debtor's business account in the eight months before bankruptcy, leaving only debtor's intent at issue. However, neither party presented sufficient evidence to support a finding of debtor's intent and there was insufficient evidence in the record to apply the Fifth Circuit's multi-factor test to evaluate evidence of actual intent to defraud under section 727(a)(2)(A). However, based on the evidence and testimony at trial, the court concluded that debtor's failure to keep adequate records prevented her creditors, namely plaintiff, from evaluating her financial condition. Over $35,000 in cash was withdrawn from debtor's business account in the eight months prior to bankruptcy, and $33,000 in cash was withdrawn from the account in the six weeks following the bankruptcy filing. Court, although acknowledging debtor was in some ways lacking in sophistication, concluded that debtor's failures were ultimately a product of obstinate noncompliance during discovery and in her testimony at trial, and plaintiff prevailed under section 727(a)(3).

***Yaquinto v. Ward, (Matter of Ward),* 970 F.3d 298 (5**th **Cir. 2020).** After several opposed motions for extension of deadline for filing objections to discharge were granted, chapter 7 trustee and judgment creditors filed adversary complaint seeking denial of debtor's discharge in bankruptcy case that had been transferred from the Eastern District of Texas after the first meeting of creditors was scheduled but before it was held. The bankruptcy court entered judgment in favor of plaintiffs on denial-of-discharge claims, and debtor appealed. The Fifth Circuit held that: (1) addressing an issue of apparent first impression for the court, even assuming without deciding that the bankruptcy court erred when it moved the date of the first creditors meeting, and consequently, the deadline to file objections, the bankruptcy court had the equitable power to correct any error it may have committed, by deeming objectors' motion timely; (2) the bankruptcy court properly denied debtor's discharge for having made a false oath or account under section 727(a)(4)(A); and (3) the bankruptcy court also correctly denied debtor's discharge for his failure to explain satisfactorily a loss of assets under section 727(a)(5). Here, the bankruptcy court issued a notice (Eastern District) on May 5, 2014 that scheduled a section 341(a) meeting for May 30, 2014 and set July 29, 2014 as the bar date for filing discharge/dischargeability claims. However, before the 341 meeting date arrived, an agreed motion to transfer the bankruptcy proceedings to the Northern District was filed on May 13, 2014, and the initial creditor's meeting was not held. On June 5, 2014, Debtor's case was transferred to the Northern District. The Northern District subsequently entered its own notice which specified July 22, 2014 as the date for the initial section 341 meeting and September 22, 2014 as the date for filing discharge/dischargeability claims. Debtor did not object to the Northern District notice or the new discharge/dischargeability date. Debtor's judgment creditors filed a motion for extension of the deadline to file objections to discharge on August 27, 2014. The chapter 7 trustee joined in. Here, debtor opposed the motion arguing it was untimely under Bankruptcy Rules 4004(a) and 4007(c) because it was filed more than sixty days after the May 30, 2014 date set for the section 341(a) meeting in the Eastern District Notice. The bankruptcy court granted the motion and two more opposed motions for extension establishing May 1, 2015 as the final deadline for filing objections. It was clear from the record that had the debtor raised his contentions regarding the deadline for filing objections to discharge prior to July

29, 2014 (the deadline for filing objections in the notice sent by the Eastern District), the judgment creditors could have filed a motion for extension of time, and the bankruptcy court would have granted such a motion and would have authorized additional extensions, all of which would clearly be permitted by the Bankruptcy Rules. On April 30, 2015 the Complaint Objecting to Discharge was filed. After holding a trial on the merits, the Bankruptcy Court issued an opinion (1) affirming its conclusion that the initial motion for extension and the complaint were timely, and (2) denying debtor's discharge under sections 727(a)(4)(A) and 727(a)(5). Debtor appealed to the United States District Court for the Northern District of Texas, which affirmed. This appeal followed. The Fifth Circuit concluded that the bankruptcy court had the equitable power emanating from section 105(a) to correct any error it may have committed in changing the date of the first creditor's meeting after the case was transferred out of the Eastern District. The creditors reasonably relied on the issuance of the Northern District's Notice of a second, later date for the section 341(a)(meeting and a corresponding new, later deadline for filing objections to discharge). The bankruptcy court denied debtor a discharge after finding that he made a false oath or account regarding (1) his income, (2) his wife's income, (3) two automobiles, (4) a trust that he established for his family, and (5) the operating dates of two entities with which he was associated. As the bankruptcy court's judgment sufficiently rested on unchallenged findings, the Fifth Circuit affirmed the denial of debtor's discharge under Section 727(a)(4)(A). Plaintiffs also alleged that debtor was not entitled to a discharge under Section 727(a)(5) because he could not sufficiently account for compensation ($900,000) he received as an officer of one of his entities. The bankruptcy court found the debtor's explanation for the $900,000 wanting—i.e. self-serving, not credible or both and his version of events implausible. It was simply not plausible that debtor, a sophisticated businessman and lawyer would permit an entity he controlled to file a tax return showing substantial compensation to him if, in fact, that money was not paid to him. The Fifth Circuit held that the bankruptcy court did not clearly err when it concluded debtor received at least $900,000 in compensation and thus affirmed the denial of debtor's discharge under section 727(a)((5).

