Essentials of Bankruptcy

March 19, 2019

6:00 p.m. – 8:00 p.m.

CBA Law Center

New Britain, CT

CT Bar Institute Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (AOP)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Agenda

5:55 – 6:00 p.m. Welcome/Introductions

6:00 – 7:00 p.m. Basics of Bankruptcy – **Roberta Napolitano**, Chapter 13 Standing Trustee

1. Difference between Chapters 7, 11 and 13 of the Bankruptcy Code
2. About bankruptcy schedules, means testing and credit counseling
3. About the automatic stay
4. What is included in the property of the bankruptcy estate and what is exempt
5. About the bankruptcy discharge and dischargeability issues

7:00 – 7:05 p.m. Break

7:05 – 7:55 p.m. Intersection of Small Business and Individual Bankruptcies – **Robert M. Fleischer**, Green & Sklarz LLC

1. Special considerations
2. Problems attorneys are likely to encounter

7:55 – 8:00 p.m. Questions/Conclusion

Faculty Biographies

Robert M. Fleischer

Robert is a partner with the law firm Green & Sklarz in New Haven. He practices primarily in the areas of bankruptcy, business litigation, and appeals. In bankruptcy matters, he has represented varied interests including debtors, creditors' committees, chapter 11 and chapter 7 trustees, unsecured and secured creditors and indenture trustees in cases in Connecticut, New York, Delaware, California and other jurisdictions. Among the more notable chapter 11 cases that Robert has been involved are: Allied Technology Group Inc. (Bankr. N.D. Cal.), Bernard L. Madoff Investment Securities (Bankr. S.D.N.Y.), Blockbuster Video (Bankr. S.D.N.Y.), Caesars Entertainment Op. Co., Inc. (Bankr. N.D. Ill.), Handy & Harmon Refining Group Inc. (Bankr. D. Conn.), Lehman Brothers Holdings (Bankr. S.D.N.Y.), Power Company of America, L.P. (Bankr. D. Conn.), Republic Metals Corp. (Bankr. S.D.N.Y.), SageCrest Holdings (Bankr. D. Conn.), The Great Atlantic and Pacific Tea Co., Inc. (Bankr. S.D.N.Y.), Towers Financial Corp. (Bankr. S.D.N.Y.), U.S. Coal Corp. (Bankr. E.D. Ky.) and Verde Media Inc. (D. Del.). Prior to joining Green & Sklarz, Robert was a member of the bankruptcy practice group at the firm Pryor Cashman LLP in New York City. Robert received a B.S. in business from Northeastern University in 1985 and his J.D. from Pace University School of Law in 1992. Robert has been Secretary of the Business Law Section of the CBA and a member of that section's Executive Committee since 2015.

Roberta Napolitano

Roberta Napolitano was a member of the panel of Chapter 7 Trustees for the District of Connecticut from May 1997 through September 1, 2017, when she became the acting Chapter 13 Trustee for the District of Connecticut. She was a partner and associate at Ignal Napolitano and Shapiro from October 1983 to September 1, 2018. Roberta is Vice President of the Commercial Section of the Connecticut Bar Association, and Treasurer of the Connecticut Chapter of the International Women's Insolvency and Reorganization Confederation. She received her J.D. from the University of Connecticut School of Law in 1982, and her A.B. in 1979 from Bryn Mawr College. Her reported cases are *Fichera v. Mine Hill Corporation*, 207 Conn. 204 (1988); *In re McNamara*, 310 B.R. 664, 666 (Bankr. D. Conn. 2004); and *In re Kujan*, 286 B.R. 216, 217 (Bankr. D. Conn. 2002).

Essentials of Bankruptcy CLE

March 19, 2019

Robert M. Fleischer, Green & Sklarz LLC
Roberta Napolitano, Chapter 13 Standing Trustee

General

I. Typical Types of Bankruptcy Cases: Chapters 7, 11 and 13

a. Chapter 7 – Liquidation

i. Chapter 7 is the liquidation or selling off of non-exempt property for payment to creditors from the proceeds.

ii. The Debtor (or Debtors in the case of a joint petition by spouses) files a petition and schedules, an order for relief enters and an interim trustee from a panel of trustees is assigned to administer the case.

iii. The Chapter 7 trustee is a disinterested attorney on a rotation panel of trustees whose primary duty is to locate and liquidate assets of the estate into cash and then to distribute the money to creditors in accordance with the priority scheme of the Bankruptcy Code.

iv. The trustee reviews the schedules and examines the Debtor at the meeting of the creditors (341 meeting).

v. Subject to the Debtor's rights to exempt certain assets after electing to take the bankruptcy or non-bankruptcy exemptions and rights of secured creditors in their collateral, the trustee collects and liquidates assets of the estate with equity and then distributes net cash according to priority scheme of the Bankruptcy Code.

vi. In a no asset case (e.g. all assets of the estate are exempt or abandoned because of little or no equity), a discharge will enter within 60-90 days after the first meeting of creditors.

vii. Where there are assets with equity that have not been exempted or when exemption is questioned, the first meeting of creditors is often continued by the trustee and the clerk's office of the bankruptcy court will not issue a discharge until creditors and/or the trustee may file objections to the discharge or to the dischargeability of their debt, or request extensions of time in which to do so.

viii. Note, an involuntary bankruptcy case may also be commenced.

b. Chapter 11 – "Reorganization"

i. Chapter 11 provides the opportunity to reorganize or readjust debts through a plan or contract with creditors. Creditors are allowed to vote on the plan and the plan must be approved by the Court. Individuals and most businesses can file a petition under Chapter 11.

ii. Debtor files a petition and schedules and an order for relief enters.

iii. The Debtor is examined under oath at the meeting of creditors by the U.S. Trustee's office every several months to monitor the status of the case.

iv. Unless the case is converted or a trustee is appointed, the Debtor remains in control of the estate and is known as the debtor-in-possession,

managing its operations and ultimately files a Disclosure Statement and Plan of Reorganization subject to court approval and confirmation.

v. There is a four-month exclusivity period to file a plan.
vi. Confirmation of the plan discharges a Debtor.
vii. Lengthy delays, inability to provide adequate protection to secured creditors or to have a plan confirmed, gross mismanagement and other problems during the pendency of the case can result in a trustee or examiner being appointed or the conversion or dismissal of the case.

c. Chapter 13 – Reorganization of Individual with Regular Income
   i. Chapter 13 provides the opportunity to restructure debts through a payment plan which lasts between 3-5 years.
   ii. Debtor files a petition and schedules and an order for relief enters.
   iii. The Chapter 13 Trustee monitors, supervises and performs other administrative tasks. She ensures the plan is feasible and supported by Debtor's financial information and that the case is properly prosecuted.
   iv. The Debtor remains in control and files a plan for confirmation.
   v. A plan is generally filed with the petition or within 14 days.
   vi. Payments under a Chapter 13 plan commence shortly after the plan is filed.
   vii. Consummation of the plan discharges the Debtor.
   viii. Like a Chapter 11 case, delays and other problems can lead to a conversion of the case to one under Chapter 7 or dismissal of the case.

II. Bankruptcy Code and Bankruptcy Rules

a. The Bankruptcy Code
   i. 11 U.S.C. §§ 101 et seq. The Code consists of nine chapters.
      1. Chapter 1: contains provisions dealing generally with definitions, rules of construction and eligibility requirements for relief under the Code.
      2. Chapter 3: contains provisions dealing with the commencement of the case, filing fees, schedules, lists, statements to be filed, case administration, the bankruptcy estate and its officers, professionals, automatic stay, abstention, dismissal, conversion, adequate protection, assumption/rejection of executory contracts and unexpired leases, and certain administrative powers.
         a. 11 U.S.C. § 362 – automatic stay
         b. 11 U.S.C. § 348 – conversion
      3. Chapter 5: deals with creditor's rights, including the filing and allowance of claims, determination of secured status, claims to priority in payment, and the subordination of creditors. It also addresses avoiding powers, property of the estate, setoff, discharge, administrative expenses and tax liability. (Note: Except as provided in 11 U.S.C. § 103, Chapters 1, 3 and 5 apply to all other chapters of Title 11).
      4. Chapter 7: Liquidation.
      5. Chapter 11: Reorganization.
      6. Chapter 13: Reorganization of Individual.

b. The Bankruptcy Rules
    i. The Federal Rules of Bankruptcy Procedure ("FRBP") set forth various types of procedures in a bankruptcy case necessary to obtain an order from a bankruptcy judge, or to obtain a result or conclusion within a case.
    ii. The Supreme Court revises the rules from time to time.
    iii. The rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2075.
    iv. The rules must be read along with the relevant Bankruptcy Code provisions.
        1. (1001-1021) – commencement of the case, proceedings relating to the petition and order for relief.
        2. (2001-2020) – notice, meetings, examination, elections, attorneys and accountants.
        3. (3001-3022) – claims and distribution to creditors and equity interest holders, plans.
        4. (4001-4008) – Debtor's duties and benefits.
        5. (5001-5012) – courts and clerks.
        6. (6001-6011) – collection and liquidation of the estate.
        7. (7001-7087) – proceedings in adversary proceedings – many rules incorporate similar rules in the Federal Rules of Civil Procedure.
        8. (8001-8028) – appellate procedure.
        9. (9001-9037) – general provisions, including those dealing with extensions of time, sanctions similar to Fed. R. Civ. P. 11, contempt, motions, contested matters and noncore procedure, transmittal of pleadings.
    v. In addition to the FRBP, there are Local Rules of Bankruptcy Procedure established by the bankruptcy judges in Connecticut.

III. Schedules, Means Testing and Credit Counseling

a. Obtain client information (in writing) including:
    i. Valuation of real property, lien balances, recorded liens, bank account balance, balance sheet for any business, recent tax returns, credit counseling certificate, paystubs, signed representation agreement.
b. Inquire about certain matters:
    i. Tax issues, past bankruptcies, tax refunds, claims against third parties (pending and/or that could be asserted), assets, trusts, interests in businesses, alimony or support arrearages, possible inheritances, transfers to third parties, repayments of loans to family members and friends, antiques/collections, cosigners, exemption issues and planning, timing issues.
c. Discuss alternatives to bankruptcy:
    i. Wait to see if problem is temporary, assess existing assets to help situation, evaluate settlement opportunities (settle with aggressive creditors), evaluate whether debtor is judgment proof, borrow money, debt

repayment plans, Fair Debt Collection Practices Act issues, return collateral/short sale.

d. Credit Counseling:
    i. Law requires that before an individual file a bankruptcy case, the individual must:
        1. Receive a credit counseling briefing during the 180 days before filing the case, and
        2. File a credit counseling certificate from the agency with the petition.
    ii. Only applies to individual debtors, applies to any Chapter, pre-bankruptcy filing requirement, certificate is good for 180 days, each Debtor must take course, usually takes 90 minutes or less, credit counseling agency must be approved by U.S. Trustee and can be obtained from their website.
    iii. There is also a post-bankruptcy Debtor education financial management course requirement.
        1. Discharge will not enter without it.
        2. Requirements similar to credit counseling course.
        3. Agency providing Debtor education financial course must be approved by U.S. Trustee.

IV. About Bankruptcy Schedules
a. Extensive compilation of detailed financial affairs, both past and present, of a Debtor.
b. Must be prepared and reviewed carefully by Debtor – signed under penalty of perjury.
c. Attorney should review carefully. Review assets, exemptions, responses, income and expenses for issues.
    i. An attorney is considered "debt relief agency." See 11 U.S.C. § 101(12A) and § 707(b)(3) for the definition and some of the added responsibilities which require "reasonable investigation into the circumstances that give rise to the petition, pleading or written motion."
        1. Certain disclosures and notices required by the Debtors counsel. See 11 U.S.C. §§ 527-528.
        2. Some straightforward requirements:
            a. Disclose assets, liabilities, income and expenses.
            b. There could be an audit.
            c. Different chapters.
        3. Some not to straightforward requirements:
            a. Within 5 business days after bankruptcy assistance is provided a written retainer contract is to be executed.

b. Disclose conspicuously in advertising that you are a debt relief agency and help people file for bankruptcy relief under the Bankruptcy Code.

d. Look for:
    i. Real property
        1. Who owns real property – debtor or entity debtor controls?
            a. 11 U.S.C.§ 522 (b)(1) – "an *individual* debtor may exempt . . . "
            b. Exemptions available only to natural persons "Under Connecticut law, exemptions-including the homestead exemption—'afforded by General Statutes § 52–352a, apply only to 'property of any natural person'.' *Shawmut Bank, N.A. v. Valley Farms, et al.,* 222 Conn. 361, 366 (1992). The *Valley Farms* court stated that '[a]lthough the term 'natural person' is not defined ..., it clearly means a human being, *as opposed to an artificial or juristic entity.*'" *Id.* In re Kochman, No. 11-50111, 2011 WL 5325792, at *2 (Bankr. D. Conn. Nov. 3, 2011).
        2. Debtor need not inhabit entire property – "Connecticut's homestead exemption statute does not require that a homestead be used exclusively as the debtor's residence, nor does it pro-rate the exemption if some portion of the property claimed as a homestead is utilized for other purposes." In re Majewski, 362 B.R. 67, 70 (Bankr. D. Conn. 2007).
        3. Check for address on petition – PO Box? Check for mail, utility bills, voter registration, address on license, address on tax return.
    ii. Check state court website for personal injury claims.
    iii. Check Zillow for values.
    iv. Check tax returns for interest, dividends, income not traceable to scheduled assets.
    v. Check Schedule F for types of claims listed – if commercial, may lead to business.
    vi. Means Test Form –I can provide an Excel spreadsheet for detailed analysis, but the most fruitful inquiry is whether tax returns or other independent documents support household size.
        1. Only applies to individuals with primarily consumer debts.
        2. Set forth in 11 U.S.C. § 707(b)(2) for Chapter 7.
        3. Can be convoluted and complex different test for each Chapter.
        4. Complicated mathematical formula.

5. Average of last 6 months of current monthly income less certain expenses (some capped, some unlimited, some not allowed) to determine if presumption of bankruptcy abuse arises.
6. Uses household income.
7. If household income is above the median for household of that size in your area, then more extensive questions must be answered on means test.
8. Can rebut presumption, but sometimes difficult to show special circumstances.
9. Can deduct, for example:
    a. IRS standards for housing, transportation, food and clothing;
    b. Reasonably necessary insurance;
    c. Reasonably necessary housing and utility expenses that exceed national standards but proof required to determine that they are reasonably necessary;
    d. Charitable contributions of up to 10% of gross income;
    e. Actual secured debt;
    f. Payments of priority debt (e.g. taxes); and
    g. Actual education expenses up to $1,500 per year per child.

vii. Asset transfer – grounds for denial of discharge and counseling same is an ethical violation in Connecticut.

The Automatic Stay, 11 U.S.C. § 362

V. About the automatic stay
   a. 11 U.S.C. § 362(a) of the Bankruptcy Code:
      i. (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
         1. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
         2. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
         3. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
         4. any act to create, perfect, or enforce any lien against property of the estate;
         5. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
         6. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
         7. the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
         8. the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the Bankruptcy Court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.
   b. Termination of the Automatic Stay – 11 U.S.C. § 362(c)
      i. The various circumstances under which the automatic stay terminates, without need for a specific court order granting stay relief, are set forth in 11 U.S.C. § 362(c):
         1. With respect to actions against property of the estate (as opposed to actions against the Debtor (i.e. in rem actions)) stayed under 362(a), when the property is no longer property of the estate (11 U.S.C. § 362(c)(1)).