Paccar Financial Corp. v. Dhaliwal and Kaur (In re Dhaliwal), **20-3391, 2021 WL 1993585 (Bankr. S.D. Tex. May 18, 2021).** Plaintiff sought denial of discharge pursuant to section 727(a)(2)(A) or in the alternative exception from discharge pursuant to sections 523(a)(2)(A), 523(a)(4), and 523(a)(6). Plaintiff had financed debtors' purchase of one truck for their trucking business in California in 2015. This truck broke down, and debtors were unable to repair the truck but continued to pay on the truck through July 2019 but evidently left the truck at a repair shop in California. In August debtors moved from California to Texas. Thereafter, they sold their California home and used the estimated $90,000 of proceeds to repay relatives and friends for funds they had previously borrowed. Debtors then filed Chapter 7 and stated that the truck would be surrendered. Plaintiff had been unable to locate the truck after obtaining a lift stay in the bankruptcy, and debtors failed to help them locate the truck. Debtors admitted at trial that they had failed to list the payment of $90,000 they received from the sale of their California home. The court determined that the debtors made false statements under oath with respect to estate property by failing to disclose the proceeds of the California real estate within one year of filing, transferring $90,000 to friends and family, and thereby concealing and permitting this property to be concealed. As such, the debtors' actions were sufficient to show fraudulent intent as set forth in section 727(a)(2)(A), and the debtors' discharge was denied. Although the court found that plaintiff failed to meet its burden under sections 523(a)(2)(A) and 523(a)(4), the court determined that here, the

evidence showed that it was substantially certain that the debtors' actions in not advising plaintiff as to the location of the truck, and the concealment of the sale proceeds were certain to result in harm, and therefore plaintiff was entitled to relief under section 523(a)(6) excepting plaintiff's debt from discharge.

Epstein v. Busby et al (In re Busby), **19-5051, 2021 WL 1522216 (Bankr. W.D. Tex. April 15, 2021).** Debtor husband was a CPA and realtor who engaged in multiple pre-petition transactions involving hundreds of thousands of dollars of transfers that he failed to disclose until the end of a series of amendments to his SOFA and Schedules, as well as business interests that were undisclosed. US trustee sought denial of discharge under Section 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4)(A), and (a)(5). Debtor argued that failures to disclose were inadvertent and harmless. With respect to various transfers to family members, and noting that the debtors had retained possession of certain of those items despite having supposedly sold them to those family members, the court denied discharge under 727(a)(2)(A). Because debtors' failed to put into evidence various books and records that either should have been in their possession or should have been readily available by subpoena and which were necessary to support their claims relating to various business interests, the court also denied discharge under (a)(3). Concerned about the number of continued 341 meetings and amendments to the schedules and SOFA, the court concluded that discharge should also be denied under (a)(4)(A). The court declined to deny discharge under (a)(5) with respect to certain large monetary transfers, finding that although the transfers were unorthodox and did not appear to bring benefit to debtors, the debtors had provided an accurate explanation of what had happened with those funds. Because there was no evidence of post-petition transfers, the court also denied relief under (a)(2)(B).

DISCHARGE - PARTICULAR DEBTS ....

Ascentium Capital, LLC v. Rigoulot (In re Rigoulot) **19-3131, 2020 WL 67001400 (Bankr. N.D. Tex. November 13, 2020).** Debtor caused his company to sell certain collateral of creditor without remitting the proceeds to the creditor or obtaining consent of the creditor, in violation of the agreement between the company (signed by debtor) and the creditor, which debtor had guaranteed. When the debtor filed personal chapter 7, the creditor initiated an adversary seeking a ruling that he should be liable to creditor for willful and malicious injury under 11 U.S.C. § 523(a)(6). The credible evidence at trial was that the debtor's father handled the financial side of the business while debtor handled the logistical side and that debtor was unsophisticated in business matters and did not understand that selling the collateral required the creditor's consent. While the court did conclude that under the facts of the case, the debtor was liable for conversion, the evidence at trial did not establish willfulness or maliciousness on the part of debtor.

Naquin v. Rodriguez, (In re Rodriguez), **19-3024, 2020 WL 6787527 (Bankr. N.D. Tex. Nov. 16, 2020);** ***Naquin v. Rodriguez (In re Rodriquez),*** **19-3015, 2020 WL 6737430 (Bankr. N.D. Tex. Nov. 16, 2020).** Plaintiff filed complaints against debtors seeking determination that the debtors were liable for barratry pursuant to Texas Gov't Code 82.0651(c) and that plaintiff's resulting claims were non dischargeable pursuant to sections 523(a)(2)(A) and 523(a)(6). These adversaries against the two debtors were consolidated for pretrial matters and trial due to prevalence of common issues of fact and law. Plaintiff was involved in a car accident and was taken to a hospital by ambulance where he received treatment. Plaintiff did not initiate contact

with an attorney to seek legal assistance. Plaintiff then received a voicemail from an unidentified female caller concerning the plaintiff engaging the Law Office of Jeremy C. Anderson for legal representation in connection with property damage and personal injury from the car accident. Plaintiff then returned the voicemail call, and it was answered by a female the plaintiff believed to have been the same person leaving the voicemail. It was unclear to the court who actually left the voicemail or answered the return call because the females did not identify themselves by name. Both Terra Rodriguez and Richard Rodriguez were employees of Anderson Law but testified that they were not the unidentified person on the voice mail and phone call. During the return call, plaintiff understood that he was speaking with someone from Anderson Law and was given information about getting assistance with his injuries and losses due to the accident. Plaintiff answered "yes" when the unidentified caller asked him if he would like more detail about how the process would work. Richard Rodriquez then called plaintiff. It was unclear exactly what was discussed on this phone call but Richard Rodriguez sent plaintiff several documents to sign in connection with Anderson Law representing him with respect to the accident. During the legal representation, Anderson Law filed a claim against plaintiff's automobile insurer for personal injury protection benefits and recovered $2,500 for the plaintiff from which Anderson Law kept its fee of $833. Plaintiff subsequently terminated Anderson Law. Terra Rodriguez and Richard Rodriguez each filed their own bankruptcy proceeding and plaintiff then filed complaints asserting claims against them for barratry and sought a determination that his claims were nondischargeable. The criminal prohibition of barratry is codified in section 38.12 of the Texas Penal Code. A person commits barratry, if with intent to obtain an economic benefit, the person solicits employment, either in person or by telephone, for himself or another or accepts or agrees to money or anything of value to solicit employment. Section 82.0651 of the Texas Government Code also imposes civil liability for prohibited barratry. The elements of a civil barratry claim are solicitation and procurement of a contract for legal services through conduct violating section 38.12(a) of the Texas Penal Code or rule 7.03 of the Texas Disciplinary Rules of Professional Conduct which prohibits a lawyer from paying or offering to pay a non-lawyer for soliciting prospective clients. The civil barratry statute recognizes that non-lawyers can commit barratry. With respect to Terra Rodriguez, the plaintiff did not satisfy the solicitation element of barratry because plaintiff did not show by a preponderance of the evidence that Terra Rodriguez left the voicemail or spoke to plaintiff on the return call. As such, the evidence did not support a finding that Terra Rodriguez ever communicated with the plaintiff prior to the time he signed the engagement documents with Anderson Law, and she could not be held liable for barratry. With respect to Richard Rodriguez, the evidence did show that he spoke with plaintiff on the phone prior to the time the plaintiff signed the engagement documents with Anderson Law, but the plaintiff did not show by a preponderance of the evidence that Richard Rodriguez ever solicited employment. The conversation could only constitute solicitation of employment if neither the person receiving the communication nor anyone acting on that person's behalf had requested the communication. Here, plaintiff did request the communication from Richard Rodriguez. The court therefore concluded that plaintiff did not have a claim against either Terra Rodriquez or Richard Rodriguez for barratry, and therefore there was no need to opine on the dischargeability of these claims.