2. With respect to actions against the Debtor (as opposed to actions against property), the stay continues until the earlier of:
    a. the time the bankruptcy case is closed or dismissed (11 U.S.C. § 362(c)(2)(A) and (c)(2)(B)); or
    b. the time discharge is granted (in all cases except non-individual Chapter 7 cases) (11 U.S.C. § 362(c)(2)C)).
3. Secured creditors seeking to continue an action to recover against their collateral after discharge but before the bankruptcy case is closed or terminated need to determine whether the collateral remains an asset of the estate. Creditors should determine whether the Trustee has abandoned the asset (in accordance with 11 U.S.C. § 554) before proceeding against the collateral in reliance on 11 U.S.C. § 362(c)(1).

ii. The Bankruptcy Code provides other circumstances under which the stay can be terminated or modified by order of the Bankruptcy Court. 11 U.S.C. § 362(d).
1. Motions for relief from stay are commonplace where Debtor has no equity in property subject to a security interest and (in the case of Chapter 7 or 13), the property is not necessary for an effective reorganization.
2. In cases where the stay terminates on account of entry of the discharge, creditors must understand that the stay is subsumed by the Discharge Injunction, which enters automatically (by operation of 11 U.S.C. § 524(a)).

c. Serial filers and the Automatic Stay
i. 11 U.S.C. § 362(c)(3) – stay is in effect against property of the **DEBTOR** until case is closed, dismissed, or discharge is granted or denied but the stay is effective against property of the **ESTATE** until the property is no longer property of the estate 11 U.S.C. § 362(c)(1). Property is property of the estate until case is closed or dismissed. 11 U.S.C. §550 (c); 11 U.S.C. § 349(b)(3). However -
ii. 11 U.S.C. § 362(c)(3) of the Bankruptcy Code –
1. (A) the stay expires "with respect to the debtor" 30 days after filing as to secured creditors if the Debtor re-files a case within a year of filing a prior Chapter 7, 11 or 13 and that case was dismissed. Court may re-impose stay but order must enter within 30 days of filing.
2. (C) the stay expires with respect to all creditors if more than one case were pending within year preceding filing AND there has not been a substantial change in circumstances OR if the case was dismissed and a Motion for Relief was pending.

iii. "Finding the majority interpretation persuasive, I hold that section 362(c)(3) merely provides for a partial termination of the automatic stay. After thirty days, the stay terminates only with respect to the debtor and

the debtor's property; the stay remains operative, however, with respect to estate property even after the thirty-day period expires." In re Weil, No. 3:12CV462 SRU, 2013 WL 1798898, at *4 (D. Conn. Apr. 29, 2013).

iv. However – Stay expires as to property of ESTATE and "In sum, after following the guideposts the Supreme Court has planted, and reexamining this question with the benefit of over a decade of experience, scholarly study, and case law, this Court is persuaded the Minority Approach to interpreting the Controlling Statute is the most truly aligned with the congressional goal of deterring successive bankruptcy filings by an individual debtor and should be applied in this district. The Minority Approach meaningfully implements a deterrent to repeat filings by terminating the stay as to all creditors." In re Goodrich, 587 B.R. 829, 847 (Bankr. D. Vt. 2018).

v. 11 U.S.C. §362(h) – automatic expiration of stay against personal property in individual cases expires 45 days after case is filed if not extended.

vi. 11 U.S.C. 109(g) – no refiling if Debtor voluntarily dismissed and motion for relief was filed.

vii. 11 U.S.C. § 362(c)(4)(A) if– two or more pending cases – a party in interest can request entry of an order confirming no stay is in effect AND (D) – presumption of bad faith filing.

d. Other serial filer issues

i. 11 U.S.C. § 109(g) of the Bankruptcy Code bars a Debtor from refiling within 180 days if the Debtor voluntarily dismisses after a motion for relief is filed.

ii. 11 U.S.C. §§ 105(a) and 349(a) of the Bankruptcy Code permit a Bankruptcy Court, in an appropriate case, to prohibit a serial filer from filing petitions for periods of time exceeding 180 days. In re Casse, 198 F.3d 327, 339 (2d Cir. 1999).

iii. A Debtor shows bad faith if the "sole and transparent purpose" of a bankruptcy is to "frustrate" foreclosure proceedings. In re Casse, 198 F.3d 327, 329 (2d Cir. 1999).

e. Lien stripping

i. 11 U.S.C. § 522(f) – available in Chapters 7, 11, 13 and only as to judicial liens.

ii. 11 U.S.C. § 506(a) – only Chapters 11 and 13 and in Chapter 13, can't alter terms of claim secured by Debtor's residence.

iii. A Debtor can't cram down a car if it were purchased within 910 days of filing– 11 U.S.C. § 1325(a)(9).

iv. Defenses generally involve valuation but look at the exemptions, too

v. Remember you have only 30 days from termination of meeting of creditors to object to exemption under FRBP Rule 4003(b), so make sure you've examined exemptions as soon as you can.

f. Debtor and small businesses
   i. Debtor must file MORs (monthly operating reports).
   ii. Liquidation and valuation of small businesses
      1. Check operating agreements – most agreements provide for dissociation, not dissolution.
      2. Chapter 7 Trustee owns all stock, interest in wholly owned business and, if majority interest, can control business.
      3. If minority interest, Trustee will market and will likely find buyer whose specialty is purchasing interests and negotiating with co-owners.
      4. Dissociation in Connecticut if in a member-managed limited liability company, the person: (A) Becomes a Debtor in bankruptcy; Conn. Gen. Stat. Ann. § 34-263a.
      5. " If a person is dissociated as a member: (1) The person's right to participate as a member in the management and conduct of the company's activities and affairs terminates; (2) if the company is member-managed, the person's duties and obligations under section 34-255h as a member end with regard to matters arising and events occurring after the person's dissociation; and (3) subject to section 34-259c and sections 34-279 to 34-279g, inclusive, or the Connecticut Entity Transactions Act, any transferable interest owned by the person in the person's capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee." Conn. Gen. Stat. Ann. § 34-263b(a).

g. Property of the estate
   i. Inquiry must focus on relationship between asset and pre-petition past.
      1. Examples – commissions due real estate brokers, insurance agents, contingency fees due personal injury attorneys.
   ii. Exemption of most property removes its value, not the property itself, from the estate. "As noted above, §§ 522(d)(5) and (6) define the 'property claimed as exempt' as an 'interest' in Reilly's business equipment, *not* as the equipment *per se*." Schwab v. Reilly, 560 U.S. 770, 783, 130 S. Ct. 2652, 2662, 177 L. Ed. 2d 234 (2010).

The Bankruptcy Discharge and Dischargeability Issues

VI. Exceptions to Discharge, Denial or Revocation of Discharge

a. Discharge Exceptions - 11 U.S.C. § 523 (Specific Debts Not Discharged)

i. Some types of debt are not subject to discharge in bankruptcy, even when the Debtor receives a general discharge. 11 U.S.C. § 523 sets forth 19 categories of debts that are not discharge in bankruptcy. Among the categories of non-dischargeable debts are:

1. Tax obligations (subject to certain limitations) (11 U.S.C. § 523(a)(1), (a)(14) and (a)(14a));
2. Debts that are unlisted/unscheduled in Debtor's schedules (11 U.S.C. § 523(a)(3));
3. Alimony and child support (11 U.S.C. § 523(a)(5));
4. Government fines and penalties (as distinguished from compensation for pecuniary loss), subject to certain limitations in the statute (11 U.S.C. § 523(a)(7));
5. Liability for death or personal injury caused by Debtor's operation of automobile or vessel while intoxicated (11 U.S.C. § 523(a)(9);
6. Loan from retirement fund (11 U.S.C. § 523(a)(18)); and
7. Violation of Securities Laws (11 U.S.C. § 523(a)(19)).

Note: in Chapter 13 case, not all the exceptions set forth in 11 U.S.C. § 523(a) apply where the debtor has completed his or her plan payments. (See 11 U.S.C. § 1328(a)). However, a chapter 13 debtor that has not completed his or her plan payments is remains subject to all the exceptions to discharge set forth in § 523(a), even if he or she does obtain a discharge. (See 11 U.S.C. § 1328(b) and (c)(2)).

ii. Litigation under 11 U.S.C. § 523(a)(2), (4) and (6)

1. These exceptions are the most common statutory basis for debt discharge litigation brought by unhappy creditors:

a. 11 U.S.C. § 523(a)(2): Debts for money, property or services provided to Debtor, to the extent obtained by fraud or false pretenses or by use of a false written statement of Debtors financial condition.

i. Certain consumer debts for purchase of luxury goods, and cash advances, presumed non-dischargeable (See 11 U.S.C. § 523(a)(2)(C).

ii. If Creditor brings 523(a)(2) non-discharge proceeding for a consumer debt and loses the action, the creditor may be held liable for the Debtor's attorney's fees if the Court finds such award warranted. See 11 U.S.C. § 523(d).

iii. Burden of proof is on the creditor. However, even if creditor is alleging fraud (11 U.S.C. § 523(a)(2)), applicable standard is not clear and convincing, as

would be the case in a civil action outside the bankruptcy context, but preponderance of the Evidence, which is the applicable standard for all bankruptcy matters. Grogen v. Garner, 498 U.S. 279 (1991).

b. 11 U.S.C. § 523(a)(4): Debts for Debtor's fraud or defalcation while acting in a fiduciary capacity, and for embezzlement or larceny.

c. 11 U.S.C. § 523(a)(6): Debts for a willful or malicious injury by the Debtor. Debtor fired five shots at victim – two in the air, one in the ground and two that hit victim in the arm. Debtor claimed his conduct was neither reckless nor malicious. In re Arguello, No. 17-80324, 2018 WL 6720772, at *1 (Bankr. S.D. Tex. Dec. 20, 2018).

iii. Who has standing to bring litigation under 11 U.S.C. § 523?
   1. The Debtor or any creditor (Rule 4004(a)).

iv. How litigated
   1. When non-discharge is based on 11 U.S.C. § 523(a)(2), (a)(4) or (a)(6), discharge of such debt will be denied only upon the Court's determination that such debt is non-dischargeable (11 U.S.C. § 523(c)(1)). Such a proceeding requires the initiation of an adversary proceeding (Rule 7001(6)). With limited exception, non-discharge of the other types of debts listed in 11 U.S.C. § 523(a) requires no court determination and is essentially automatic.

v. When A 11 U.S.C. § 523(c) Action Must Be Commenced
   1. Not later than 60 days after the First date set for the 11 U.S.C. § 341(a) Creditors Meeting. Rule 4007(c).
   2. Creditors are entitled to at least 30 days' notice of the deadline. On motion of a party in interest, the 60 day deadline may be extended.

vi. Government Guaranteed/Funded Student Loan Debt
   1. These types of student loans are automatically excepted from discharge (11 U.S.C. § 523(a)(8)). However, guaranteed student loan debt can be discharged if the Debtor demonstrates that non-discharge of the debt results in "undue hardship" on Debtor and his or her dependents (11 U.S.C. § 523(a)(8)). A Debtor must initiate an adversary proceeding against the entity holding the student loan in order to obtain a hardship discharge (Rule 7001(6)).

vii. In Chapter 13
   1. In Chapter 13 cases, the 11 U.S.C. § 523(a) exceptions apply when a Chapter 13 Debtor receives a discharge despite having failed to complete payments under the confirmed Chapter 13 plan as permitted under 1328(b). However, when a Chapter 13 Debtor completes payments under the Chapter 13 plan, the scope of exceptions to discharge is more limited:
      a. Certain tax obligations (of the kind specified in 11 U.S.C. § 507(a)(8)(C), and 523(a)(1)(B) and (a)(1)(C).

b. Unscheduled and unlisted debts.
c. Debts incurred by fraud or breach of fiduciary duty (of the kind specified in 11 U.S.C. § 523(a)(2) and (a)(4).
d. Alimony and child support – property division claims are dischargeable.
e. Guaranteed Student Loans (subject to undue hardship exception).
f. Liability for death or personal injury caused by Debtor's operation of automobile or vessel while intoxicated.
g. Post-petition consumer debts not approved by the trustee before being incurred.

b. Denial of Bankruptcy Discharge Generally
   i. In certain circumstances, a Debtor can be denied a bankruptcy discharge altogether - in which case no prepetition debts are discharged.
   ii. In Chapter 7 Cases
      1. 11 U.S.C. § 727(a) **s**ets forth 12 separate circumstances where a Chapter 7 Debtor may be denied a discharge. Among the 12 reasons:
         a. Debtor has transferred or concealed assets within 1 year preceding bankruptcy, with intent to hinder, delay or defraud creditors (11 U.S.C. § 727(a)(2));
         b. Debtor's spoliation of relevant evidence related to Debtor's financial condition or business affairs (11 U.S.C. § 727(a)(3));
         c. Debtor has provided false information in connection with the bankruptcy case or has withheld necessary information from the trustee (such as books and records) (11 U.S.C. § 727(a)(4));
         d. Debtor's refusal to obey court orders or to provide testamentary evidence (11 U.S.C. § 727(a)(6));
         e. Debtor previously granted a bankruptcy discharge in a Chapter 7 or Chapter 11 case filed within 8 years of the filing of the instant bankruptcy case (11 U.S.C. § 727(a)(8)); and
         f. Debtor previously granted a bankruptcy discharge in a Chapter 13 case filed within 6 years of the filing of the instant bankruptcy case (11 U.S.C. § 727(a)(9)) unless Debtor paid 100%/70% of general unsecured claims.
      2. How 11 U.S.C. § 727(a) Discharge Exceptions Determined:
         a. Proceedings to object to discharge or revoke discharge under 11 U.S.C. § 727(a) are brought by adversary proceeding, except for discharge based on Debtor's prior discharge (11 U.S.C. § 727(a)(8) and 9)), which may be brought by motion objecting to discharge (Rule 7001(4)).
      3. Who can seek denial of the discharge under 11 U.S.C. § 727(a)?

a. The Chapter 7 Trustee, The United States Trustee, or a Creditor may seek denial of discharge (11 U.S.C. § 727(c)).

4. When must a 11 U.S.C. § 727(a) proceeding be brought?
   a. 60 days after the FIRST date set for the 11 U.S.C. § 341 creditors meeting (Rule 4004(a); 4007(c)).
   b. This date may be extended for cause - Debtor will often stipulate to the extension (Rule 4004(b)).

Avoidance Litigation

VII. Avoidance Litigation in Bankruptcy

a. Bankruptcy Code Chapter 5 Avoidance Tools
   i. Preferential Transfers
   ii. Fraudulent Conveyances
   iii. Trustee's "Strong-Arm" Avoidance Powers
   iv. Unauthorized Post-Petition Transfers

b. General
   i. Who can bring avoidance action?
      1. The Trustee (in a Chapter 11 case that would be the Debtor unless a Chapter 11 trustee has been appointed) (11 U.S.C. § 550(a)). In Chapter 11 cases, we have seen the authority delegated to Official Committee of Unsecured Creditors - requires a court order. It might also be the Debtor in a Chapter 13 case. "Inasmuch as Olick's activities before the district court did not involve any attempt to assert the trustee's avoiding powers, *see* 11 U.S.C. §§ 544–53, we need not consider, and deliberately express no opinion regarding, whether a Chapter 13 Debtor would be able to invoke those powers in an action to augment the bankruptcy estate." Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513, 516 (2d Cir. 1998).
   ii. How are Chapter 5 Avoidance Actions Determined?
      1. As proceedings to recover money or property, avoidance litigation requires commencement of an adversary proceeding (Bankruptcy Rule 7001(1)). A defendant that has not otherwise subjected itself to the jurisdiction of the Bankruptcy Court may have the right to trial by jury, though jury trials in Chapter 5 litigation is extremely rare.
   iii. Who is liable for avoidable transfers?
      1. The initial transferee. 11 U.S.C. § 550(a);
      2. The immediate or mediate transferee of the initial transferee unless such immediate or mediate transferee takes for value provided, in good faith, and without knowledge of the voidability of the transfer (11 U.S.C. § 550(a)).
   iv. What is the Statute of Limitations to bring an Avoidance Action?

1. Statute of limitations is 11 U.S.C. § 546(a). These actions must be brought by the later of:
    a. 2 years entry of the order for relief (i.e. the bankruptcy petition date); or
    b. 1 year after the appointment of a bankruptcy trustee.

c. Avoidance of Preferential Payments – 11 U.S.C. § 547
    i. Trustee can bring action to avoid "preferential" payments made by Debtor prior to the Petition Date. 11 U.S.C. § 547(b). The Look back periods for avoidable preferences are:
        1. For payments to non-insider creditors, 90 days prior to the Petition Date.
        2. For payments to insider creditors, 1 year prior to the Petition Date.
    ii. Elements of Avoidable Preference Cause of Action
        1. The payment was made to or for the benefit of a creditor;
        2. The payment was on account of an antecedent debt (i.e., the debt was owed before the payment was made);
        3. The payment was made while the Debtor was insolvent; and
        4. The payment enabled the creditor to receive more than it would receive if the case were Chapter 7 and the payment had not been made.
    iii. Defenses
        1. 11 U.S.C. § 547 provides a number of affirmative defenses to an otherwise avoidable preference. Of those defenses, those most often litigated are:
            a. The payment was, and was intended to be, a contemporaneous exchange for new value. 11 U.S.C. § 547(c)(1).
            b. The payment was made in the ordinary course of business between the Debtor and the creditor, or made in accordance with ordinary business terms (industry standard). 11 U.S.C. § 547(c)(2).
        2. The creditor provided new value to Debtor after the payment. 11 U.S.C. § 547(c)(4).
    iv. Payments to Secured Creditors
        1. Payments made to a creditor that has a valid, perfected security interest in Debtor's assets are typically safe (at least to the extent the creditor is not undersecured) from avoidance because the payment, being secured, did not enable the creditor to receive "more" than it would have received in a Chapter 7 liquidation and the payment had not been made.

d. Fraudulent Conveyance Actions – 11 U.S.C. § 548
    i. Trustee can bring action to avoid transfers of the interest of Debtor in property within 2 years of the petition date where:
        1. The payment was made with actual intent to hinder or delay or defraud a creditor (11 U.S.C. § 548(a)(1)(A);

2. The Debtor received less than reasonably equivalent value in exchange for such transfer (11 U.S.C. § 548(a)(1)(B). Certain other conditions that must be satisfied to avoid a transfer under 11 U.S.C. § 548(a)(1)(B);
3. Debtor was insolvent when the transfer in issue was made, or became insolvent because of such payment;
4. Debtor was under capitalized for the business it was transacting; or
5. Debtor intended to incur debts beyond its ability to pay such debts as they matured; or
6. Debtor made the transfer to the benefit of an insider under an employment contract and outside the ordinary course.

e. Trustee's Strong-Arm Avoidance Power – 11 U.S.C. § 544
   i. Pursuant to 11 U.S.C. § 544, the Trustee has the avoidance powers of a hypothetical lien creditor as of the Petition Date as provided under applicable non-bankruptcy law. This essentially means that state laws granting creditors the power to avoid transfers of a Debtor's interests in property are available to a bankruptcy trustee. Such actions are not limited to the look back period of 11 U.S.C. § 548 – the look back period of the applicable non-bankruptcy law applies.
   ii. In Connecticut, a Trustee may have standing under 11 U.S.C. § 544 to invoke the Connecticut Uniform Fraudulent Transfer Act., C.G.S. § 52-552 to avoid fraudulent transfers. The look-back period under the Connecticut act is four years for some types of transfers. However, under the Connecticut law, a UFTA plaintiff must be an actual creditor before the transfer to be avoided was made. Thus, to have standing under Section 544 to invoke UFTA, a Trustee must that there was at least one creditor whose claim existed before the Debtor made the transfer in question. The statute might be 10 years if the IRS is a creditor. "In sum, this Court agrees with *Kaiser* and the majority of decisions that the language in § 544(b) is clear and allows the Trustee in this case to step into the shoes of the IRS to take advantage of the ten-year collection period in 26 U.S.C. § 6502." In re Kipnis, 555 B.R. 877, 883 (Bankr. S.D. Fla. 2016).
   iii. In New York, Trustees frequently invoke New York Debtor and Creditor Law 270-281.

APPENDIX OF STATUTES

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

11 U.S.C.A. § 105

§ 105. Power of court

Effective: December 22, 2010
Currentness

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest--

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2555; Pub.L. 98-353, Title I, § 118, July 10, 1984, 98 Stat. 344; Pub.L. 99-554, Title II, § 203, Oct. 27, 1986, 100 Stat. 3097; Pub.L. 103-394, Title I, § 104(a), Oct. 22, 1994, 108 Stat. 4108; Pub.L. 109-8, Title IV, § 440, Apr. 20, 2005, 119 Stat. 114; Pub.L. 111-327, § 2(a)(3), Dec. 22, 2010, 124 Stat. 3557.)

Notes of Decisions (1548)

11 U.S.C.A. § 105, 11 USCA § 105
Current through P.L. 116-5.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)

11 U.S.C.A. § 109

§ 109. Who may be a debtor

Effective: April 1, 2016
Currentness

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not--

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

(3)(A) a foreign insurance company, engaged in such business in the United States; or

(B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity--

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a railroad, a person that may be a debtor under chapter 7 of this title (except a stockbroker or a commodity broker), and an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $394,725 [1] and noncontingent, liquidated, secured debts of less than $1,184,200 [1], or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $394,725 [1] and noncontingent, liquidated, secured debts of less than $1,184,200 [1] may be a debtor under chapter 13 of this title.

(f) Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section other than paragraph (4) of this subsection, an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

(2)(A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that--

(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2557; Pub.L. 97-320, Title VII, § 703(d), Oct. 15, 1982, 96 Stat. 1539; Pub.L. 98-353, Title III, §§ 301, 425, July 10, 1984, 98 Stat. 352, 369; Pub.L. 99-554, Title II, § 253, Oct. 27, 1986, 100 Stat. 3105; Pub.L. 100-597, § 2, Nov. 3, 1988, 102 Stat. 3028; Pub.L. 103-394, Title I, § 108(a), Title II, § 220, Title IV, § 402, Title V, § 501(d)(2), Oct. 22, 1994, 108 Stat. 4111, 4129, 4141, 4143; Pub.L. 106-554, § 1(a)(5) [Title I, § 112(c)(1), (2)], (8) [§ 1(e)], Dec. 21, 2000, 114 Stat. 2763, 2763A-393, 2763A-665; Pub.L. 109-8, Title I, § 106(a), Title VIII, § 802(d)(1), Title X, § 1007(b), Title XII, § 1204(1), Apr. 20, 2005, 119 Stat. 37, 146, 188, 193; Pub.L. 111-16, § 2(1), May 7, 2009, 123 Stat. 1607; Pub.L. 111-327, § 2(a)(6), Dec. 22, 2010, 124 Stat. 3557.)

Notes of Decisions (811)

Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 109, 11 USCA § 109

Current through P.L. 116-5.

End of Document

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter III. Administration

11 U.S.C.A. § 349

§ 349. Effect of dismissal

Currentness

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--

(1) reinstates--

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2569; Pub.L. 98-353, Title III, § 303, July 10, 1984, 98 Stat. 352; Pub.L. 103-394, Title V, § 501(d)(6), Oct. 22, 1994, 108 Stat. 4144.)

Notes of Decisions (198)

11 U.S.C.A. § 349, 11 USCA § 349
Current through P.L. 116-5.

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version's Limitation Recognized by In re Medical Care Management Co., Bkrtcy.M.D.Tenn., Jan. 02, 2003

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 3. Case Administration (Refs & Annos)
Subchapter IV. Administrative Powers

11 U.S.C.A. § 362

§ 362. Automatic stay

Effective: December 22, 2010
Currentness

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of--

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer--

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that

the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of--

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded--

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless--

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended--

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)--

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that--

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)--

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)--

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify--

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied--

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)--

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor--

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply--

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if--

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2570; Pub.L. 97-222, § 3, July 27, 1982, 96 Stat. 235; Pub.L. 98-353, Title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub.L. 99-509, Title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub.L. 99-554, Title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub.L. 101-311, Title I, § 102, Title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub.L. 101-508, Title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388-28; Pub.L. 103-394, Title I, §§ 101, 116, Title II, §§ 204(a), 218(b), Title III, § 304(b), Title IV, § 401, Title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub.L. 105-277, Div. I, Title VI, § 603, Oct. 21, 1998, 112 Stat. 2681-886; Pub.L. 109-8, Title I, § 106(f), Title II, §§ 214, 224(b), Title III, §§ 302, 303, 305(1), 311, 320, Title IV, §§ 401(b), 441, 444, Title VII, §§ 709, 718, Title IX, § 907(d), (o)(1), (2), Title XI, § 1106, Title XII, § 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub.L. 109-304, § 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub.L. 109-390, § 5(a)(2), Dec. 12, 2006, 120 Stat. 2696; Pub.L. 111-327, § 2(a)(12), Dec. 22, 2010, 124 Stat. 3558.)

Notes of Decisions (6236)

11 U.S.C.A. § 362, 11 USCA § 362
Current through P.L. 116-5.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter I. Creditors and Claims

11 U.S.C.A. § 506

§ 506. Determination of secured status

Currentness

<Notes of Decisions for 11 USCA § 506 are displayed in multiple documents.>

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2583; Pub.L. 98-353, Title III, § 448, July 10, 1984, 98 Stat. 374; Pub.L. 109-8, Title III, § 327, Title VII, § 712(d), Apr. 20, 2005, 119 Stat. 99, 128.)

Notes of Decisions (353)

11 U.S.C.A. § 506, 11 USCA § 506
Current through P.L. 116-5.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Limited on Constitutional Grounds by In re Pontius, Bkrtcy.W.D.Mich., Dec. 22, 2009

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter II. Debtor's Duties and Benefits

11 U.S.C.A. § 522

§ 522. Exemptions

Effective: April 1, 2016
Currentness

(a) In this section--

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is--

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that--

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that--

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in such paragraph);

(2) a debt secured by a lien that is--

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $23,675[1] in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $3,775[1] in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $600[1] in value in any particular item or $12,625[1] in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,600 [1] in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $1,250 [1] plus up to $11,850 [1] of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $2,375 [1] in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $12,625 [1] less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive--

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $23,675,[1] on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

(B) a nonpossessory, nonpurchase-money security interest in any--

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor--

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $6,425 [1].

(4)(A) Subject to subparagraph (B), for purposes of paragraph (1)(B), the term “household goods” means--

(i) clothing;

(ii) furniture;

(iii) appliances;

(iv) 1 radio;

(v) 1 television;

(vi) 1 VCR;

(vii) linens;

(viii) china;

(ix) crockery;

(x) kitchenware;

(xi) educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

(xii) medical equipment and supplies;

(xiii) furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;

(xiv) personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and

(xv) 1 personal computer and related equipment.

(B) The term "household goods" does not include--

(i) works of art (unless by or of the debtor, or any relative of the debtor);

(ii) electronic entertainment equipment with a fair market value of more than $675[1] in the aggregate (except 1 television, 1 radio, and 1 VCR);

(iii) items acquired as antiques with a fair market value of more than $675[1] in the aggregate;

(iv) jewelry with a fair market value of more than $675[1] in the aggregate (except wedding rings); and

(v) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except--

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a)(5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed $1,283,025 [1] in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in--

(1) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(3) a burial plot for the debtor or a dependent of the debtor; or

(4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;

shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $160,375[1] in value in--

(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(C) a burial plot for the debtor or a dependent of the debtor; or

(D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2)(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.

(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $160,375[1] if--

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from--

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2586; Pub.L. 98-353, Title III, §§ 306, 453, July 10, 1984, 98 Stat. 353, 375; Pub.L. 99-554, Title II, § 283(i), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-647, Title XXV, § 2522(b), Nov. 29, 1990, 104 Stat. 4866; Pub.L. 103-394, Title I, § 108(d), Title III, §§ 303, 304(d), 310, Title V, § 501(d)(12), Oct. 22, 1994, 108 Stat. 4112, 4132, 4133, 4137, 4145; Pub.L. 106-420, § 4, Nov. 1, 2000, 114 Stat. 1868; Pub.L. 109-8, Title II, §§ 216, 224(a), (e)(1), Title III, §§ 307, 308, 313(a), 322(a), Apr. 20, 2005, 119 Stat. 55, 62, 65, 81, 87, 96; Pub.L. 111-327, § 2(a)(17), Dec. 22, 2010, 124 Stat. 3559.)

Notes of Decisions (3184)

Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

6 Veterans benefits generally are covered by 38 USCA § 5301.

11 U.S.C.A. § 522, 11 USCA § 522

Current through P.L. 116-5.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter II. Debtor's Duties and Benefits

11 U.S.C.A. § 523

§ 523. Exceptions to discharge

Effective: April 1, 2016
Currentness

<Notes of Decisions for 11 USCA § 523 are displayed in multiple documents.>

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required--

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)--

(I) consumer debts owed to a single creditor and aggregating more than $675 [1] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $950 [1] that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph--

(I) the terms “consumer”, “credit”, and “open end credit plan” have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term “luxury goods or services” does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under--

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that--

(A) is for--

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from--

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2590; Pub.L. 96-56, § 3, Aug. 14, 1979, 93 Stat. 387; Pub.L. 97-35, Title XXIII, § 2334(b), Aug. 13, 1981, 95 Stat. 863; Pub.L. 98-353, Title III, §§ 307, 371, 454, July 10, 1984, 98 Stat. 353, 364, 375; Pub.L. 99-554, Title II, §§ 257(n), 281, 283(j), Oct. 27, 1986, 100 Stat. 3115 to 3117; Pub.L. 101-581, § 2(a), Nov. 15, 1990, 104 Stat. 2865; Pub.L. 101-647, Title XXV, § 2522(a), Title XXXI, § 3102(a), Title XXXVI, § 3621, Nov. 29, 1990, 104 Stat. 4865, 4916, 4964; Pub.L. 103-322, Title XXXII, § 320934, Sept. 13, 1994, 108 Stat. 2135; Pub.L. 103-394, Title II, § 221, Title III, §§ 304(e), (h)(3), 306, 309, Title V, § 501(d)(13), Oct. 22, 1994, 108 Stat. 4129, 4133 to 4135, 4137, 4145; Pub.L. 104-134, Title I, § 101[(a)] [Title VIII, § 804(b)], Apr. 26, 1996, 110 Stat. 1321, 1321-74; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327; amended Pub.L. 104-193, Title III, § 374(a), Aug. 22, 1996, 110 Stat. 2255; Pub.L. 105-244, Title IX, § 971(a), Oct. 7, 1998, 112 Stat. 1837; Pub.L. 107-204, Title VIII, § 803, July 30, 2002, 116 Stat. 801; Pub.L. 109-8, Title II, §§ 215, 220, 224(c), Title III, §§ 301, 310, 314(a), Title IV, § 412, Title VII, § 714, Title XII, §§ 1209, 1235, Title XIV, § 1404(a), Title XV, § 1502(a)(2), Apr. 20, 2005, 119 Stat. 54, 59, 64, 75, 84, 88, 107, 128, 194, 204, 215, 216; Pub.L. 111-327, § 2(a)(18), Dec. 22, 2010, 124 Stat. 3559.)

Notes of Decisions (991)

Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 523, 11 USCA § 523

Current through P.L. 116-5.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Vacated by In re Reyes, S.D.Fla., Dec. 19, 2007

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter II. Debtor's Duties and Benefits

11 U.S.C.A. § 527

§ 527. Disclosures

Effective: December 22, 2010
Currentness

(a) A debt relief agency providing bankruptcy assistance to an assisted person shall provide--

(1) the written notice required under section 342(b)(1); and

(2) to the extent not covered in the written notice described in paragraph (1), and not later than 3 business days after the first date on which a debt relief agency first offers to provide any bankruptcy assistance services to an assisted person, a clear and conspicuous written notice advising assisted persons that--

(A) all information that the assisted person is required to provide with a petition and thereafter during a case under this title is required to be complete, accurate, and truthful;

(B) all assets and all liabilities are required to be completely and accurately disclosed in the documents filed to commence the case, and the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value;

(C) current monthly income, the amounts specified in section 707(b)(2), and, in a case under chapter 13 of this title, disposable income (determined in accordance with section 707(b)(2)), are required to be stated after reasonable inquiry; and

(D) information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction.

(b) A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules, and Statement of Financial Affairs, and in some cases a Statement of Intention, need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.".

(c) Except to the extent the debt relief agency provides the required information itself after reasonably diligent inquiry of the assisted person or others so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs, a debt relief agency providing bankruptcy assistance to an assisted person, to the extent permitted by nonbankruptcy law, shall provide each assisted person at the time required for the notice required under subsection (a)(1) reasonably sufficient information (which shall be provided in a clear and conspicuous writing) to the assisted person on how to provide all the information the assisted person is required to provide under this title pursuant to section 521, including--

(1) how to value assets at replacement value, determine current monthly income, the amounts specified in section 707(b)(2) and, in a chapter 13 case, how to determine disposable income in accordance with section 707(b)(2) and related calculations;

(2) how to complete the list of creditors, including how to determine what amount is owed and what address for the creditor should be shown; and

(3) how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506.

(d) A debt relief agency shall maintain a copy of the notices required under subsection (a) of this section for 2 years after the date on which the notice is given the assisted person.

CREDIT(S)

(Added Pub.L. 109-8, Title II, § 228(a), Apr. 20, 2005, 119 Stat. 69; amended Pub.L. 111-327, § 2(a)(21), Dec. 22, 2010, 124 Stat. 3560.)

Notes of Decisions (14)

11 U.S.C.A. § 527, 11 USCA § 527
Current through P.L. 116-5.

End of Document

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

Effective: June 19, 1998
Currentness

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2596; Pub.L. 98-353, Title III, § 459, July 10, 1984, 98 Stat. 377; Pub.L. 105-183, § 3(b), June 19, 1998, 112 Stat. 518.)

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 546

§ 546. Limitations on avoiding powers

Effective: December 12, 2006
Currentness

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--

(1) the later of--

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that--

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If--

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but--

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer made by or to (or for the benefit of) a repo participant or financial participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i)(1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7-209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or any successor to such section 7-209.

(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to (or for the benefit of) a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 97-222, § 4, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 351, 393, 461, July 10, 1984, 98 Stat. 358, 365, 377; Pub.L. 99-554, Title II, §§ 257(d), 283*(l)*, Oct. 27, 1986, 100 Stat. 3114, 3117; Pub.L. 101-311, Title I, § 103, Title II, § 203, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title II, §§ 204(b), 209, 216, 222(a), Title V, § 501(b)(4), Oct. 22, 1994, 108 Stat. 4122, 4125, 4126, 4129, 4142; Pub.L. 105-183, § 3(c), June 19, 1998, 112 Stat. 518; Pub.L. 109-8, Title IV, § 406, Title IX, § 907(e), (o)(2), (3), Title XII, § 1227(a), Apr. 20, 2005, 119 Stat. 105, 177, 182, 199; Pub.L. 109-390, § 5(b), Dec. 12, 2006, 120 Stat. 2697.)

Notes of Decisions (771)

11 U.S.C.A. § 546, 11 USCA § 546
Current through P.L. 116-5.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 547

§ 547. Preferences

Effective: April 1, 2016
Currentness

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $6,425 [1] .

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 98-353, Title III, §§ 310, 462, July 10, 1984, 98 Stat. 355, 377; Pub.L. 99-554, Title II, § 283(m), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 103-394, Title II, § 203, Title III, § 304(f), Oct. 22, 1994, 108 Stat. 4121, 4133; Pub.L. 109-8, Title II, §§ 201(b), 217, Title IV, §§ 403, 409, Title XII, §§ 1213(a), 1222, Apr. 20, 2005, 119 Stat. 42, 55, 104, 106, 194, 196.)

Notes of Decisions (3780)

Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 547, 11 USCA § 547

Current through P.L. 116-5.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 548

§ 548. Fraudulent transfers and obligations

Currentness

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l* and 78*o*(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, § 5, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub.L. 99-554, Title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-311, Title I, § 104, Title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title V, § 501(b)(5), Oct. 22, 1994, 108 Stat. 4142; Pub.L. 105-183, §§ 2, 3(a), June 19, 1998, 112 Stat. 517; Pub.L. 109-8, Title IX, § 907(f), (o)(4) to (6), Title XIV, § 1402, Apr. 20, 2005, 119 Stat. 177, 182, 214.)

Notes of Decisions (2100)

11 U.S.C.A. § 548, 11 USCA § 548
Current through P.L. 116-5.

End of Document

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 550

§ 550. Liability of transferee of avoided transfer

Currentness

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section [1] (a)(2) of this section from--

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition--

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes--

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of--

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2601; Pub.L. 98-353, Title III, § 465, July 10, 1984, 98 Stat. 379; Pub.L. 103-394, Title II, § 202, Oct. 22, 1994, 108 Stat. 4121.)

Notes of Decisions (690)

Footnotes

1 So in original. Probably should be "subsection".

11 U.S.C.A. § 550, 11 USCA § 550

Current through P.L. 116-5.

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 7. Liquidation (Refs & Annos)
Subchapter II. Collection, Liquidation, and Distribution of the Estate (Refs & Annos)

11 U.S.C.A. § 727

§ 727. Discharge

Currentness

(a) The court shall grant the debtor a discharge, unless--

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case--

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall

review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that--

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily--

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge--

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of--

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2609; Pub.L. 98-353, Title III, § 480, July 10, 1984, 98 Stat. 382; Pub.L. 99-554, Title II, §§ 220, 257(s), Oct. 27, 1986, 100 Stat. 3101, 3116; Pub.L. 109-8, Title I, § 106(b), Title III, §§ 312(1), 330(a), Title VI, § 603(d), Apr. 20, 2005, 119 Stat. 38, 86, 101, 123.)