***Eady v. United States of America and The Pennsylvania State University (In re Eady),* 20-4028, 2021 WL 3148951 (Bankr. E.D. Tex. July 26, 2021).** Plaintiff sought this discharge on the basis that excepting his student loans from discharge would impose an undue hardship on him and his dependents. Debtor was recently divorced and the non-custodial parent of two minor children. He

had been diagnosed with a chronic medical condition but could still work in a sedentary environment. One of his children had been diagnosed with a developmental disorder. Debtor held a bachelor and a master's degree in engineering and he was currently employed earning an annual salary of $90,000. On Motion for Summary Judgment by defendants, the court found that the debtor did not meet the minimal standard of living *Brunner* prong as his salary far exceeded the federal poverty level for a household of three, and several of his expenses (401k contribution, children's educational fund, a security system and home warranty plan) could be redirected toward payment of his student loans. Debtor provided no admissible evidence concerning his medical diagnosis on his future ability to work and thus failed to show that "additional circumstances" would persist for a significant period under the second prong of *Brunner*. The court did determine that the debtor had demonstrated a good faith effort to repay under the third prong of the *Brunner* test. But failing the other two prongs, the court determined that defendants were entitled to summary judgment that the debts owed were nondischargeable.

***Griffith v. Cleveland State University Student Loans, et al. (In re Griffith),* 17-3051-hdh, 2021 WL 2762809 (Bankr. N.D. Tex. June 30, 2021).** Debtor sought discharge of her student loans based on the fact she could not work full time because she had to care for her partner who had Parkinson's disease. Debtor worked as a psychometrist and holds a master's degree in psychology. She had originally lived in Dallas, but moved to Virginia where her adult son lived so he could help with the care of her disabled partner. This move decreased the debtor's income and increased her expenses. She later obtained her real estate license but had not earned much income and had been able to only find part-time work as a psychometrist. She was unwilling to relocate her partner to a nursing home and testified that she did not believe she could return to full time work as she needed to care for her partner. The court determined that debtor's expenses could be drastically reduced (rent, car payment, car maintenance plan, tolls, phone and vitamins) while still maintaining a minimal standard of living and therefore did not satisfy the first prong of the *Brunner* test. Debtor did not satisfy the second prong of the *Brunner* test as she was well-educated and had been able to find employment quickly in the past. While the court understood the debtor's desire to care for her disabled partner personally, the court determined this was not outside of debtor's control and did not result in a "total incapacity" to pay debts now and in the future. In addition, the debtor did not demonstrate a good faith effort to repay her student loans and failed the third prong of the *Brunner* test. Following her deferments and forbearances, she failed to make payments toward her loan balance even when she could have done so by lowering her expenses. Student loan debts were thus non-dischargeable.

***Randall v. Navient Solutions (In re Randall),* 19-00368-MMH, (Bankr. D. Mary. June 21, 2021).** Sixty-eight year old debtor sought to discharge student loan debts that she incurred to obtain liberal arts degrees. She owed more than $500k in student loans, did not own meaningful assets, was not incurring unnecessary expenses, and worked full-time with some overtime. The court easily found that the debtor would not be able to repay ALL of her student loan debt while maintaining a minimal standard of living, that debtor's age and situation indicated that her financial state of affairs was almost certain to persist, and that debtor's various efforts to address her loans indicated a good faith intent to repay them. Reviewing the circumstances, the court concluded that $12,000.00 of the student loans would be nondischargeable and payable over a ten year period.

***Epperson v. Educational Credit Management Corporation (In re Epperson)* 18-4015, 2021 WL 810873 (Bankr. E.D. Tex. February 24, 2021).** *Pro se* debtor who owned home with significant equity, whose gross annual income was $86k, and who chose to send his children to private school, brought adversary seeking determination that his $40k in student loans were an undue hardship. At trial, debtor was his only witness. Noting that the debtor had apparently not made a meaningful effort to reduce his expenses and had failed to present corroborating evidence with respect to the various health issues from which he claimed to suffer, the court found that the debtor lived far above a minimal standard of living and was not entitled to discharge of his student loan obligations.