Notes of Decisions (3360)

11 U.S.C.A. § 727, 11 USCA § 727
Current through P.L. 116-5.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 13. Adjustment of Debts of an Individual with Regular Income (Refs & Annos)
Subchapter II. The Plan

11 U.S.C.A. § 1325

§ 1325. Confirmation of plan

Effective: April 1, 2016
Currentness

(a) Except as provided in subsection (b), the court shall confirm a plan if--

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that--

(I) the holder of such claim retain the lien securing such claim until the earlier of--

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $700 [1] per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $700 [1] per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2649; Pub.L. 98-353, Title III, §§ 317, 530, July 10, 1984, 98 Stat. 356, 389; Pub.L. 99-554, Title II, § 283(y), Oct. 27, 1986, 100 Stat. 3118; Pub.L. 105-183, § 4(a), June 19, 1998, 112 Stat. 518; Pub.L. 109-8, Title I, § 102(g), (h), Title II, § 213(10), Title III, §§ 306(a), (b), 309(c)(1), 318(2), (3), Title VII, § 716(a), Apr. 20, 2005, 119 Stat. 33, 53, 80, 83, 93, 129; Pub.L. 109-439, § 2, Dec. 20, 2006, 120 Stat. 3285; Pub.L. 111-327, § 2(a)(44), Dec. 22, 2010, 124 Stat. 3562.)

Notes of Decisions (2284)

Footnotes

1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 1325, 11 USCA § 1325

Current through P.L. 116-5.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version's Validity Called into Doubt by In re Greenfield, Bkrtcy.S.D.Cal., Jan. 31, 2003

United States Code Annotated
Federal Rules of Bankruptcy Procedure (Refs & Annos)
Part IV. The Debtor: Duties and Benefits

Federal Rules of Bankruptcy Procedure, Rule 4003

Rule 4003. Exemptions

Currentness

(a) Claim of exemptions

A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(b) Objecting to a claim of exemptions

(1) Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

(2) The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The trustee shall deliver or mail the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney.

(3) An objection to a claim of exemption based on § 522(q) shall be filed before the closing of the case. If an exemption is first claimed after a case is reopened, an objection shall be filed before the reopened case is closed.

(4) A copy of any objection shall be delivered or mailed to the trustee, the debtor and the debtor's attorney, and the person filing the list and that person's attorney.

(c) Burden of proof

In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

(d) Avoidance by debtor of transfers of exempt property

A proceeding under § 522(f) to avoid a lien or other transfer of property exempt under the Code shall be commenced by motion in the manner provided by Rule 9014, or by serving a chapter 12 or chapter 13 plan on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint. Notwithstanding the provisions of subdivision (b), a creditor may object to a request under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.

CREDIT(S)

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 23, 2008, eff. Dec. 1, 2008; Apr. 27, 2017, eff. Dec. 1, 2017.)

ADVISORY COMMITTEE NOTES

This rule is derived from § 522(l) of the Code and, in part, former Bankruptcy Rule 403. The Code changes the thrust of that rule by making it the burden of the debtor to list his exemptions and the burden of parties in interest to raise objections in the absence of which "the property claimed as exempt on such list is exempt;" § 522(l).

Subdivision (a). While § 522(l) refers to a list of property claimed as exempt, the rule incorporates such a list as part of Official Form No. 6, the schedule of the debtor's assets, rather than requiring a separate list and filing. Rule 1007, to which subdivision (a) refers, requires that schedule to be filed within 15 days after the order for relief, unless the court extends the time.

Section 522(l) also provides that a dependent of the debtor may file the list if the debtor fails to do so. Subdivision (a) of the rule allows such filing from the expiration of the debtor's time until 30 days thereafter. Dependent is defined in § 522(a)(1).

Subdivision (d) provides that a proceeding by the debtor, permitted by § 522(f) of the Code, is a contested matter rather than the more formal adversary proceeding. Proceedings within the scope of this subdivision are distinguished from proceedings brought by the trustee to avoid transfers. The latter are classified as adversary proceedings by Rule 7001.

1991 Amendments

Subdivision (b) is amended to facilitate the filing of objections to exemptions claimed on a supplemental schedule filed under Rule 1007(h).

2000 Amendments

This rule is amended to permit the court to grant a timely request for an extension of time to file objections to the list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day period. The purpose of this amendment is to avoid the harshness of the present rule which has been construed to deprive a bankruptcy court of jurisdiction to grant a timely request for an extension if it has failed to rule on the request within the 30-day period. See *In re Laurain*, 113 F.3d 595 (6th Cir. 1997); *Matter of Stoulig*, 45 F.3d 957 (5th Cir. 1995); *In re Brayshaw*, 912 F.2d 1255 (10th Cir. 1990). The amendments clarify that the extension may be granted only for cause. The amendments also conform the rule to § 522(l) of the Code by recognizing that any party in interest may file an objection or request for an extension of time under this rule. Other amendments are stylistic.

GAP Report on Rule 4003(b). The words "trustee or creditor" were replaced by "party in interest" to conform to § 522(l) of the Bankruptcy Code which permits any party in interest to object to claimed exemptions. Style revisions also were made to the published draft.

2008 Amendments

Subdivision (b) is rewritten to include four paragraphs.

Subdivision (b)(2) is added to the rule to permit the trustee to object to an exemption at any time up to one year after the closing of the case if the debtor fraudulently claimed the exemption. Extending the deadline for trustees to object to an exemption when the exemption claim has been fraudulently made will permit the court to review and, in proper circumstances, deny improperly claimed exemptions, thereby protecting the legitimate interests of creditors and the bankruptcy estate. However, similar to the deadline set in § 727(e) of the Code for revoking a discharge which was fraudulently obtained, an objection to an exemption that was fraudulently claimed must be filed within one year after the closing of the case. Subdivision (b)(2) extends the objection deadline only for trustees.

Subdivision (b)(3) is added to the rule to reflect the addition of subsection (q) to § 522 of the Code by the 2005 Act. Section 522(q) imposes a $136,875 limit on a state homestead exemption if the debtor has been convicted of a felony or owes a debt arising from certain causes of action. Other revised provisions of the Code, such as § 727(a)(12) and § 1328(h), suggest that the court may consider issues relating to § 522(q) late in the case, and the 30-day period for objections would not be appropriate for this provision.

Subdivision (d) is amended to clarify that a creditor with a lien on property that the debtor is attempting to avoid on the grounds that the lien impairs an exemption may raise in defense to the lien avoidance action any objection to the debtor's claimed exemption. The right to object is limited to an objection to the exemption of the property subject to the lien and for purposes of the lien avoidance action only. The creditor may not object to other exemption claims made by the debtor. Those objections, if any, are governed by Rule 4003(b).

Other changes are stylistic.

2017 Amendments

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

Notes of Decisions (344)

Fed.Rules Bankr.Proc. Rule 4003, 11 U.S.C.A., FRBP Rule 4003
Including Amendments Received Through 3-1-19

End of Document

United States Code Annotated
Federal Rules of Bankruptcy Procedure (Refs & Annos)
Part IV. The Debtor: Duties and Benefits

Federal Rules of Bankruptcy Procedure, Rule 4004

Rule 4004. Grant or Denial of Discharge

Currentness

(a) Time for objecting to discharge; notice of time fixed

In a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor's discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a chapter 11 case, the complaint shall be filed no later than the first date set for the hearing on confirmation. In a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). At least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

(b) Extension of Time

(1) On motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.

(2) A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.

(c) Grant of discharge

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge, except that the court shall not grant the discharge if:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor’s favor;

(C) the debtor has filed a waiver under § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U.S.C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management if required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;

(K) a presumption is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or

(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under § 521(f).

(2) Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.

(3) If the debtor is required to file a statement under Rule 1007(b)(8), the court shall not grant a discharge earlier than 30 days after the statement is filed.

(4) In a chapter 11 case in which the debtor is an individual, or a chapter 13 case, the court shall not grant a discharge if the debtor has not filed any statement required by Rule 1007(b)(7).

(d) Applicability of rules in Part VII and Rule 9014

An objection to discharge is governed by Part VII of these rules, except that an objection to discharge under §§ [1] 727(a)(8), (a)(9), or 1328(f) is commenced by motion and governed by Rule 9014.

(e) Order of discharge

An order of discharge shall conform to the appropriate Official Form.

(f) Registration in other districts

An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.

(g) Notice of discharge

The clerk shall promptly mail a copy of the final order of discharge to those specified in subdivision (a) of this rule.

CREDIT(S)

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 23, 2008, eff. Dec. 1, 2008; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 16, 2013, eff. Dec. 1, 2013.)

ADVISORY COMMITTEE NOTES

This rule is adapted from former Bankruptcy Rule 404.

Subdivisions (a) and (b) of this rule prescribe the procedure for determining whether a discharge will be granted pursuant to § 727 of the Code. The time fixed by subdivision (a) may be enlarged as provided in subdivision (b).

The notice referred to in subdivision (a) is required to be given by mail and addressed to creditors as provided in Rule 2002.

An extension granted on a motion pursuant to subdivision (b) of the rule would ordinarily benefit only the movant, but its scope and effect would depend on the terms of the extension.

Subdivision (c). If a complaint objecting to discharge is filed, the court's grant or denial of the discharge will be entered at the conclusion of the proceeding as a judgment in accordance with Rule 9021. The inclusion of the clause in subdivision (c) qualifying the duty of the court to grant a discharge when a waiver has been filed is in accord with the construction of the Code. 4 Collier, Bankruptcy ¶727.12 (15th ed. 1979).

The last sentence of subdivision (c) takes cognizance of § 524(c) of the Code which authorizes a debtor to enter into enforceable reaffirmation agreements only prior to entry of the order of discharge. Immediate entry of that order after expiration of the time fixed for filing complaints objecting to discharge may render it more difficult for a debtor to settle pending litigation to determine the dischargeability of a debt and execute a reaffirmation agreement as part of a settlement.

Subdivision (d). An objection to discharge is required to be made by a complaint, which initiates an adversary proceeding as provided in Rule 7003. Pursuant to Rule 5005, the complaint should be filed in the court in which the case is pending.

Subdivision (e). Official Form No. 27 to which subdivision (e) refers, includes notice of the effects of a discharge specified in § 524(a) of the Code.

Subdivision (f). Registration may facilitate the enforcement of the order of discharge in a district other than that in which it was entered. See 2 Moore's Federal Practice ¶1.04[2] (2d ed. 1967). Because of the nationwide service of process authorized by Rule 7004, however, registration of the order of discharge is not necessary under these rules to enable a discharged debtor to obtain relief against a creditor proceeding anywhere in the United States in disregard of the injunctive provisions of the order of discharge.

Subdivision (g). Notice of discharge should be mailed promptly after the order becomes final so that creditors may be informed of entry of the order and of its injunctive provisions. Rule 2002 specifies the manner of the notice and persons to whom the notice is to be given.

1991 Amendments

This rule is amended to conform to § 727(c) which gives the United States trustee the right to object to discharge. This amendment is derived from Rule X-1008(a)(1) and is consistent with Rule 2002. The amendment to subdivision (c) is to prevent a timely motion to dismiss a chapter 7 case for substantial abuse from becoming moot merely because a discharge order has been entered. Reference to the Official Form number in subdivision (e) is deleted in anticipation of future revision and renumbering of the Official Forms.

1996 Amendments

Subsection (c) is amended to delay entry of the order of discharge if a motion pursuant to Rule 4004(b) to extend the time for filing a complaint objecting to discharge is pending. Also, this subdivision is amended to delay entry of the discharge order if the debtor has not paid in full the filing fee and the administrative fee required to be paid upon the commencement of the case. If the debtor is authorized to pay the fees in installments in accordance with Rule 1006, the discharge order will not be entered until the final installment has been paid.

The other amendments to this rule are stylistic.

GAP Report on Rule 4004. No changes have been made since publication, except for stylistic changes.

1999 Amendments

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See, e.g., In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Other amendments to this rule are stylistic.

GAP Report on Rule 4004. No changes since publication.

2000 Amendments

Subdivision (c) is amended so that a discharge will not be granted while a motion requesting an extension of time to file a motion to dismiss the case under § 707(b) is pending. Other amendments are stylistic.

GAP Report on Rule 4004(c). No changes since publication except for style revisions.

2002 Amendments

Subdivision (c)(1)(D) is amended to provide that the filing of a motion to dismiss under § 707 of the Bankruptcy Code postpones the entry of the discharge. Under the present version of the rule, only motions to dismiss brought under § 707(b) cause the postponement of the discharge. This amendment would change the result in cases such as *In re Tanenbaum*, 210 B.R. 182 (Bankr. D. Colo. 1997).

Changes Made After Publication and Comments. No changes were made.

2008 Amendments

Subdivision (c)(1)(G) is amended to reflect the fee waiver provision in 28 U.S.C. § 1930, added by the 2005 amendments.

Subdivision (c)(1)(H) is new. It reflects the 2005 addition to the Code of §§ 727(a)(11) and 1328(g), which require that individual debtors complete a course in personal financial management as a condition to the entry of a discharge. Including this requirement in the rule helps prevent the inadvertent entry of a discharge when the debtor has not complied with this requirement. If a debtor fails to file the required statement regarding a personal financial management course, the clerk will close the bankruptcy case without the entry of a discharge.

Subdivision (c)(1)(I) is new. It reflects the 2005 addition to the Code of § 727(a)(12). This provision is linked to § 522(q). Section 522(q) limits the availability of the homestead exemption for individuals who have been convicted of a felony or who owe a debt arising from certain causes of action within a particular time frame. The existence of reasonable cause to believe that § 522(q) may be applicable to the debtor constitutes grounds for withholding the discharge.

Subdivision (c)(1)(J) is new. It accommodates the deadline for filing a reaffirmation agreement established by Rule 4008(a).

Subdivision (c)(1)(K) is new. It reflects the 2005 revisions to § 524 of the Code that alter the requirements for approval of reaffirmation agreements. Section 524(m) sets forth circumstances under which a reaffirmation agreement is presumed to be an undue hardship. This triggers an obligation to review the presumption and may require notice and a hearing. Subdivision (c)(1)(J) has been added to prevent the discharge from being entered until the court approves or disapproves the reaffirmation agreement in accordance with § 524(m).

Subdivision (c)(1)(L) is new. It implements § 1228(a) of Public Law Number 109-8, an uncodified provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which prohibits entry of a discharge unless required tax documents have been provided to the court.

Subdivision (c)(3) is new. It postpones the entry of the discharge of an individual debtor in a case under chapter 11, 12, or 13 if there is a question as to the applicability of § 522(q) of the Code. The postponement provides an opportunity for a creditor to file a motion to limit the debtor's exemption under that provision.

Other changes are stylistic.

2009 Amendments

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadline in the rule is amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5-day periods become 7-day periods
- 10-day periods become 14-day periods
- 15-day periods become 14-day periods
- 20-day periods become 21-day periods
- 25-day periods become 28-day periods

2010 Amendments

Subdivision (a). Subdivision (a) is amended to include a deadline for filing a motion objecting to a debtor's discharge under §§ 727(a)(8), (a)(9), or 1328(f) of the Code. These sections establish time limits on the issuance of discharges in successive bankruptcy cases by the same debtor.

Subdivision (c). Subdivision (c)(1) is amended because a corresponding amendment to subdivision (d) directs certain objections to discharge to be brought by motion rather than by complaint. Subparagraph (c)(1)(B) directs the court not to grant a discharge if a motion or complaint objecting to discharge has been filed unless the objection has been decided in the debtor's favor.

Subdivision (c)(4) is new. It directs the court in chapter 11 and 13 cases to withhold the entry of the discharge if an individual debtor has not filed a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7).

Subdivision (d). Subdivision (d) is amended to direct that objections to discharge under §§ 727(a)(8), (a)(9), and 1328(f) be commenced by motion rather than by complaint. Objections under the specified provisions are contested matters governed by Rule 9014. The title of the subdivision is also amended to reflect this change.

2011 Amendments

Subdivision (b). Subdivision (b) is amended to allow a party, under certain specified circumstances, to seek an extension of time to object to discharge after the time for filing has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If, during that period, a party discovers facts that would provide grounds for revocation of discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. Furthermore, during that period the debtor may commit an act that provides a basis for both denial and revocation of the discharge. In those situations, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

2013 Amendments

Subdivision (c)(1) is amended in several respects. The introductory language of paragraph (1) is revised to emphasize that the listed circumstances do not just relieve the court of the obligation to enter the discharge promptly but that they prevent the court from entering a discharge.

Subdivision (c)(1)(H) is amended to reflect the simultaneous amendment of Rule 1007(b)(7). The amendment of the latter rule relieves a debtor of the obligation to file a statement of completion of a course concerning personal financial management if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) now requires postponement of the discharge when a debtor fails to file a statement of course completion only if the debtor has an obligation to file the statement.

Subdivision (c)(1)(K) is amended to make clear that the prohibition on entering a discharge due to a presumption of undue hardship under § 524(m) of the Code ceases when the presumption expires or the court concludes a hearing on the presumption.

Because this amendment is being made to conform to a simultaneous amendment of Rule 1007(b)(7) and is otherwise technical in nature, final approval is sought without publication.

Notes of Decisions (255)

Footnotes

1 So in original. Probably should be only one section symbol.

Fed.Rules Bankr.Proc. Rule 4004, 11 U.S.C.A., FRBP Rule 4004
Including Amendments Received Through 3-1-19

United States Code Annotated
Federal Rules of Bankruptcy Procedure (Refs & Annos)
Part IV. The Debtor: Duties and Benefits

Federal Rules of Bankruptcy Procedure, Rule 4007

Rule 4007. Determination of Dischargeability of a Debt

Currentness

(a) Persons entitled to file complaint

A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.

(b) Time for commencing proceeding other than under § 523(c) of the Code

A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

(c) Time for filing complaint under § 523(c) in a chapter 7 liquidation, chapter 11 reorganization, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case; notice of time fixed

Except as otherwise provided in subdivision (d), a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

(d) Time for filing complaint under § 523(a)(6) in a chapter 13 individual's debt adjustment case; notice of time fixed

On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

(e) Applicability of Rules in Part VII

A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.

CREDIT(S)

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 23, 2008, eff. Dec. 1, 2008.)

ADVISORY COMMITTEE NOTES

This rule prescribes the procedure to be followed when a party requests the court to determine dischargeability of a debt pursuant to § 523 of the Code.

Although a complaint that comes within § 523(c) must ordinarily be filed before determining whether the debtor will be discharged, the court need not determine the issues presented by the complaint filed under this rule until the question of discharge has been determined under Rule 4004. A complaint filed under this rule initiates an adversary proceeding as provided in Rule 7003.

Subdivision (b) does not contain a time limit for filing a complaint to determine the dischargeability of a type of debt listed as nondischargeable under § 523(a)(1), (3), (5), (7), (8), or (9). Jurisdiction over this issue on these debts is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum.

Subdivision (c) differs from subdivision (b) by imposing a deadline for filing complaints to determine the issue of dischargeability of debts set out in § 523(a)(2), (4) or (6) of the Code. The bankruptcy court has exclusive jurisdiction to determine dischargeability of these debts. If a complaint is not timely filed, the debt is discharged. See § 523(c).

Subdivision (e). The complaint required by this subdivision should be filed in the court in which the case is pending pursuant to Rule 5005.

1991 Amendments

Subdivision (a) is amended to delete the words "with the court" as unnecessary. See Rules 5005(a) and 9001(3).

Subdivision (c) is amended to apply in chapter 12 cases the same time period that applies in chapter 7 and 11 cases for filing a complaint under § 523(c) of the Code to determine dischargeability of certain debts. Under § 1228(a) of the Code, a chapter 12 discharge does not discharge the debts specified in § 523(a) of the Code.

1999 Amendments

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See, e.g., In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

The other amendments to this rule are stylistic.

GAP Report on Rule 4007. No changes since publication, except for stylistic changes in the heading of Rule 4007(d).

2008 Amendments

Subdivision (c) is amended because of the 2005 amendments to § 1328(a) of the Code. This revision expands the exceptions to discharge upon completion of a chapter 13 plan. Subdivision (c) extends to chapter 13 the same time limits applicable

to other chapters of the Code with respect to the two exceptions to discharge that have been added to § 1328(a) and that are within § 523(c).

The amendment to subdivision (d) reflects the 2005 amendments to § 1328(a) that expands the exceptions to discharge upon completion of a chapter 13 plan, including two out of three of the provisions that fall within § 523(c). However, the 2005 revisions to § 1328(a) do not include a reference to § 523(a)(6), which is the third provision to which § 523(c) refers. Thus, subdivision (d) is now limited to that provision.

Notes of Decisions (348)

Fed.Rules Bankr.Proc. Rule 4007, 11 U.S.C.A., FRBP Rule 4007
Including Amendments Received Through 3-1-19

End of Document

C.G.S.A. § 34-263a

§ 34-263a. Events causing dissociation

Effective: July 1, 2017
Currentness

A person is dissociated as a member when:

(1) The company has notice of the person's express will to withdraw as a member, but, if the person specified a withdrawal date later than the date the company had notice, on that later date;

(2) An event set forth in the operating agreement as causing the person's dissociation occurs;

(3) The person is expelled as a member pursuant to the operating agreement;

(4) The person is expelled as a member by the unanimous consent of the other members if: (A) It is unlawful to carry on the company's activities and affairs with the person as a member; (B) there has been a transfer of all the person's transferable interest in the company, other than: (i) A transfer for security purposes; or (ii) a charging order in effect under section 34-259b; or (C) the person is an entity and: (i) The company notifies the person that it will be expelled as a member because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, its charter or its equivalent has been revoked, or the person's right to conduct business has been suspended by the governing jurisdiction; and (ii) not later than ninety days after the notification, the statement of dissolution or the equivalent has not been withdrawn, rescinded or revoked, or the person's charter or the equivalent or right to conduct business has not been reinstated;

(5) On application by the company or a member in a direct action under section 34-271, the person is expelled as a member by judicial order because the person: (A) Has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the company's activities and affairs; (B) has committed wilfully or persistently, or is committing wilfully or persistently, a material breach of the operating agreement or a duty or obligation under section 34-255h; or (C) has engaged or is engaging in conduct relating to the company's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a member;

(6) In the case of an individual: (A) The individual dies; or (B) in a member-managed limited liability company: (i) A guardian or general conservator for the individual is appointed; or (ii) a court orders that the individual has otherwise become incapable of performing the individual's duties as a member under sections 34-243 to 34-283d, inclusive, or the operating agreement;

(7) In a member-managed limited liability company, the person: (A) Becomes a debtor in bankruptcy; (B) executes an assignment for the benefit of creditors; or (C) seeks, consents to, or acquiesces in the appointment of a trustee, receiver or liquidator of the person or of all or substantially all the person's property;

(8) In the case of a person that is a testamentary or inter vivos trust or is acting as a member by virtue of being a trustee of such a trust, the trust's entire transferable interest in the company is distributed;

(9) In the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire transferable interest in the company is distributed;

(10) In the case of a person that is not an individual, the existence of the person terminates;

(11) The company participates in a merger under sections 34-279 to 34-279q, inclusive, or the Connecticut Entity Transactions Act and: (A) The company is not the surviving entity; or (B) otherwise as a result of the merger, the person ceases to be a member;

(12) The company participates in an interest exchange under sections 34-279 to 34-279q, inclusive, or the Connecticut Entity Transactions Act and, as a result of the interest exchange, the person ceases to be a member;

(13) The company participates in a conversion under sections 34-279 to 34-279g, inclusive, or the Connecticut Entity Transactions Act;

(14) The company participates in a domestication under sections 34-279 to 34-279q, inclusive, or the Connecticut Entity Transactions Act and, as a result of the domestication, the person ceases to be a member; or

(15) The company dissolves and completes winding up.

Credits
(2016, P.A. 16-97, § 54, eff. July 1, 2017.)

C. G. S. A. § 34-263a, CT ST § 34-263a
The statutes and Constitution are current through General Statutes of Connecticut, Revision of 1958, Revised to January 1, 2019.

End of Document

Connecticut General Statutes Annotated
Title 34. Limited Partnerships, Partnerships, Professional Associations, Limited Liability Companies and Statutory Trusts (Refs & Annos)
Chapter 613A. Uniform Limited Liability Company Act (Refs & Annos)
Part VI. Dissociation

C.G.S.A. § 34-263b

§ 34-263b. Effect of dissociation

Effective: July 1, 2017
Currentness

(a) If a person is dissociated as a member: (1) The person's right to participate as a member in the management and conduct of the company's activities and affairs terminates; (2) if the company is member-managed, the person's duties and obligations under section 34-255h as a member end with regard to matters arising and events occurring after the person's dissociation; and (3) subject to section 34-259c and sections 34-279 to 34-279g, inclusive, or the Connecticut Entity Transactions Act, any transferable interest owned by the person in the person's capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee.

(b) A person's dissociation as a member does not of itself discharge the person from any debt, obligation or other liability to the company or the other members which the person incurred while a member.

Credits
(2016, P.A. 16-97, § 55, eff. July 1, 2017.)

C. G. S. A. § 34-263b, CT ST § 34-263b
The statutes and Constitution are current through General Statutes of Connecticut, Revision of 1958, Revised to January 1, 2019.

End of Document

Connecticut General Statutes Annotated
Title 52. Civil Actions
Chapter 923A. Uniform Fraudulent Transfer Act (Refs & Annos)

C.G.S.A. § 52-552a

§ 52-552a. Short title: Uniform Fraudulent Transfer Act

Currentness

Sections 52-552a to 52-552*l*, inclusive, may be cited as the "Uniform Fraudulent Transfer Act".

Credits
(1991, P.A. 91-297, § 1.)

C. G. S. A. § 52-552a, CT ST § 52-552a
The statutes and Constitution are current through General Statutes of Connecticut, Revision of 1958, Revised to January 1, 2019.

APPENDIX OF CASES

2018 WL 6720772
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
S.D. Texas, Galveston Division.

IN RE: Martin ARGUELLO, Debtor(s)
Dylan Lafavers, Plaintiff(s)
v.
Martin Arguello, Defendant(s)

CASE NO: 17-80324
|
ADVERSARY NO. 18-8003
|
SIGNED: 12/20/2018.

Attorneys and Law Firms

Erin E Jones, Erin E. Jones, P.C., Houston, TX, for Plaintiff.

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MEMORANDUM OPINION

Jeffrey P. Norman, United States Bankruptcy Judge

***1** The plaintiff, Dylan LaFavers ("LaFavers"), commenced this adversary proceeding by filing a complaint on February 5, 2018. LaFavers, a creditor in the underlying bankruptcy case, requested this Court find that the damages award from the lawsuit styled *Collin LaFavers, as next friend of D.L., a minor* v. *Martin Arguello*, Cause No. 16-CV-0434, 122nd Judicial District, Galveston County, Texas ("State Court Case") be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). The Court held a bench trial in this adversary proceeding on December 3, 2018.

LaFavers alleges that the defendant/debtor Martin Arguello ("Arguello") acted willfully and maliciously in shooting his firearm at and near the plaintiff, and eventually shooting the plaintiff twice. LaFavers further alleges that Arguello's conduct resulted in severe bodily injury to the plaintiff, including two gunshot wounds. It is the damages that flow from these gunshot wounds that LaFavers seeks a determination of non-dischargeability.

LaFavers is Arguello's stepson. On or about December 9, 2015, when LaFavers was a minor, LaFavers and Arguello were involved in an altercation at the debtor's home. This was approximately six months after Arguello married LaFaver's mother. Arguello fired five shots at or near LaFavers from a 9 mm Barretta pistol. LaFavers was shot twice. The Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52. For the reasons stated in this opinion, the Court holds that any damages awarded in the State Court Case are non-dischargeable.

On or about December 9, 2015, LaFavers was living in a guesthouse located on Arguello's homestead. LaFavers had resided with Arguello and his mother for about six months at the time of the shooting. LaFavers and Arguello had prior disagreements and confrontations which had led Arguello barring LaFavers from the main home on the property. On that date, Arugello confronted LaFavers while LaFavers was walking from the guesthouse to the main property. Arguello wanted LaFavers to return to the guesthouse and not enter the main house. There was a disagreement and an altercation ensued. Arguello removed a loaded 9 mm Beretta from his pocket and fired five shots. He fired two shots in the air, one shot into the ground, and two final shots that hit LaFavers. However, between the first three shots and the last two shots, LaFavers was able to strike Arguello in the face. After this, Arguello shot LaFavers once in the biceps and once in the forearm.

The plaintiff and the debtor tell different versions of the same events but there is some commonality. They include the volatile nature of the relationship between the plaintiff and the debtor, the events that led up to the altercation and the number of shots fired. However, they differ in certain aspect including whether or not there was an objective or subjective intent by the debtor to injure the plaintiff. The plaintiff argues that the debtor intended to kill him and would have done so but for the fact that the debtor's gun jammed between the third and fourth shots. The debtor argues that his conduct was negligent or reckless but that he never intended to shoot the plaintiff. [1] The Court for the reasons discussed below holds that whether the Court finds the plaintiff more believable or the debtor more believable the result is that any damages that ensued from the gunshot wounds are non-dischargeable.

***2** 11 U.S.C. § 523(a)(6) provides that a discharge under Sections 727, 1141, 1228(a), 1228(b), or 1328(b) of the Bankruptcy Code does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity. "Willful" means that there is objective substantial certainty of injury to subjective motive to injure. *Miller v. J.D. Abrams, Inc. (In re Miller)*, 156 F.3d 598, 603 (5th Cir. 1998), *citing Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). "Malicious" means an act done with the actual intent to cause injury. *Id.* at 606. The Fifth Circuit held that "[a]n injury is willful and malicious where there is either an objective substantial certainty of harm or a subjective notice to cause harm." *Id.*

For the damages from the gunshot wounds suffered by the plaintiff to be non-dischargeable the Court need only find injury by the debtor to another entity, i.e. the plaintiff, that is willful and malicious. Here the injuries are very self-evident. The debtor shot the plaintiff with a 9 mm Barretta. The debtor was physically injured and getting shot would be at a minimum very unpleasant, injuries would clearly ensue. For a finding of willful and malicious the Court must find either there is an objective substantial certainty of harm or a subjective notice to cause harm.

"Whether the acts were substantially certain to cause injury (the "objective test") is based on "whether the [d]efendant's actions, which from a reasonable person's standpoint were substantially certain to result in harm, are such that the court ought to infer that the debtor's *subjective* intent was to inflict a willful and malicious injury on the Plaintiff." *In re Powers*, 421 B.R. 326, 335 (Bankr. W.D. Tex. 2009) (emphasis in original). A subjective motive to cause harm (the "subjective test") exists when a tortfeasor acts "deliberately and intentionally, in knowing disregard of the rights of another." *See Miller*, 156 F.3d at 605-06 (adopting the definition of "implied malice" from *In re Nance*, 556 F.2d 602, 611 (1st Cir. 1977))" *Lowry v. Croft (In re Croft)*, 500 B.R. 823, 860 (Bankr. W.D. Tex. 2013).

In analyzing a dischargeability of debt determination under § 523(a)(6), the Court must examine the events or facts that caused the plaintiff harm. The evidentiary reality is that the defendant in this case, and most other cases like it, will not admit a malicious intent. A court is thus expected to analyze whether the defendant's actions, which from a reasonable person's standpoint are substantially certain to cause harm, are such that the court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff. *Christensen v. Lay (In re Lay)*, Nos. 11-43085, 11-4234, 2013 Bankr. LEXIS 773, 2013 WL 868558 (Bankr. E.D. Tex. Mar. 1, 2013). Here, the Court makes such a finding to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff. Other courts in the Fifth Circuit have also recognized that the "objective substantial certainty of harm" prong of the *Miller* test allows courts to infer willful and malicious injury from a preponderance of the evidence. "The "objective substantial certainty" prong "is a recognition of the evidentiary reality that a defendant in a bankruptcy context rarely admits any prior action was taken with the intent to cause harm to anyone. A court is thus expected to analyze whether the defendant's actions, which from a reasonable person's standpoint were substantially certain to cause harm, are such that the court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff." *Mann Bracken, LLP v. Powers (In re Powers)*, 421 B.R. 326, 334-35 (Bankr. W.D. Tex. 2009) (citing *Berry v. Vollbracht (In re Vollbracht)*, 276 Fed.Appx. 360, 362 (5th Cir. 2007)" *White Nile Software, Inc. v. Mandel (In re Mandel)*, Nos. 12-4127, 12-4128, 2017 Bankr. LEXIS 890, at *87-88, 2017 WL 1207503 (Bankr. E.D. Tex. Mar. 31, 2017).

***3** In analyzing the actions of the debtor, the Court finds that the debtor's subjective intent was to inflict a willful and malicious injury on the plaintiff. The Court finds that the intentional actions of the debtor, of pulling a loaded 9mm Barretta handgun from his pocket and then shooting it five times, aiming near to and then into his 17-year-old step-child constitutes a subjective intent by the debtor to inflict a willful and malicious injury on the plaintiff. This is true whether one believes the plaintiff's or the debtor's version of events. This was not an incident where a loaded gun accidentally discharges once and then hits someone. Additionally, this was not a single or isolated shot that happened to cause an injury. The debtor pulled the gun's trigger repeatedly, five times and with the final two trigger pulls struck the plaintiff twice with 9 mm bullets. It is this repeated firing that leads the Court to find the shooting was not accidental, reckless or negligent but intentional, willful and malicious. The Court has inferred from the totality of the evidence and testimony, as well as a preponderance of the evidence that when the debtor fired the final two shots that struck and injured the plaintiff

there was objective substantial certainty on the part of the debtor that harm would occur.

The debtor would argue that by inference the actions of the debtor were reckless and negligent, however, based on the burden of proof[2] and the evidence presented the Court disagrees. While there was some evidence that the actions of the debtor were both greatly reckless and overly negligent, the greater weight of evidence does not support the debtor's claims.

ACCORDINGLY, IT IS ORDERED judgment is granted in favor of the plaintiff, and that damages arising in *Collin LaFavers, as next friend of D.L., a minor* v. *Martin Arguello*, Cause No. 16-CV-0434, 122nd Judicial District, Galveston County, Texas are deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(6). A separate final judgment will issue.

All Citations

Slip Copy, 2018 WL 6720772

Footnotes

1 The debtor's testimony was at times incomplete. He admitted he did not remember some events or that they happened so quickly he does not recall exactly what happened. While the Court finds the debtor testimony credible, his incomplete testimony was evaluated by the Court as it considered the evidentiary standard for nondischargeability.

2 The burden of proof in a dischargeability action is a preponderance of evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by In re Ross, Bankr.N.D.Ga., February 8, 2006

198 F.3d 327
United States Court of Appeals,
Second Circuit.

In re Robert E. CASSE, Debtor.
Robert E. Casse, Debtor–Appellant,
v.
Key Bank National Association, Creditor–Appellee.

Docket No. 98–5067
|
Argued: April 22, 1999
|
Decided: Dec. 10, 1999

Synopsis

Chapter 13 debtor moved to set aside mortgage foreclosure sale, as allegedly having been conducted in violation of automatic stay. The Bankruptcy Court, Jerome Feller, J., 219 B.R. 657, denied debtor's motion, and dismissed Chapter 13 case nunc pro tunc to date of filing. On appeal, the United States District Court for the Eastern District of New York, Carol Bagley Amon, J., affirmed. Debtor appealed. The Court of Appeals, Charles S. Haight, Jr., Senior United States District Judge for the Southern District of New York, sitting by designation, held that: (1) in its order dismissing prior Chapter 11 case with prejudice, bankruptcy court intended to bar any subsequent filing by debtor under Bankruptcy Code, including a filing under Chapter 13; (2) as matter of apparent first impression, bankruptcy court is authorized, in an appropriate case, to prohibit a serial filer from filing bankruptcy petitions for periods of time exceeding 180 days; (3) bankruptcy court did not abuse its discretion in barring debtor's filing under Chapter 13, and in denying debtor's motion to vacate mortgage foreclosure sale; and (4) in light of prior order dismissing Chapter 11 case with prejudice, bankruptcy court was justified in treating debtor's subsequent Chapter 13 filing as void ab initio, thereby erasing the automatic stay upon which debtor-appellant relied to vacate the foreclosure.