***Zeba, LLC v. Hosseini (In re Hosseini),* 19-2001, 2021 WL 1961921 (Bankr. S.D. Tex. May 14, 2021).** Debtor helped his father run a sketchy check cashing business located inside a store owned by a business associate. When the father suffered from a stroke, the son closed up the business without paying the business associate certain monies owed. The business associate threatened the debtor into signing a promissory note and granting a deed of trust to real property owned by debtor. When the debtor filed bankruptcy, the business associate sought to have the entirety of the debt reflected in the promissory note deemed nondischargeable. The court bifurcated the amounts owed into two parts: 1) dischargeable amounts that consisted of losses the business associate suffered over the course of the time in which debtor's father operated the check cashing business and 2) nondischargeable amounts relating to funds the debtor failed to account for when closing up the business. Although finding that the debtor had told many falsehoods in his testimony, the court concluded that the promissory note and deed of trust were given under duress and could not themselves form the basis for nondischargeable debts.

***Estate of Perteet et al v. Jones-Peteet (In re Peteet),* 630 B.R. 61 (Bankr. S.D. Tex. 2021).** Debtor's divorce decree divested her of all rights to proceeds from husband's pension benefits. When husband died several years later with debtor still listed as beneficiary on the pension account, the debtor received over $220,000.00 from the pension benefits. Debtor spent all of the money then filed bankruptcy seeking to discharge the pension-related debt to the husband's estate. The husband's estate sought a finding of nondischargeability under, among others, 523(a)(15). The debtor argued that she could not be liable under 523(a)(15) because her ex-spouse was deceased. The bankruptcy court held that the language of the statute did not distinguish between debts owed to living and deceased former spouses and therefore could be applied to debts owed to the estates of deceased former spouses. Finding that all property settlements between a husband and wife are covered by 523(a)(15), the court held that the debtor's liability to the former husband's estate was nondischargeable.

***Reticulum Management, LLC v. Watters (In re Watters),* 20-3088, 2021 WL 3744408 (Bankr. N.D. Tex. August 24, 2021).** Creditor brought nondischargeability complaint against debtor relating to failed business investment. At trial, there was substantial evidence from third-parties that the business failed in the normal course and that debtor had an honesty of intent in all of his dealings related to it. Finding the debtor to be a credible witness and noting that the counterparties were sophisticated business people, the court found that there had been neither misrepresentations nor justifiable reliance and therefore found the debts to be dischargeable.

***Lawrence v. Frost Bank (In re Lawrence)*, 3:19-cv-01843, 2021 WL 24541 (N.D. Tex. January 4, 2021).** Debtor took substantial business loans from Frost Bank for his entity, then promptly

formed a new entity through which he did business and never made a single payment on the debts to the bank. The bankruptcy court held the debts to be nondischargeable under 523(a)(2)(A). The district court, noting that the debtor "throws everything but the kitchen sink at the bankruptcy court's judgment" by raising twenty-one issues on appeal, easily affirmed the bankruptcy court in a blisteringly succinct opinion that somehow managed to avoid direct commentary on the absurdity of some of the arguments made (e.g. that the bankruptcy court erred by commenting on credibility of witnesses).

***Pediaplex Management, LLC v. Van Kleef (In re Van Kleef)*, 20-3082-sjg, 2021 WL 4483440 (Bankr. N.D. Tex. September 29, 2021).** Debtor undertook to perform on a construction contract under a dba. Despite not having complied with various contractual terms regarding timing and change orders, debtor filed a mechanic's lien for disputed payment amounts. Counter party paid certain sums for release of the lien, but there was no release of the debtor by the counterparty. Debtor filed for chapter 7 and omitted counterparty from his schedules. Counterparty sued debtor in state court, causing debtor to amend his bankruptcy schedules to include the counterparty. Counterparty promptly (but after the bar date) filed an adversary seeking a determination of nondischargeability based upon allegations that debtor had filed a fraudulent lien. After trial, bankruptcy court entered judgment in favor of counterparty, finding that the debtor's lien claim was fraudulent under Texas law and therefore nondischargeable under Section 523(a)(2)(A).

***Poddar v. Hamza-Harris et al (In re Hamza-Harris),* 19-4031, 2021 WL 4256163 (Bankr. E.D. Tex. September 17, 2021).** Creditor of chapter 7 debtor sought determination of nondischargeability relating to monies he had paid to debtor to repair a car that debtor failed to repair. Debtor did not appear at trial. The court found that the debt to be nondischargeable under 523(a)(4) and (a)(6) because debtor had apparently known nothing about how to fix the car and apparently used the arrangement as a way to get money out of the creditor.

***United States v. Tallis (In re Tallis),* 19-4113, 2021 WL 4145622 (Bankr. N.D. Tex., Sept. 9, 2021).** IRS sought determination of nondischargeability relating to more than $15 million of unpaid 2012 federal income tax liability pursuant to 523(a)(1)(C). Debtor had been responsible for woefully deficient record keeping associated with the underlying tax debt and the IRS had engaged in long-running collection litigation attempting to collect the debt. Finding that the debtor had engaged in conduct intended to evade or defeat the tax obligation, including engaging in transactions intended to hide millions of dollars of assets from the IRS, the court held the debt to be nondischargeable.

CHAPTER 13 - GENERAL ....

***In re Nobles,* 17-50294-rlj13, 2021 WL 771665 (Bankr. N.D. Tex. February 26, 2021).** When chapter 13 debtors had increased income in thirty-six month of sixty-month plan, the chapter 13 trustee moved to amend the plan to increase the monthly payments. The debtors argued that because they were below-median income and had a thirty-six month applicable commitment period, they could not as a matter of law be required to make higher payments after month thirty-

six. The court rejected the debtors' argument that the applicable commitment period controlled over the approved plan term, noting that 11 U.S.C. § 1329 does not limit the amount of the monthly payments proposed under a modification.

***In re Guerrero,* 19-52605-CAG, 2021 WL 809770 (Bankr. W.D. Tex. March 1, 2021).** Trustee objected to secured lender's request for attorney fees under section 506(b) and bankruptcy rule 2016(a) arguing that bankruptcy Rule 3002.1 applies to secured lender's claim for fees and expenses because this is a chapter 13 case in which secured lender holds a claim secured by a security interest in the debtor's principal residence, and for which the plan provides that the trustee… will make contractual installment payments. Trustee contended that Rule 3002.1(c) required secured lender to prepare a notice using the appropriate form uploaded to the claims registry—not a fee application—to itemize all fees, expenses, and charges served within 180 days after the date on which the fees, expenses and charges were incurred. Court determined that the plain language of Rule 3002.1 sets forth the mandatory procedures for a claimholder seeking post-petition fees, expenses or other charges. Here, the secured lender failed to give notice of its fees, expenses and charges by filing Official Form 410S2 in the claim registry. Because secured lender sought post-petition fees and costs through the fee application process and not pursuant to the requirements of bankruptcy rule 3002.1, the court sustained the trustee's objection and required the secured lender to seek fees under the procedures listed in Rule 3002.1.

***In re Young,* 19-20386-rlj13, 2021 WL 415880 (Bankr. N.D. Tex. Feb. 5, 2021).** Court considered whether the debtors could retain their entire tax refund, which was $4,415 after they had spent the refund and then filed a Motion to Retain the refund. The debtors proactively requested that they be able to retain their tax refund after they spent it. Trustee expressed his dissatisfaction with the debtors having already spent the refund rather than having turned it over to the trustee. The motion specifically requested that the funds be used to repair a car needed to take Ms. Young to doctor's appointments due to an illness. However, the debtors had actually spent the refund on other expenses by the time of the hearing. Although the debtors spent the refund before the hearing, given their circumstances there was no indication of bad faith. Court granted the debtors request to retain as it was shown the debtors needed the extra funds to pay for unexpected, but necessary expenses associated with Ms. Young's illness. Although, the debtors spent the refund on other expenses associated with Ms. Young's illness instead of the car repair, the court determined the debtors were doing their best to cope with the effects of the illness and demonstrated a need to retain the entire refund.

***Blanco et al v. Bayview Loan Servicing, LLC (In re Blanco)*, 20-1005, 2021 WL 4190170 (Bankr. S.D. Tex. September 14, 2021)**. Chapter 13 debtors received discharge in 2018 (case filed in 2011), with facts involving tenuous relationship with mortgage lender. Shortly thereafter, debtors ceased paying mortgage lender, claiming frustration over disputed amounts owed. Mortgage lender proceeded to foreclosure and debtors filed chapter 13 again, initiating adversary challenging the note, deed of trust, changes to mortgage payments that had been made during the 2011 case without compliance with Rule 3002.1, and post-discharge activities of mortgage lender; mortgage lender countersued for breach of contract. Resolving competing motions to dismiss and for judgment, the court dismissed the debtors' challenge of the note and deed of trust on the grounds that no such challenge had been made in the 2011 case, held that debtors could seek

penalties and sanctions for violations of Rule 3002.1 that had occurred in a prior case, and did not need to allege harm in order to seek relief under Rule 3002.1.

***In re Parson*, 21-30982, 2021 WL 4483124 (Bankr. N.D. Tex. September 30, 2021).** A *pro se* chapter 13 debtor with a history of vexatious litigation in her prior, dismissed chapter 13 cases refiled for chapter 13. The trustee moved to dismiss on account of debtor's abuse of the bankruptcy process. The court, exploring the lengthy and absurd extent to which debtor had gone in her various cases to disrupt the process (dozens of motions for continuance, notices of appeal, motions to recuse the judge, etc), the court dismissed the case with prejudice to refiling for three years.

***In re Holton,* 19-50158, 2021 WL 4255467 (Bankr. N.D. Tex. September 17, 2021).** Chapter 13 debtors defaulted on plan payments, resulting in trustee and mortgage lender seeking dismissal. Debtors subsequently caught up their plan payments. Mortgage lender filed a Rule 3002.1 notice seeking its attorney's fees. Debtors objected, and on eve of hearing mortgage lender supplemented their notice to add the attorney's fees incurred responding to debtors' objection. Because mortgage lender had not included an itemization in its original notice, the court disallowed a small portion of the supplemental fees but allowed the original fees and some of the supplemental fees noting that under the Court's general orders, the mortgage lender was entitled to recover its attorney's fees.

Chapter 13 - PLAN ....

***Evolve Federal Credit Union v. Barragan-Flores (In re Barragan-Flores),* 984 F.3d 471 (5th Cir. 2021).** To obtain confirmation of his proposed chapter 13 plan, debtor could not elect different options of "surrender" and "cram down" for the two different motor vehicles that cross-collateralized the creditor's two claims. Debtor had to surrender both vehicles or retain both pursuant to "cram down" option and could not mix and match and obtain confirmation over secured creditor's objection. The Fifth Circuit determined that the text of section 1325(a)(5) allows debtors to select a different option "with respect to each allowed secured claim." However, allowing a debtor to select a different section 1325(a)(5) option for each claim is different from allowing a debtor to select different options for different collateral securing the same claim. While section 1325(a)(5) allows the former, it does not allow the latter: its use of the conjunction "or" between the options provided in subsection (A), (B) and (C) makes it clear that the debtors may choose only one of those three options for each claim. A plan violates that requirement when it selects different options for different collateral securing the same claim.

***In re Tate*, 21-50947, 2021 WL 4467604 (Bankr. W.D. Tex. September 29, 2021).** Debtor's home was purchased at property tax foreclosure. Debtor filed Chapter 13 bankruptcy and proposed plan that would redeem the property through payments over five years. The purchaser at the tax foreclosure sought relief from stay, with debtor asserting that purchaser's interest was more of a lien and purchaser asserting that it held title. The bankruptcy court held that the debtor could not use a Chapter 13 plan to achieve redemption in a timeframe that was greater than that called for under Texas law and that under Texas law, purchaser held title to the property and was entitled to possession of the property.