Affirmed.

West Headnotes (10)

[1] Bankruptcy
Frustration or Delay of Creditors

Bankruptcy court was not clearly erroneous in concluding that debtors acted in bad faith in connection with their serial Chapter 11 filings on eve of mortgage foreclosure sale, in an effort to delay foreclosure sale and thwart mortgagee from exercising its legitimate contractual and state law foreclosure remedies.

7 Cases that cite this headnote

[2] Bankruptcy
Simultaneous or Successive Proceedings

Bankruptcy
Proceedings

In its order dismissing prior Chapter 11 case with prejudice, bankruptcy court intended to bar any subsequent filing by debtor under Bankruptcy Code, including a filing under Chapter 13, and not just to bar further Chapter 11 filings, even though order itself was ambiguous in that regard, where bankruptcy court later issued opinion, in debtor's subsequent Chapter 13 case, in which it interpreted its order as barring future Chapter 13 filings.

16 Cases that cite this headnote

[3] Bankruptcy
Scope of Review in General

If bankruptcy order of dismissal is ambiguous as to its reach, the bankruptcy court's interpretation of its own order warrants customary appellate deference.

33 Cases that cite this headnote

[4] Bankruptcy
Scope of Review in General

Although bankruptcy court's order dismissing "with prejudice" the debtor's earlier Chapter 11 case, as having been filed in bad faith attempt to delay mortgage foreclosure sale, did not specify duration of the prejudicial bar to refiling, order was only intended to bar debtor temporarily from filing another petition so as to afford mortgagee time to foreclose, and, thus, Court of Appeals would not reach question whether bankruptcy court could permanently preclude serial filers from filing bankruptcy petitions.

16 Cases that cite this headnote

[5] **Bankruptcy**
Proceedings

Bankruptcy court had statutory authority to enter order dismissing Chapter 11 case for cause and barring any subsequent bankruptcy filing by debtor, even though dismissal order did not specify the Bankruptcy Code sections upon which it was based, or specify the scope and duration of the bar on future filings implicit in dismissal "with prejudice," since ambiguities caused by these omissions were resolved by bankruptcy court's subsequent opinion by which it dismissed debtor's Chapter 13 case and demonstrated court's intent behind the original dismissal order. Bankr.Code, 11 U.S.C.A. §§ 105(a), 349.

4 Cases that cite this headnote

[6] **Bankruptcy**
In General;Nature and Purpose

Object of Chapter 11 is to permit a potentially viable debtor to restructure and emerge from bankruptcy protection. Bankr.Code, 11 U.S.C.A. § 1101 et seq.

2 Cases that cite this headnote

[7] **Bankruptcy**
Carrying Out Provisions of Code
Bankruptcy
Simultaneous or Successive Proceedings
Bankruptcy
Order;Prejudice

Statutory provision authorizing bankruptcy courts to enter any necessary or appropriate orders, and statute governing prejudicial effect of dismissal of bankruptcy case, provides bankruptcy court with power, in an appropriate case, to prohibit a serial filer from filing petitions for periods of time exceeding 180 days. Bankr.Code, 11 U.S.C.A. §§ 105(a), 109(g), 349(a).

33 Cases that cite this headnote

[8] **Bankruptcy**
Scope of Review in General

Reviewing courts will affirm bankruptcy court's order barring subsequent filings by particular debtor if they can discern neither legal nor factual error, nor abuse of discretion, in the bankruptcy court's ruling. Bankr.Code, 11 U.S.C.A. §§ 105, 349.

7 Cases that cite this headnote

[9] **Bankruptcy**
Simultaneous or Successive Proceedings
Bankruptcy
Secured Claims

After having previously dismissed prior Chapter 11 case "with prejudice," on basis of debtor's bad faith and serial filings, bankruptcy court did not abuse its discretion in barring debtor's subsequent filing under Chapter 13, and in denying debtor's motion to vacate mortgage foreclosure sale, given debtor's manifest and abusive bad faith and the court's just purpose in allowing mortgagee to proceed with its long-delayed foreclosure remedy.

16 Cases that cite this headnote

[10] **Bankruptcy**
Simultaneous or Successive Proceedings

After having dismissed prior Chapter 11 case "with prejudice," on basis of debtor's bad faith serial filings, bankruptcy court was justified in

treating debtor's subsequent Chapter 13 filing as void ab initio.

12 Cases that cite this headnote

Attorneys and Law Firms

***329** Stuart Jay Young, Rego Park, NY, for Debtor–Appellant.

Shapiro & DiCaro (John A. DiCaro) Rochester, NY, for Creditor–Appellee.

Stuart P. Gelberg, Garden City, NY, for Appellee–Trustee.

Before: KEARSE and CALABRESI, Circuit Judges, and HAIGHT, District Judge. [*]

Opinion

HAIGHT, Senior District Judge:

Debtor–Appellant Robert E. Casse appeals from an order of the United States District Court for the Eastern District of New York (Carol Bagley Amon, *Judge*) entered August 31, 1998, affirming an order of the bankruptcy court (Jerome Feller, *Bankruptcy Judge*) dated April 21, 1998 and denying debtor-appellant's motion for a stay. The bankruptcy court's order denied debtor-appellant's motion to vacate a foreclosure sale of the home belonging to him and his wife, Carol J. Casse, dismissed the Chapter 13 case upon which appellant's motion was based, and reserved decision on the Chapter 13 Trustee's motion to sanction debtor-appellant's counsel. *See In re Casse,* 219 B.R. 657 (Bankr.E.D.N.Y.1998).

By order entered October 20, 1998, the district court stayed further proceedings under a warrant of eviction from the home pending this Court's resolution of the instant appeal.

The bankruptcy court held, and the district court agreed, that the Casses' prior bankruptcy filings, culminating in the bankruptcy court's order dated July 16, 1997 dismissing their then pending Chapter 11 case "with prejudice," barred the subsequent filing by debtor-appellant of the Chapter 13 case upon which he based his motion to vacate the foreclosure of the home. Accordingly the bankruptcy court dismissed that Chapter 13 case as void *ab initio,* thereby erasing the automatic stay upon which debtor-appellant relied to vacate the foreclosure.

Because we conclude that the Bankruptcy Code authorized the order of the bankruptcy court appealed from and that court did not abuse its discretion in entering it, we affirm.

I. *BACKGROUND*

In September 1988, appellant Robert E. Casse and his wife Carol J. Casse (collectively "the Casses") obtained a mortgage loan of approximately $170,000 to purchase a home at 64–24 Austin Street, Rego Park, Queens, New York ("the Property"). About a year later the Casses defaulted on the loan. In April 1990 appellee Key Bank National Association ("Key Bank"), to which the mortgage loan had been assigned, instituted foreclosure proceedings upon the Property in state court. The Casses thereupon embarked upon a series of filings under the Bankruptcy Code, whose sole and transparent purpose was to frustrate Key Bank's foreclosure proceedings. [1]

The Casses' First Chapter 11 Filing

On August 29, 1991 the Casses filed the first of three joint petitions for relief under Chapter 11 of the Bankruptcy Code, ***330** 11 U.S.C. §§ 1101–1146 (1994), thereby obtaining the automatic stay of Key Bank's state court foreclosure action provided by the Code, 11 U.S.C. § 362. The Casses never filed a reorganization plan or took any other meaningful action to advance that Chapter 11 proceeding. In July 1992 the bankruptcy court granted Key Bank a conditional lifting of the stay, setting a time table for the selling of the Property and requiring the Casses to commence making post-petition mortgage payments by August 1, 1992, failing which the stay would automatically terminate without further court order. The Casses failed to comply with those requirements. Upon Key Bank's filing of a notice of non-compliance on July 8, 1993, the stay terminated. On July 29, 1993, the case was converted to a Chapter 7 liquidation case on the Casses' motion. The Chapter 7 Trustee submitted a "no asset" report. The Casses were granted a discharge on January 6, 1995.

The Casses' Second Chapter 11 Filing

In the interim Key Bank continued with its foreclosure action against the Property, eventually obtaining a judgment of foreclosure and sale from the state court. A foreclosure sale of the Property scheduled for April 18, 1996 was forestalled when, on April 17, the Casses filed their second Chapter 11 case and achieved another automatic stay. Once again, the Casses took no steps to advance the reorganization. They failed to file the monthly reports required of a debtor in possession; failed to pay the United States Trustee's quarterly fees; failed to remain current on post-petition administrative expenses; failed to attend the meeting of creditors mandated by § 341 of the Code; and failed to file a plan of organization.

In July 1996, the United States Trustee moved to dismiss the proceeding. The bankruptcy court granted that motion and dismissed the Casses' second Chapter 11 case in an order dated September 24, 1996.

The Casses' Third Chapter 11 Filing

Following dismissal of the Casses' second Chapter 11 case, Key Bank renewed its efforts to foreclose on the Property. Eventually the state court scheduled a foreclosure sale for April 17, 1997. True to form, on April 16, 1997 the Casses filed their third Chapter 11 case, thereby staying the foreclosure sale for the third time. The Casses showed no more interest in Chapter 11's substantive remedies than previously. The United States Trustee moved to dismiss the Casses' third Chapter 11 case within two weeks of its filing. After two adjournments procured by the Casses, that motion came on for hearing before the bankruptcy court on June 19, 1997.

The June 19, 1997 Hearing Before the Bankruptcy Court

The hearing on the Trustee's motion to dismiss the Casses' third Chapter 11 case took place before Bankruptcy Judge Feller on June 19, 1997. Alfred Dimino, Esq., appeared as counsel for the Trustee. Bertram Brown, Esq., appeared as counsel for the Casses. The hearing was brief. We reproduce below the transcript of the hearing in its entirety.

> COURTROOM DEPUTY: Number 21 on the calendar, Robert and Carol Casse. Adjourned motion to convert from Chapter 11 to 7 or a motion to dismiss by the U.S. Trustee's Office.
>
> MR. DIMINO: Good morning, Your Honor. I conferenced this with debtor's counsel. Given the history of this case and the status of their negotiations with the secured creditor, they are going to consent to the dismissal.
>
> THE COURT: Mr. Brown is a very very persistent advocate on the part of these people. He is what my Chapter 13 Trustee would call "a good customer."
>
> MR. BROWN: Judge, I am just a hired gun. I have spoken to Mr. Dimino. I am going back into the woodwork. I agreed to withdraw my opposition to his ***331** application. He is going to settle an order.
>
> THE COURT: That will be with prejudice.
>
> MR. BROWN: With prejudice on 21 days notice. Thank you, Judge.
>
> MR. DIMINO: Your Honor, I am looking for July 11th.

The July 16, 1997 Order of the Bankruptcy Court

On July 16, 1997 Bankruptcy Judge Feller signed an order which reads in its entirety as follows:

> ORDER DISMISSING THIS CHAPTER 11 CASE WITH PREJUDICE
>
> WHEREAS, the United States Trustee having made an application to this Court, dated April 23, 1997, pursuant to 11 U.S.C. Section 1112(b), for conversion or dismissal of this case; and
>
> WHEREAS, a hearing having been held on June 19, 1997; and
>
> WHEREAS, the debtors and their its [sic] attorney, Bertram Brown, Esq., having appeared and consented to the dismissal of this case; and
>
> WHEREAS, the United States Trustee, by Alfred M. Dimino, Esq., having appeared in support of a dismissal of this case; and
>
> WHEREAS, it appearing that appropriate notice having been given and sufficient cause existing for the relief requested, it is

> ORDERED, that pursuant to 11 U.S.C. Section 1112(b), this case commenced under Chapter 11 of the Bankruptcy Code be, and hereby is, dismissed with prejudice.

The Debtor–Appellant's Chapter 13 Filing

Once more, Key Bank geared up for a foreclosure sale of the Property, which was set for September 19, 1997.

Debtor-appellant Robert E. Casse (hereinafter "Casse" or "the debtor") responded by retaining a new attorney, George Poulos, Esq., who on September 17 filed a Chapter 13 petition on behalf of the debtor, in an effort to obtain yet another stay of the foreclosure sale of the Casses' residence.

Unlike the three preceding Chapter 11 filings, Casse's wife Carol was not a party. Presumably that was because she had insufficient income of her own. As a commentator has noted, "Chapter 13 of the Bankruptcy Code provides a procedure for eligible individuals with regular income to pay their debts in full or to effect a composition. This chapter offers a qualifying individual an alternative to the liquidation case under Chapter 7 or the more formal reorganization case under Chapter 11." 5 Norton, *Bankruptcy Law and Practice 2d* (1997) at 113:1 (footnotes omitted).

This time the debtor did not obtain a stay of the foreclosure sale. Attorney Poulos says in an affidavit dated September 29, 1997 and filed with the bankruptcy court, App. 50–53, that he reviewed that court's files, determined at least to his own satisfaction that Judge Feller's July 16, 1997 order dismissing the Casses' third Chapter 11 case "with prejudice" did not bar a subsequent Chapter 13 filing, accomplished that filing on September 17, and faxed a copy to Key Bank's attorneys on September 18, stating that the foreclosure sale should be stayed.

Not in the least deterred, on September 18 counsel for Key Bank replied to Poulos in a letter reading in part:

> I reviewed the Order Dismissing Case in Mr. Casse's previous Chapter 11 case. I also consulted with Judge Feller's law clerk concerning this matter. He reviewed the court dockets and advised me after talking to Judge Feller that the court interpreted the Order of Dismissal with Prejudice to mean that it precludes subsequent filings under any chapter of the Bankruptcy Code. Based on that information, we are proceeding with the foreclosure sale at 10:30 a.m. on September 19, 1997.

***332** And so counsel for Key Bank did, leading to the debtor's motion to vacate the sale. The bankruptcy court denied that motion in an opinion and order, both dated April 21, 1998. The opinion is reported at 219 B.R. 657. The order, in addition to denying the debtor's motion to vacate the foreclosure sale, also dismissed the Chapter 13 case "nunc pro tunc to September 17, 1997," the date of filing, and reserved decision on the trustee's motion to impose sanctions on the debtor and Mr. Poulos, his new attorney.

The district court affirmed. This appeal followed.

II. *DISCUSSION*

A. *Standard of Review*

In an appeal from a district court's review of a bankruptcy court decision, we review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law *de novo*. *See In re AroChem Corp.*, 176 F.3d 610, 620 (2d Cir.1999).

B. *The Nature of the Casses' Conduct*

[1] The nature of the Casses' conduct throughout this bankruptcy litigation lies at the heart of the case. It is a subject which Bankruptcy Judge Feller addressed in no uncertain terms. Two quite different perceptions of the Casses are conceptually possible. On this Chapter 13 appeal, Casse portrays himself as an honorable but unlucky debtor, deserving of the fresh start in life bestowed upon such citizens by the remedial provisions of the Bankruptcy Code.[2] Presumably Casse would confer that same state of grace upon Carol Casse, his partner in marriage and Chapter 11 filings.

A different view of the Casses is suggested by Bankruptcy Judge Hardin's decision in *In re Felberman,* 196 B.R. 678, 681 (Bankr.S.D.N.Y.1995):

> The filing of a bankruptcy petition merely to prevent foreclosure, without the ability or the intention to reorganize, is an abuse of the Bankruptcy Code. Serial filings are a badge of bad faith, as are petitions filed to forestall creditors.

(citations and internal quotation marks omitted). If the Casses fit this profile of serial filers, they are to be found not in the ranks of the nation's honest debtors, but among the Hannibal Lecters of current bankruptcy litigation.

Bankruptcy Judge Feller entertained no doubt that the Casses deserved that opprobrium. He wrote in his April 21, 1998 opinion:

> By the time of dismissal of the third Chapter 11 case, if not earlier, it became abundantly clear that the Debtors were impermissibly employing the Bankruptcy Code in repeated futile bankruptcy reorganization efforts solely to thwart Key Bank from exercising its legitimate contractual and state law foreclosure remedies.... Here, the fact that the Debtor's numerous bankruptcy petitions were filed solely to delay a foreclosure sale of the Property, rather than forwarding any honest attempt to reorganize debt, is glaringly apparent.

219 B.R. at 658, 661.

Thus the bankruptcy judge found as a fact that the Casses acted in bad faith throughout this litigation. We have no reason to disturb that finding. Given the undisputed chronology of scheduled Property ***333** foreclosure sales and bankruptcy filings, viewed in the light of *Felberman* and similar authorities, the bankruptcy court's finding of bad faith can hardly be characterized as clearly erroneous.

C. *The Intent and Effect of the Bankruptcy Court's July 16, 1997 Order*

Casse's appeal turns upon the intent and effect of the bankruptcy court's July 16, 1997 order, quoted in its entirety *supra* ("the Order"). Two separate but related questions arise: (1) Did Bankruptcy Judge Feller intend by the Order to bar any subsequent filing by Casse under the Bankruptcy Code, including a filing under Chapter 13, or only further Chapter 11 filings? (2) If the bankruptcy judge intended by the Order to bar any subsequent filing, did such order lie within his powers under the statutory scheme?

Casse argues on appeal that the Order does not express the bankruptcy court's intent to bar Chapter 13 filings; and that in any event, such a bar would exceed the court's powers under the Code.

We consider these questions in turn.