***In re Gibson,* 21-20072-rlj13, 2021 WL 4237548 (Bankr. N.D. Tex. September 15, 2021).** Chapter 13 debtors proposed plan that contributed $1,000 per month to various ERISA qualified retirement plans. The trustee objected, asserting that the plan failed to contribute all disposable income. The court overruled the trustee's objection because debtors were contributing more to the plan from social security income than they were devoting to the retirement plans and were making a distribution to unsecured creditors despite having a negative disposable income calculation.

***In re Stanke*, No. 16-60110-rlj13, 2022 Bankr. LEXIS 50 (Bankr. N.D. Tex. 2022).** As he was preparing to start closing a completed 60-month case, a Ch. 13 trustee learned that the debtors had received inheritances during the case. He told the debtors he would seek to amend the plan to pay off all creditors. The debtors were amenable to that solution, particularly since they had a large amount of student loan debt, which would be paid. However, in a review of a bankruptcy plan modification, the court denied the trustee's modification because the plan modification violated 11 U.S.C.S. § 1329(a) because it was proposed after the debtors completed their plan payments to the trustee; [2]-The plan modification violated 11 U.S.C.S. § 1329(c) because the modification would have extended the plan term beyond the sixty month time limit for a bankruptcy plan.

***Hammett v. Woodard*, No. 4:21-cv-0099-P, 2022 U.S. Dist. LEXIS 41459 (N.D. Tex. 2022).** In a good faith dispute arising in a CH. 13 confirmation proceeding, the bankruptcy court did not err in confirming the plan. The court is not required to enumerate every factor considered in evaluating good faith. Although the Bankruptcy Court appears to give great weight to Woodward's compliance with the Bankruptcy Code's technical requirements, the Bankruptcy Court nonetheless correctly applied the totality-of-the-circumstances test. Because a court need not make a formulary statement articulating the individual facts pertinent to its decision, it cannot be said that the Bankruptcy Court incorrectly applied the totality-of-the-circumstances test. Further, nothing in the record indicates that the Bankruptcy Court confirmed the Plan, and overruled Hammett's objections, based on a legal conclusion rather than the facts gleaned from the evidence in the record. Accordingly, "the fair import" of the Bankruptcy Court's analysis is that the Bankruptcy Court considered each good-faith consideration individually and in total, despite the apparent focus on the technical requirements of the Bankruptcy Code, as required by the Fifth Circuit.

CONVERSION ....

***In re Assadi*[4], 1:20-CV-998-LY, 2021 WL 917489 (W.D. Tex. March 9, 2021).** Sole issue on appeal was whether the bankruptcy court abused its discretion by converting the case from chapter 11 to chapter 7. The court "shall" dismiss or convert a case under chapter 11 to one under chapter 7, whichever is in the best interests of the creditors and the estate for "cause." 11 U.S.C. 1112(b)(1). In this instance, conversion instead of dismissal would allow the trustee to work with a secured creditor of debtor to resolve various title issues, which were caused by certain transfers among the debtor and his entities. Trustee believed he would be able to resolve the title issues with the secured creditor to allow a quicker and more efficient sale of certain real estate and as such funds would likely be available for the unsecured creditors. The court agreed with the bankruptcy court findings that the debtor was unable to show "unusual circumstances"-here debtor's apparent intent was to fund a chapter 11 plan through continued litigation with the secured creditor and the sale of the real estate notwithstanding various title and legal issues. Court

[4] Subsequent filing [Affirmed by]: In re Assadi, No. 21-50293, 2021 U.S. App. LEXIS 31341 (5th Cir. 2021)

concluded that bankruptcy court did not abuse its discretion by converting case from chapter 11 to chapter 7.

***UST v. Adamcik (In re Adamcik),* 20-5052, 2021 WL 3868251 (Bankr. N.D. Tex. August 27, 2021).** Chapter 13 debtor was involved in several post-confirmation transactions (e.g. purchase of a house) that were not disclosed when he subsequently converted to Chapter 7 after losing his job. At his Chapter 7 341 meeting, he was evasive and lacked candor about a large severance payment that he received post-conversion and refused to acknowledge several of the post-confirmation transactions. The UST initiated an adversary seeking to either deny his discharge or dismiss for bad faith conversion. Among other things, the debtor argued that the lack of disclosures were inadvertent and immaterial because post-petition property of a converted chapter 13 case is not property of the bankruptcy estate. The court declined to deny the discharge, finding it troubling that debtor's attorneys had apparently failed to adequately advise him with respect to his various disclosure obligations. However, due to debtor's lack of candor during the Chapter 7 phase of the case, the court found that the conversion was in bad faith and invoked Section 348(f)(2) to bring into the estate all of debtor's property as of the conversion date.

ATTORNEYS (FEES AND CONDUCT) ....

***In re Ozcelebi,* 20-70295, 2021 WL 3160861 (Bankr. S.D. Tex. July 20, 2021).** In Subchapter V case, after court had approved retention of counsel by debtor, creditor attacked retainer held by debtor's counsel arguing that it was the fruit of fraudulent transfer schemes by the debtor. In the context of the creditor's objection to an interim fee application from debtor's counsel, and noting that no evidence was presented that the retainer itself was part of a fraudulent transfer scheme, the court found that debtor's counsel had made adequate disclosures in its application to employ, that debtor's counsel had a state law security interest in the retainer it was seeking to draw down, and that creditor had untimely filed his objections which independently justified denial of the same.

***In re Steen,* 20-50042, 2021 WL 2877515 (Bankr. N.D. Tex. July 8, 2021**). Chapter 13 debtor's ex-spouse filed nondischargeability adversary that was subsequently dismissed under Rule 12(b)(6). Debtor's counsel filed a fee application and the Chapter 13 trustee objected to the inclusion of fees for responding to the adversary because doing so did not benefit the estate. Finding that section 330(a)(4)(B) permitted debtor's counsel to be compensated for services that benefited the debtor and not the estate, the court concluded that the relatively small fees charged by debtor's counsel were reasonable and necessary and would be approved for administrative expense status under section 503(b)(2).

***Chowdary v. Ozcelebi (Ozcelebi)*, 635 B.R. 467 (Bankr. S.D. Tex. 2021).** Citing Winston Churchill, the court orders amendment of a "shotgun pleading": "the discipline of setting out the real points concisely will prove an aid to clearer thinking." In plaintiffs' adversary proceeding seeking an exception to discharge of a judgment under 11 U.S.C.S. § 523(a)(2)(A), (a)(4), and (a)(6), the debtor defendant's motion to dismiss was rendered moot by the fact that plaintiffs' first amended complaint committed multiple shotgun pleading errors that violated Fed. R. Civ. P. 8(a)(2), 9(b), and 10(b) and made the court unable to determine what was being alleged or to rule on the merits, so the court sua sponte ordered plaintiffs to submit a more definite statement pursuant to Fed. R. Civ. P. 12(e).

***Sylvester v. Chaffe McCall, L.L.P. (In re Sylvester)*, No. 21-30186, 2022 U.S. App. LEXIS 1141 (5th Cir. 2022).** Bankruptcy court applied the wrong legal standard in awarding attorney's fees under 11 U.S.C.S. § 330(a) as limiting compensation to services requiring professional expertise maintained the integrity of the commission-based compensation scheme, which the court did not do. The attorney had to meet its burden of demonstrating entitlement to fees. A court may compensate an attorney under 11 U.S.C.S. § 330(a) only for services requiring legal expertise that a trustee would not generally be expected to perform with an attorney's assistance. It was improper for the bankruptcy court to assume that the attorney's services required legal expertise rather than requiring the attorney to meet its burden. If insufficient explanatory information was provided for determining the precise nature of the services rendered, the court was compelled to determine that the services were not compensable as legal services.

ESTOPPEL THEORIES...

***Parkin et al v. Jamieson (In re Jamieson)*, 19-4073, 2021 WL 438868 (Bankr. E.D. Tex. February 8, 2021).** Customers of debtor's fabrication business engaged in dispute with debtor over items that they had ordered. Customers filed suit in state court and obtained a default judgment. When debtor filed personal bankruptcy, customers initiated an adversary proceeding seeking to have the default judgment determined to be nondischargeable under Section 523(a)(2). The bankruptcy court found that collateral estoppel did not apply as the default judgment lacked factual findings necessary to support the Section 523(a)(2) claim. Noting heavily that the evidence consisted entirely of "he said, she said" without meaningful independent corroboration, the court declined to find that the debtor had made false representations or committed actual fraud.

***In re Owsley,* 2:20-cv-00171, 2021 WL 3033120 (S.D. Tex. July 19, 2021).** Enforcement order from divorce proceeding called for a certain real property note to be paid for by wife. Husband subsequently filed bankruptcy and real property was sold and proceeds deposited into bankruptcy court's registry. Wife asserted that she was entitled to reimbursement for post-divorce mortgage payments that she had made and husband asserted that funds should be disbursed equally. The bankruptcy court found that neither Texas law nor the state court orders relating to the divorce authorized the wife to receive reimbursements upon sale of the real property. Wife appealed and sought certification of direct appeal to Fifth Circuit. The district court denied direct certification, finding that the multifarious issues the wife claimed to raise were really two simple issues readily resolved by well-settled legal principles. The district court went on to affirm the bankruptcy court's ruling that wife was not entitled to reimbursement, holding that the relevant state court orders from the divorce proceeding were owed preclusive effect.

***Mazzara v. Provencher, (In re Provencher),* 19-5026-cag, 2020 WL 7787036 (Bankr. W.D. Tex. Dec. 4, 2020).** The court considered plaintiff's Motion for Summary Judgment and defendant's Response with respect to plaintiff's 523(a)(6) claim. Plaintiff had previously filed a lawsuit in Virginia state court seeking $25,000 in compensatory and punitive damages against debtor for a defamation claim. Plaintiff alleged debtor had posted a message on a facebook page that "[accused] plaintiff of sexual assault and/or rape" while plaintiff was a student at Christendom College. Plaintiff claimed that debtor's allegations were false, and that debtor had no personal knowledge or factual foundation for the accusations. Plaintiff also contended that debtor "published the factually false statements with malice, actual and/or legal," that the statements were

published "with the intent they carry… false, defamatory innuendo," and "such defamatory publications were intentional, willful, wanton and/or reckless. Debtor responded in the state court lawsuit which was then set for trial. Prior to trial, debtor filed for relief under chapter 7. Plaintiff then initiated this adversary proceeding and filed his Motion to Lift the Stay to allow the state court lawsuit to proceed. The court lifted the stay for the parties to litigate the defamation claim in the Virginia state court. When the Virginia state lawsuit resumed, debtor stipulated to liability and agreed to entry of judgment in favor of plaintiff for the full amount of the damages claimed. The Virginia state court entered judgment against debtor for defamation and defamation *per se*. The amount of the judgment was written on the Warrant in Debt coversheet, which was signed and dated by the state court judge. The Warrant in Debt coversheet was attached to a document labeled "Attachment A." Plaintiff submitted "Attachment A" which recited the same facts and allegations as the Warrant in Debt. The state court did not include any other documents with its judgment. Once the judgment was entered in state court, the bankruptcy court lifted the abatement and issued a new scheduling order. Plaintiff proceeded to file his First Amended Complaint and then filed his Motion for Summary Judgment arguing that the judgment against debtor entered in the Virginia lawsuit was non-dischargeable under section 523(a)(6) due to the applicability of either *res judicata*, collateral estoppel, or judicial estoppel. The bankruptcy court concluded that collateral estoppel applied in this case. The court also found that the dollar amount of the debt and the defamation claim were subject to *res judicata*. The state court record, however, was insufficient to conclude that debtor's conduct was willful and malicious under section 523(a)(6). The bankruptcy court gave preclusive effect to the dollar amount of the debt and the finding of defamation provided in the state court judgment, but ordered that it must receive further evidence of debtor's intent along with legal argument to determine if the debt was nondischargeable under section 523(a)(6).