1. *The Intent of the Order*

[2] This question need not detain us long. The Order's sole decretal paragraph provided that "pursuant to 11 U.S.C. Section 1112(b), this case commenced under Chapter 11 of the Bankruptcy Code be, and hereby is, dismissed with prejudice." The Order does not say with prejudice *to what,* although it could have done so, *viz,* "with prejudice to any further filings under the Bankruptcy Code," or "with prejudice to any further filings under Chapter 11." Accordingly "with prejudice" may be regarded as ambiguous, as at least one other circuit has found when the phrase is used in a bankruptcy court's order. *See Colonial Auto Ctr. v. Tomlin (In re Tomlin),* 105 F.3d 933, 940 (4th Cir.1997) ("[W]e believe the bankruptcy court's order granting the trustee's motion to dismiss 'with prejudice,' '[f]or the reasons set forth' in that motion, is ambiguous.... Our remaining task is to determine the meaning of the ambiguous order at issue here.").

[3] As *Tomlin* also holds, if a bankruptcy order of dismissal is ambiguous in this regard, the bankruptcy court's interpretation of its own order "warrants customary appellate deference. The bankruptcy court was

in the best position to interpret its own orders." 105 F.3d at 941 (citations and internal quotation marks omitted). This brings us to Bankruptcy Judge Feller's April 21, 1998 opinion and order, which remove any lingering doubt as to his intention when he dismissed the Casses' third Chapter 11 petition "with prejudice." [3]

In its April 21, 1998 opinion, which denied Casse's motion to vacate the sale of the Property, the bankruptcy court specifically concluded that

> [t]he instant Chapter 13 case was filed in violation of the Order dismissing the Debtor's third Chapter 11 case "with prejudice." The Debtor was thus ineligible to file under any chapter of the Bankruptcy Code. Therefore, this Chapter 13 case is dismissed as a nullity.

219 B.R. at 665.

[4] One cannot imagine a more clear declaration of the bankruptcy court's intention than its July 16, 1997 order barring all future filings by the debtor, including those invoking other chapters of the Code. [4] ***334** We agree with the Fourth Circuit in *Tomlin,* 105 F.3d at 941, that an appellate court reviewing bankruptcy orders should "defer to a district court's interpretation of its own order," and extend the same deference to Bankruptcy Judge Feller's interpretation of his order in the case at bar.

2. *The Effect of the Order*

[5] Whether the bankruptcy court's July 16, 1997 order dismissing the Casses' third Chapter 11 case "with prejudice" could have its intended effect of barring filings under other chapters presents a question of law which we consider *de novo.*

This case illustrates the serious problems that bad faith litigants can pose for the proper, timely and just administration of the Bankruptcy Code. "The challenge courts have faced is what forms of relief can be entered to bring to an end abusive practices by debtors, especially to deal with abuses caused by so-called serial filers." *Felberman,* 196 B.R. at 681. It is clear enough that the Casses were serial filers. Judge Feller concluded that their abusive practices could be ended, and the long-suffering Key Bank furnished foreclosure relief, by dismissing the then pending Chapter 11 case in such a way as to stop further abuse. That is the intended function of the phrase "with prejudice," which the bankruptcy judge viewed as barring the debtor's subsequent Chapter 13 filing. Judge Feller explained his reasoning in these words:

> The relevant portion of the Order reads "that pursuant to 11 U.S.C. Section 1112(b), this case commenced under Chapter 11 of the Bankruptcy Code be, and hereby is, dismissed with prejudice." Like other courts that have dismissed cases with prejudice, barring debtors from refiling so that creditors may complete foreclosure actions, this Court relied on § 105(a) and § 349(a) of the Bankruptcy Code, ... which is made applicable to Chapter 11 cases by § 103(a) of the Bankruptcy Code.

219 B.R. at 661–62 (footnote omitted), 664.

We must consider those other sections of the Bankruptcy Code which Judge Feller concludes govern the effect of his § 1112(b) order of dismissal. But we begin with § 1112(b).

[6] 11 U.S.C. § 1112(b) forms a part of Chapter 11, whose object "is to permit a potentially viable debtor to restructure and emerge from bankruptcy protection." *Kings Terrace Nursing Home and Health Related Facility v. New York State Dep't of Social Servs. (In re Kings Terrace Nursing Home and Health Related Facility),* 184 B.R. 200, 203 (S.D.N.Y.1995). Section 1112 is captioned "conversion or dismissal." Section 1112(b) provides in pertinent part that "on request of a party in interest or the United States trustee" the bankruptcy court "may dismiss a case under this chapter ... for cause," a concept the statute illustrates by a list of specified occurrences. As the Historical and Statutory Notes appearing after 11 U.S.C.A. § 1112 (West 1993) at 473–74 observe, "[t]his list is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases."

11 U.S.C. § 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude ***335** the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 349(a) provides:

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

Section 349(a) forms a part of Chapter 3 of the Bankruptcy Code. It is made applicable to Chapter 11 cases by 11 U.S.C. § 103(a), which provides:

> Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title. [5]

11 U.S.C. § 109(g), referred to in § 349(a), provides:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

The debtor at bar argues principally that § 1112(b) is the only provision in this statutory scheme applicable to his case, so that the bankruptcy court was not entitled to avail itself of §§ 105(a) and 349(a) in determining the effect of its order of dismissal. We disagree.

First, the debtor contends that because the July 16, 1997 Order of dismissal referred only to § 1112(b) of the Code, and did not cite § 105(a) or § 349(a), the Order can only be read to apply to subsequent Chapter 11 petitions. There is no substance to this contention. Of course this Order dismissing a Chapter 11 case cited § 1112(b), the section of the Code providing for dismissal of Chapter 11 cases; one would hardly expect the bankruptcy judge to cite the comparable provisions for dismissing Chapter 7 or Chapter 13 cases. As we have previously observed, the distinctive and decisive aspect of the Order lies not in the dismissal of the Casses' third Chapter 11 petition "for cause," but in its dismissal of that case "with prejudice." The bankruptcy court's opinion made that clear: "The instant Chapter 13 case was filed in violation of the Order dismissing the Debtor's third Chapter 11 case 'with prejudice.' " 219 B.R. at 665.

The bankruptcy court's inclusion of the phrase "with prejudice" necessarily implicated §§ 105(a) and 349(a) as possible sources of authority. The dismissal of a Chapter 11 case "for cause" does not *ipso facto* bar future filings. To bar future filings, an order of dismissal must be "with prejudice"; and bankruptcy courts look to §§ 105(a) and 349(a) for their authority to impose that sanction. The distinction between dismissals "for cause" and "with prejudice" is noted in *In re Martin–Trigona,* 35 B.R. 596, 601 (Bankr.S.D.N.Y.1983): "Where there exists a

multiplicity of factors which would be sufficient to meet the cause requirement of § 1307, the cumulative effect will be considered in determining whether there exists sufficient cause for a dismissal with prejudice pursuant to § 349(a)." [6]

***336** We will consider § 105(a) and § 349(a) in turn, beginning with § 105(a), because that is the first provision Bankruptcy Judge Feller specified as authority for his order.

11 U.S.C. § 105 "is an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.... Bankruptcy courts, both through their inherent powers as courts, and through the general grant of power in section 105, are able to police their dockets and afford appropriate relief." 2 *Collier on Bankruptcy* (15th ed.1999) at 105–5 to –7 (footnote omitted). As one bankruptcy court has noted, the legislative history of § 105 reflects congressional intent that the section be "similar in effect to the All Writs Statute, 28 U.S.C. § 1651," and was included in the Bankruptcy Code "to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute." *In re Earl,* 140 B.R. 728, 741 n. 4 (Bankr.N.D.Ind.1992) (citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 316–317 (1977)). *Earl* is one of the many bankruptcy cases holding that "§ 105 empowers this Court to enjoin future filings to prevent abuse of the bankruptcy process." *Id.* at 741.

Section 349(a) also empowers bankruptcy courts to enjoin future filings, although there is a conflict among the circuits as to the scope of that empowerment, and whether the provisions of § 349(a) contradict those of § 105. The distinctly minority view on these questions is that of the Tenth Circuit, which held in *Frieouf v. United States (In re Frieouf),* 938 F.2d 1099, 1103 (10th Cir.1991), that while § 349(a) "gives bankruptcy courts discretion to determine whether there is 'cause' to dismiss a case with prejudice," the section "does not deny a debtor all future access to bankruptcy court, *except as provided in § 109(g),*" which in turn contains a 180–day temporal limit. (Emphasis in original). The Tenth Circuit also concluded in *Frieouf* that its construction of § 349(a) precluded the application of § 105(a) to justify a longer prohibition against future filings. The bankruptcy court and the district court had relied upon § 105(a) in dismissing a Chapter 11 case "with prejudice to the filing of any bankruptcy petition by debtor for a period of three years," *id.* at 1102; however, the Tenth Circuit stated:

> Such reliance was misplaced. The broad equitable powers that bankruptcy courts have under section 105(a) may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code. Consequently, the bankruptcy court's three-year prohibition against filing a bankruptcy case, which plainly contradicts the 180–day limitation under section 109(g), cannot be sustained under section 105(a).

Id. at 1103 n. 4 (citation and internal quotation marks omitted).

While lower courts in the Tenth Circuit have perforce followed *Frieouf* with a reluctant obedience, [7] no other circuit has adopted its reading of the Bankruptcy ***337** Code, and the Fourth Circuit rejects it, and so do all the lower courts which sit outside the Tenth Circuit.

In *In re Tomlin,* 105 F.3d 933, the Fourth Circuit considered whether a bankruptcy court intended by its order dismissing a case "with prejudice" to do no more than limit subsequent filings to the 180 days proscribed by § 109(g); or, instead, to imbue that order with the *res judicata* effect of precluding the subsequent discharge of debts existing at the filing of the dismissed case (as a creditor contended). The order was ambiguous, the Fourth Circuit noted, because it "contains no specific reference to the § 109(g) bar to filing successive petitions. Nor does it state the period of time that it would be in effect, *e.g.,* the 180–day period provided in § 109(g) *or a longer period.*" 105 F.3d at 939 (emphasis added) (citation omitted).

After analyzing the full record in the bankruptcy court, including that court's subsequent opinion clarifying the order at issue, the Fourth Circuit concluded that the court

intended by its order to do no more than impose § 109(g)'s 180–day prohibition against further filings. But the larger analytical significance of *Tomlin* lies in the fact that if the Fourth Circuit had agreed with *Frieouf*'s holding that a § 349(a) order of dismissal with prejudice *could not* validly bar filings for more than 180 days, there *could not* have been a meaningful ambiguity in the bankruptcy court's opinion for the court of appeals to resolve, since only one interpretation would have been permissible.

The Fourth Circuit's analysis of the statutory scheme makes manifest its view that the Code permits longer prohibitions against future filings than does § 109(g). The *Tomlin* court pointed out that § 109(g) "was added to the Bankruptcy Code in 1984 to address the precise abuse of the bankruptcy system at issue here—the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code's automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest." 105 F.3d at 937. And, the *Tomlin* court goes on to observe, "[i]n addition to the adoption of § 109(g), codifying the court's power to temporarily bar refiling, the 1984 amendments also revised the language of § 349," adding the language that appears after the semi-colon in the present text of § 349(a), namely, "nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." *Id.* at 938.

While, as the Fourth Circuit continued in *Tomlin,* some commentators suggested that "the language of 349(a) limits the prejudicial impact of a dismissal to that provided in new § 109(g)," *id.* (citations and internal brackets omitted), and indeed this is what the Tenth Circuit held in *Frieouf,* the Fourth Circuit would have none of that restrictive interpretation:

> Our analysis of the plain language and statutory scheme of the statute leads us to conclude that § 349 was never intended to limit the bankruptcy court's ability to impose a permanent bar to discharge that would have res judicata effect. Rather, the language of § 349, as amended, seems to make clear that the court has the power to order such a sanction in circumstances other than those dealt with by new § 109(g).

Tomlin, 105 F.3d at 938 (citations and internal quotation marks omitted). Subsequent lower court decisions in the Fourth Circuit read *Tomlin* to permit prohibition of future bankruptcy filings for a longer period than the 180 days specified in § 109(g). *See, e.g., In re Weaver,* 222 B.R. 521 (Bankr.E.D.Va.1998), quoted *infra.*

Indeed, in all circuits but the Tenth, bankruptcy courts and district courts invariably derive from § 105(a) or § 349(a) of the Code, or from both sections in some cases, the power to sanction bad-faith serial filers such as the Casses by prohibiting further bankruptcy filings for longer periods ***338** of time than the 180 days specified by § 109(g). The following cases are illustrative: *In re Weaver,* 222 B.R. at 522, 523 and n. 1 (dismissal of Chapter 7 case with prejudice and precluding debtor from filing another bankruptcy case for a period of 12 months; "Our court of appeals has recognized that the underscored language in § 349(a) gives a bankruptcy judge discretion to 'order otherwise' for cause and to dismiss a petition with prejudice.... The bankruptcy court's discretion under § 349(a) to bar a debtor's bankruptcy filing within a set time is not limited to the 180 day period of Code § 109(g)" (citing *Tomlin*)); *In re Robertson,* 206 B.R. at 830–31 ("this Circuit has already dealt with the issue of whether a debtor can be enjoined from filing a bankruptcy petition beyond 180 days.... It is ultimately up to the court's discretion to decide if the length of time requested by the movant is appropriate.... We believe there is strong evidence of bad faith on the part of the [Chapter 13] debtor and find this behavior deserving of a dismissal with prejudice under § 1307(c), § 105(a), § 109(g) and § 349(a). Based on the debtor's conduct, a dismissal with prejudice ... for a period of 417 days, the actual time that he has unreasonably delayed the IRS and his other creditors, is warranted.") (expressly declining to follow *Frieouf*); *Norwalk v. Sav. Soc'y v. Peia (In re Peia),* 204 B.R. 310, 311, 315 (Bankr.D.Conn.1996) (granting creditor's "Emergency Motion under 11 U.S.C. § 105(a)," concluding that serial Chapter 13 filing was not bona fide, and directing that "any further petitions filed by Peia under any chapter of the bankruptcy code in any bankruptcy court in the United States of America shall not affect or interfere with" creditor's eviction action); *In re*

Robinson, 198 B.R. 1017, 1022–23 (Bankr.N.D.Ga.1996) ("The usual remedy for a bad faith filing is a dismissal pursuant to § 109(g), which works to prohibit the filing by a debtor of any case under Title 11 for a period of 180 days.... *Further authority for such a dismissal arises under § 105(a),* which empowers this court to issue any order, process or judgment which is necessary or appropriate to prevent abuse of the bankruptcy system.") (emphasis added); *In re Herrera,* 194 B.R. 178, 189–90 (Bankr.N.D.Ill.1996) ("[T]he Court hereby dismisses the instant serial Chapter 13 case under § 109(g)(1).... In addition, pursuant to 11 U.S.C. § 349(a), the Court has the discretion to dismiss the case with prejudice.... Hence, the instant case is dismissed with prejudice and the Debtors are prohibited from filing another bankruptcy case in any chapter for a period of one year from the date this Opinion and Order are docketed."); *Mother African Union Methodist Church v. Conference of Aufcmp Church (In re The Conference of African Union First Colored Methodist Protestant Church),* 184 B.R. 207, 223 (Bankr.D.Del.1995) (1986 amendment to § 105(a) made it plain that "the fact that section 1112(b) requires a party or trustee to request dismissal or conversion does not preclude bankruptcy courts from evaluating a Chapter 11 petition and, on its own initiative, dismissing or converting that petition for cause.... For purposes of exercising the power authorized by Code § 105(a), it makes no difference whether it is a Chapter 11 case or a Chapter 7 case"; serial Chapter 7 case dismissed under § 105(a)); *In re Gros,* 173 B.R. 774, 777 (Bankr.M.D.Fla.1994) (as "the debtor's multiple bankruptcy filings, coupled with involuntary dismissals [was] cause to dismiss this case with prejudice," the court barred the debtor from filing another petition for two years without court permission); *Stathatos v. United States Trustee (In re Stathatos),* 163 B.R. 83, 87–88 (N.D.Tex.1993) (where debtors' successive Chapter 13 cases "were obviously filed to hinder eviction proceedings," district court affirmed bankruptcy court's order dismissing latest case with prejudice to filing a further Chapter 13 petition for two years; district court stated: "Pursuant to 11 U.S.C. § 1307(c), a bankruptcy court may dismiss a Chapter 13 case for cause.... ***339** Moreover, the bankruptcy court has discretion to dismiss with prejudice to the refiling of a subsequent Chapter 13 case. 11 U.S.C. § 349(a).... The bankruptcy court acted within its discretion to enjoin further filings to prevent abuse of the bankruptcy process. 11 U.S.C. § 105(a).") (citations omitted); *Jolly v. Great Western Bank (In re Jolly),* 143 B.R. 383, 385–87 (E.D.Va.1992) (on proper reading of § 349(a), "a debtor may be prejudiced from filing subsequent bankruptcy petitions under two circumstances: (1) if the court, for cause, so orders, or (2) if the terms of § 109(g) apply to the debtors' case. Thus, this court finds that, so long as the dismissing court finds cause, a bankruptcy action may be dismissed with prejudice for 180 days, *or more,* without violating the terms of § 349(a) or, for that matter, § 109(g).") (emphasis added) (citing supporting cases and declining to follow *Frieouf* principle), *aff'd without published opinion,* 45 F.3d 426 (4th Cir.1994); *In re Earl,* 140 B.R. at 741 (invoking § 105 to bar serial Chapter 13 filer from further petition "under any chapter of the Bankruptcy Code" for a stated period; "even assuming *arguendo,* (without so concluding), that the *Frieouf* Court is correct and that § 349(a) does not permit a dismissal that prohibits the filing of a new case, except as expressly provided in § 109(g), the Court nevertheless concludes that § 105 empowers this Court to enjoin future filings to prevent abuse of the bankruptcy process."); *In re Dilley,* 125 B.R. 189, 197–98 (Bankr.N.D.Ohio 1991) (serial filer prohibited from filing any case under Chapter 11 or Chapter 13 for twelve months; court reasoned that "unless" clause in § 349(a) empowered bankruptcy court to prohibit filings for cause without regard to temporal limitations found in § 109(g); alternatively, "even if the Debtor's efforts to extend his fourteen month enjoyment of bankruptcy protections free of Court control without evidence of feasibility or good faith were immune from constraint under section 349(a), it appears that the Court has authority under section 105 of the Bankruptcy Code to impose appropriate restraints.... The fact that the Code expressly provides refiling prohibitions in section 109(g) also lends support to the Court's fashioning similar prohibitions under sections 349(a) or 105(a) where appropriate."); *Lerch,* 94 B.R. at 1001 (affirming bankruptcy court's order dismissing with prejudice serial filer's Chapter 12 case and barring further filings for two years; "Section 349(a) is not modified or limited by Section 109(g) so long as the bankruptcy court 'for cause, rules otherwise' and the bankruptcy court's dismissal of the case with prejudice for the two-year period falls under the 'for cause' exception of Section 349(a)."). [8]

[7] This circuit does not appear to have considered previously the Bankruptcy Code's statutory scheme for dealing with serial filers and their bad faith abuse of the bankruptcy process. We take this opportunity to ally ourselves with the Fourth Circuit and the great majority of lower courts which derive from §§ 105(a) and 349(a) of

the Code a bankruptcy court's power, in an appropriate case, to prohibit a serial filer from filing petitions for periods of time exceeding 180 days. We join those courts in concluding that § 109(g) does not impose a temporal limitation upon those other sections.