ARBITRATION…… ....

***Allen, et al v. Amberson (In re Amberson),* 20-5060-cag, 2021 WL 1845328 (Bankr. W.D. Tex. May 7, 2021).** Son-in-law attorney represented father-in-law and related parties in large state court litigation. After successful result, attorney and related parties became embroiled in litigation over allegedly fraudulent billing practices of attorney. The related parties won a large award against the attorney after a ten and a half day arbitration hearing in which arbitrator made many specific findings regarding fraudulent billing by attorney. When attorney filed bankruptcy, the related parties initiated an adversary seeking determination of nondischargeability under section 523(a)(2)(A), (a)(4), and (a)(6). The bankruptcy court held that the arbitration award contained sufficient findings of fact to preclusively establish the requisite elements for nondischargeability of the underlying debts pursuant to 523(a)(2)(A) and (a)(4) and accordingly granted the related parties summary judgment with respect to those claims.

APPELLATE PROCEDURE ....

***In re Genter,* 3:21-CV-0965-K, 2021 WL 2716587 (U.S.D.C. N.D. Tex. June 30, 2021.** . Appellants sought leave to appeal an interlocutory order entered by the bankruptcy court in the underlying bankruptcy matter. Deadline to appeal from an interlocutory order is set by Rule 8002. Appellants missed their deadline by two days. Appellants failure to timely file their Notice of Appeal deprived the court of jurisdiction to consider the appeal.

***Dean v. Reticulum Management, LLC,* 3:20-cv-2531-G, 2020 WL 7046854 (N.D. Tex. November 30, 2020).** Pre-petition, interim arbitration award found that debtor had negligently made representations to creditor, but denied creditor's claims of fraud, fraud by omission, and fraudulent inducement. When debtor filed Chapter 7 petition, creditor initiated an adversary proceeding under 523 and 727. After discovery was taken, debtor sought partial summary judgment arguing that the interim arbitration award's findings against fraud precluded creditor from bringing 523 claims. The bankruptcy court denied debtor's partial summary judgment and debtor requested interlocutory appeal. The district court denied the request for interlocutory appeal, finding that even if debtor prevailed on his partial summary judgment, a trial would take place on the discovery that had already been taken and therefore granting interlocutory appeal would not materially advance ending the litigation. 28 U.S.C. 158(a).

***Copeland v. Neary,* 3:20-cv-00348, 2020 WL 7388607 (N.D. Tex. December 16, 2020).** Repeat *pro se* debtor filed a Chapter 11. After US trustee moved to dismiss for failure to comply with administrative requirements, debtor failed to appear at his 341 meeting. The bankruptcy court dismissed the case. Debtor moved to reconsider and the bankruptcy court denied. More than fourteen days later, debtor filed an appeal of the dismissal order. The district court dismissed the appeal, holding that debtor's failure to comply with 28 U.S.C. § 158(c)(2) and Bankruptcy Rule 8002(a) resulted in the appellate court lacking jurisdiction to hear the appeal.

TRANSFERS AND CLAIMS ....

***Reed v. Genter et al (In re Genter)* 18-03361-sgj, 2021 WL 1112538 (Bank. N.D. Tex. March 23, 2021).** Passenger on debtor's motorcycle nearly died when debtor began driving recklessly. Debtor, aware of his exposure to personal liability, began transferring assets to family members. After jury trial, multi-million dollar judgment was entered against debtor. After accident, debtor transferred 49% interest in profitable company to his father, the owner of the other 51%; the transfer was made for no value. At some point after that, debtor and father apparently realized that they had engaged in a textbook fraudulent transfer; they then did a second transfer agreement (for the same stock) that purported to include as consideration extinguishment of an undocumented loan from the father to the debtor. Debtor also transferred 1963 Impala to his mother, who claimed that it was in exchange for undocumented indebtedness related to undocumented home cleaning services she claimed to have provided to debtor. Mother claimed that transfer was dated 2013, but based on the notaries commission date it was evident that mother was lying about the date. When debtor filed chapter 7, trustee brought avoidance actions against father and mother. Defendants made two motions to dismiss (denied) and sought summary judgment (denied). In a sharp opinion addressing the facts that the value of the company had decreased over time and that the mother no longer owned the Impala, the court easily found that the transfers were fraudulent, that the circumstances justified the trustee recovering the value of the transfers pursuant to 11 U.S.C. § 550, and that the trustee was entitled to recover his attorney's fees pursuant to the Texas Uniform Fraudulent Transfer Act.

***Byman v. Lee (In re Jackson),* 20-3036, 2021 WL 438874 (Bankr. S.D. Tex. February 8, 2021).** Debtors with expensive homestead had engaged in several unorthodox efforts to refinance, with the end result being that they executed a deed in lieu transferring the homestead to the creditor in

satisfaction of the debt. The debtors continued to live at the homestead with the permission of the creditor who agreed to split the profits with them if they could locate a buyer. Debtors failed to do so and moved out of the homestead, which the creditor subsequently sold with a net profit of approximately $600,000.00. Debtors moved into a different property owned by the creditor and a friend of the debtors transferred $174,000.00 to the creditor ostensibly as a prepayment of rent and for an option to purchase the residence at a reduced price. When the debtors filed chapter 7, the trustee sought to avoid the transfer of the homestead and the transfer of the $174,000.00. The court found that the specific circumstances of the transfer of the homestead did not reflect intent to hinder, defraud, or delay creditors. With respect to the transfer by the friend of the $174,000.00, the court found several indications that it was done with the intent to hinder, defraud, and delay creditors, including that there were at the time of the transfer several judgment creditors pursuing the debtors and that the record did not reflect that adequate consideration was provided in exchange for the transfer. Given the mixed outcome, the court declined to award either side its attorney's fees.