On the issue of statutory construction, we find persuasive the district courts' analyses in *Jolly,* 143 B.R. 383, and *Lerch,* 94 B.R. 998. In *Jolly,* a decision presaging the Fourth Circuit's conclusions in *Tomlin,* the Eastern District of Virginia construed § 349(a) and reasoned at 143 B.R. at 387:

> If, according to Debtors, the qualifying phrase, "Unless the court, for cause, orders otherwise," does not modify the clause following the semi-colon, then the ***340** only way a debtor may be prejudiced regarding the filing of a subsequent petition is pursuant to the terms of § 109(g) (formerly § 109(f)), whose terms, Debtors argue, do not apply to their case.
>
> This court, however, finds that the qualifying phrase in § 349(a) applies both to the clause preceding the semi-colon and the clause following the semi-colon. The semi-colon does not create two completely separate clauses. Indeed, use of the word "nor" implies conjunction between the two clauses. Furthermore, Congress used the same syntax in constructing both clauses, and both clearly refer to the same dismissal. One clause simply states that the dismissal does not usually bar a later discharge of debts; the other states that the dismissal does not prejudice a debtor with respect to later filings. The semi-colon, as it is used in this statutory provision, is merely a means of punctuating a long sentence. This reading of § 349(a) means that a debtor may be prejudiced from filing subsequent bankruptcy petitions under two circumstances: (1) if the court, for cause, so orders, or (2) if the terms of § 109(g) apply to debtors' case.
>
> Thus, this court finds that, so long as the dismissing court finds cause, a bankruptcy action may be dismissed with prejudice for 180 days, or more, without violating the terms of § 349(a) or, for that matter, § 109(g).

(footnotes omitted). In *Lerch,* the Northern District of Illinois said at 94 B.R. at 1001:

> Section 349(a) of the Code does not allow the bankruptcy court to bar discharging in a later case debts that were dischargeable in the dismissed action, and does not allow for dismissal with prejudice except as provided under Section 109(g) "unless the court for cause, orders otherwise...." 11 U.S.C. § 349(a) (Supp. III 1985) (emphasis added). The clear meaning of this statutory reference under the Code is that unless the court "for cause, orders otherwise," the court may not dismiss a case with prejudice for a period beyond the explicit 180–day limitation found in Section 109(g). In this case, however, that court appears to have based its dismissal with prejudice on a finding of cause. When the court has found cause for a dismissal with prejudice, the mandate of Section 109(g) is not applicable—at least to the extent that it merely provides a minimum amount of time before a case may be refiled, not a maximum period of time for which the bankruptcy court may dismiss a case with prejudice when there is a dismissal for cause.
>
> Therefore, based on the foregoing, this Court holds that Section 349(a) is not modified or limited by Section 109(g) so long as the bankruptcy court "for cause, rules otherwise" and the bankruptcy court's dismissal of the case with prejudice for the two-year period falls under the "for cause" exception of Section 349(a).

We find these constructions preferable to that of the Tenth Circuit in *Frieouf,* which derives from § 349(a)'s reference to § 109(g) the temporal limitation of 180 days upon the bankruptcy courts' equitable power to preclude future filings for cause under §§ 105(a) and 349(a). When one considers that Congress intended § 109(g) to give bankruptcy courts an additional weapon for use against serial filers, it is perverse to construe the section as striking from the courts' hands other sections of the Code which may remedy the same problem. Of course, we agree with the principle articulated in *Frieouf* that a statute's general provisions may be eclipsed by a provision specifically addressing a particular issue, and have applied that principle in bankruptcy; *see Guerin v. Weil, Gotshal & Manges,* 205 F.2d 302, 304 (2d Cir.1953) (reversing allowance to petitioning creditors for certain fees because the Bankruptcy Act did not authorize their payment; "[a]lthough it has been broadly stated that a bankruptcy court is a court of ***341** equity, the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act." (citation omitted)). However, in company with most courts that have considered the question, we find nothing in § 109(g) of the present Bankruptcy Code that prescribes limits upon the bankruptcy courts' power to dismiss bad faith filings "for cause" under § 349(a), or their power to protect

against abuses of the bankruptcy process by resort to § 105(a), the Code's counterpart to the All Writ Statute. On the contrary: these several provisions complement each other in arming the bankruptcy courts with a variety of weapons for use in controlling serial filers, a species not likely to become endangered in the foreseeable future.

Accordingly we hold that the intended effect of Bankruptcy Judge Feller's order of dismissal with prejudice, namely, to preclude future filings by the debtor, was authorized by the Code provisions upon which the judge subsequently said he relied.

While the bankruptcy court's July 16, 1997 order did not specify the Code sections upon which it was based, or the scope and duration of the bar on future filings implicit in the phrase "with prejudice," these omissions avail the debtor nothing. Their only effect was to make the order ambiguous; and the ambiguities were resolved by the bankruptcy court's April 21, 1998 opinion, to which we may refer, as did the Fourth Circuit in *Tomlin* 's comparable circumstances.

Neither the debtor nor his counsel asked the bankruptcy court for clarification of the July 16, 1997 order's effect, either when the order was issued or before filing the Chapter 13 petition. A bankruptcy practitioner might have considered at least the possibility that the order of dismissal "with prejudice" implicated one or both of §§ 105(a) and 349(a). Had the court's clarification been sought at those earlier times, Bankruptcy Judge Feller undoubtedly would have responded in the same terms he used subsequently in his April 21, 1998 opinion. Of course, such a prudent inquiry would have been against the nature of a serial filer determined to hold off a foreclosure; but the debtor's failure to inquire serves to mute the tones of outrage in which the present appeal is cast. [9]

D. *Conclusion*

[8] Reviewing courts will affirm a bankruptcy court's order barring subsequent filings by a particular debtor if they can discern "neither legal nor factual error, nor abuse of discretion, in the bankruptcy court's ruling," *Jolly,* 143 B.R. at 388. Since in such cases "the bankruptcy court was able to view firsthand the actions and statements of the parties, [and] was able to view the conduct of those parties over an extended period of time," the reviewing court "will not substitute its judgment for that of the bankruptcy court," in the absence of a finding of abuse of discretion. *Lerch,* 94 B.R. at 1002.

[9] In the case at bar, we decline, as previously stated, to disturb the bankruptcy court's finding of fact that the Casses' serial filings were made in bad faith. Nor, under the statutory scheme, did the bankruptcy court's order constitute legal error. The remaining question is whether either of the bankruptcy court's two orders, the first barring the debtor's most recent filing under Chapter 13, and the second denying the debtor's motion to vacate Key Bank's foreclosure sale, constituted an abuse of ***342** the court's discretion. Given the Casses' manifest and abusive bad faith and the court's just purpose in allowing Key Bank to proceed with its long-delayed foreclosure remedy, we find no abuse of discretion.

[10] Finally, the bankruptcy court's treatment of the debtor's Chapter 13 filing as void *ab initio* is consistent with established authority. *See, e.g., Rowe v. Ocwen Federal Bank & Trust (In re Rowe),* 220 B.R. 591, 595 (E.D.Tex.1997), *aff'd without published opinion,* 178 F.3d 1290 (5th Cir.1999):

> The bankruptcy court [ ] also stands on solid footing in refusing to void the foreclosure sale of Rowe's house. After finding that Rowe's petition was filed in bad faith, the bankruptcy court used its authority under 11 U.S.C. § 362(d) to lift the automatic stay *ab initio.* By doing so, the court validated the foreclosure sale of Rowe's house. The court's obvious rationale in lifting the stay *ab initio* was, because Rowe's Chapter 13 petition was filed in bad faith and in violation of the 180–day ban, the petition was a nullity and consequently, the automatic stay never actually came into effect.

We agree with that analysis, which is not affected by the fact that the bankruptcy court's order in the case at bar was based upon sections of the Code other than § 109(g) and its 180–day ban.

We have considered the debtor-appellant's other arguments and find them to be without merit.

The judgment of the district court, which affirmed the order of the bankruptcy court denying debtor-appellant's motion to set aside the foreclosure sale of the Property, is affirmed.

It is So Ordered.

All Citations

198 F.3d 327, 35 Bankr.Ct.Dec. 97, Bankr. L. Rep. P 78,071

Footnotes

* The Honorable Charles S. Haight, Jr., Senior United States District Judge for the Southern District of New York, sitting by designation.

1 The narrative set forth in text is derived principally from Bankruptcy Judge Feller's description of the "Factual Context" of the case appearing in his April 21, 1998 opinion. *See* Appellant's Appendix at 9–18. The facts recited therein are undisputed.

2 Thus Casse's main brief at 13 n. 7 cites and quotes *Grogan v. Garner,* 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991), for the proposition that "the Bankruptcy Code's central purpose is remedial," enabling insolvent debtors to enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt" (citation and internal quotation marks omitted). However, Casse's brief omits the next sentence in *Grogan:* "But in the same breath that we have invoked this fresh start policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor." *Id.* at 286–87, 111 S.Ct. 654 (citation and internal quotation marks omitted).

3 It is of no moment that Judge Feller's dismissal order antedated his opinion interpreting that order. No occasion for a judicial interpretation arose until Casse moved to vacate the forfeiture sale of the Property. In *Tomlin,* the Fourth Circuit looked for guidance to "the 1995 memorandum opinion of the bankruptcy court interpreting its 1993 dismissal 'with prejudice,' " 105 F.3d at 941. What is material is the bankruptcy court's interpretation of its own order, not the sequence of that court's several written orders and opinions.

4 We note that, although the bankruptcy court's order did not provide a time after which the debtor could once again file a bankruptcy petition, *cf. In re Robertson,* 206 B.R. 826, 830–31 (Bankr.E.D.Va.1996) (barring future filings for 417 days); *Lerch v. Federal Land Bank of St. Louis (In re Lerch),* 94 B.R. 998, 1001 (N.D.Ill.1989) (barring further filings for two years), it is clear from the bankruptcy court's decision on April 21, 1998 that it only intended to bar temporarily the debtor from filing another petition before Key Bank had an opportunity to foreclose on the Property. *See* 219 B.R. at 664. We therefore need not reach the question of whether a bankruptcy court could permanently preclude a serial filer from filing bankruptcy petitions.

5 Section 1161, referred to in § 103(a), is not pertinent to the case at bar. It provides that certain sections of the Bankruptcy Code "do not apply in a case concerning a railroad."

6 11 U.S.C. § 1307 governs the conversion or dismissal of Chapter 13 cases. It is the counterpart to § 1112(b) in Chapter 11 cases.

7 *See, e.g., In re Cooper,* 153 B.R. 898, 900 (D.Colo.1993). The district judge described himself as bound by *Frieouf* 's reading of § 349(a) and § 109(g) that a bankruptcy court, dismissing a case for cause, " 'may not deny future access to [the] bankruptcy court, except under the circumstances of section 109(g),' " but had the temerity to add: "This is not to say, however, that the circuit's decision is free from all doubt or has been widely championed as a wise and just decision," compared *Frieouf* to "*In re Jolly,* 143 B.R. 383 (E.D.Va.1992) (As long as bankruptcy court finds 'cause' under § 349, it may dismiss a petition with prejudice for more that 180 days), and *In re Earl,* 140 B.R. 728 (Bankr.N.D.Ind.1992) (specifically finding that § 105 provides a bankruptcy court with equitable powers similar to those found in the All Writs Statute)," and concluded with discernible regret: "Like the bankruptcy court, I am equally bound by [the circuit court's] controlling precedent."

8 *Jolly, Gros,* and *Lerch* were cited by the Fourth Circuit with approval in *Tomlin,* 105 F.3d at 939.

9 At the hearing resulting in the July 16, 1997 order, the Casses were represented by Bertram Brown, Esq. Mr. Brown made no effort to resist an order of dismissal "with prejudice," an omission clearly justified by the chronology of the case. We will never know whether Mr. Brown would have felt himself at liberty to file a subsequent Chapter 13 petition for

the debtor, since the Casses replaced him with George Poulos, Esq., who filed the Chapter 13 case after reviewing the file but without seeking clarification from the court. The bankruptcy court reserved decision on the trustee's motion to sanction the debtor and Mr. Poulos for that filing, a question not before us on this appeal.

587 B.R. 829
United States Bankruptcy Court, D. Vermont.

IN RE: Robert GOODRICH, Debtor.

Case # 17-10500
|
Signed July 20, 2018

Synopsis

Background: Creditor filed motion asking the court to reconsider its previous decision on extent to which temporary automatic stay terminated, 30 days after order for relief, in successive Chapter 13 case of repeat filer.

Holdings: The Bankruptcy Court, Colleen A. Brown, J., held that:

[1] temporary automatic stay in effect in successive Chapter 13 case of repeat filer terminated, 30 days after order for relief, not just as to debtor and property of debtor but in its entirety, including with respect to property of the estate; abrogating In re McFeeley, 362 B.R. 121;

[2] creditor did not have to take formal judicial, administrative or other action against repeat filer before his successive Chapter 13 case was filed in order to benefit from early termination of stay 30 days after entry of order for relief; but

[3] repeat filer would be granted 30-day extension of time to move for extension of temporary 30-day stay in his latest Chapter 13 case, running from date of entry of bankruptcy court's decision.

Ordered accordingly.

West Headnotes (19)

[1] Bankruptcy
Particular proceedings or issues

Movant's requests for confirmation of termination of temporary 30-day stay in successive Chapter 13 case filed by repeat debtor and for reconsideration of court's interpretation of extent to which stay terminated was a "core" matter, which bankruptcy court could finally decide. 11 U.S.C.A. § 362(c)(3)(A); 28 U.S.C.A. § 157(b)(2)(A, G).

2 Cases that cite this headnote

[2] Courts
Previous Decisions as Controlling or as Precedents

Considerations of stare decisis weigh heavily in the area of statutory construction, in which the Congress is free to change a judicial interpretation of its legislation.

Cases that cite this headnote

[3] Courts
Previous Decisions as Controlling or as Precedents

Burden is on movant advocating for abandonment of established precedent, and burden is greater when court is asked to overrule point of statutory construction.

Cases that cite this headnote

[4] Courts
Construction and operation of statutes

To persuade bankruptcy court to modify its interpretation of bankruptcy statute as articulated in one of its previous decisions, movant had to demonstrate that continuing the present interpretation would lead to an irrational result or that the present interpretation was founded upon implausible inferences as to Congressional intent.

Cases that cite this headnote

[5] Courts
Previous Decisions as Controlling or as Precedents

Overruling existing precedent is never a small matter.

Cases that cite this headnote

[6] **Courts**
Decisions of Same Court or Co-ordinate Court

Bankruptcy court is mindful of the consequences that a change in precedential jurisprudence may bring, and when asked to revisit its prior decisions, weighs carefully the value of adopting what it views as a more legally sound interpretation against the impact of changing well-established precedent on an issue crucial to both debtors and creditors.

Cases that cite this headnote

[7] **Courts**
Previous Decisions as Controlling or as Precedents

While consistency and stare decisis are important to the rule of law, so are correct judicial decisions, and it is more important that court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations.

Cases that cite this headnote

[8] **Courts**
Construction and operation of statutes

Bankruptcy court would grant creditor's request for reconsideration of its own prior decision discussing extent to which the temporary 30-day stay terminates in successive Chapter 13 case filed by repeat debtor, where prior decision was reached less than two years after provision governing the temporary 30-day stay was enacted as part of the Bankruptcy Abuse Prevention And Consumer Protection Act (BAPCPA), and where intervening Supreme Court cases, while not addressing this precise issue, provided useful guidance, as did the conflicting decisions of other courts. 11 U.S.C.A. § 362(c)(3)(A).

Cases that cite this headnote

[9] **Bankruptcy**
Construction and Operation

Courts should apply provisions of the Bankruptcy Abuse Prevention And Consumer Protection Act (BAPCPA) as written where the definitions, context, and structure of provision support a single, plain meaning.

Cases that cite this headnote

[10] **Bankruptcy**
Construction and Operation

Courts should be mindful of Congressional purpose when weighing competing interpretations of a provision of the Bankruptcy Abuse Prevention And Consumer Protection Act (BAPCPA), and should consider whether a particular reading of the provision will produce absurdities or senseless results not intended by Congress.

Cases that cite this headnote

[11] **Bankruptcy**
Construction and Operation

When Congressional purpose behind particular provision of the Bankruptcy Abuse Prevention And Consumer Protection Act (BAPCPA) is not apparent from statutory language itself or from related provisions, courts are well advised to refer to the 2005 House Judiciary Report to discern the core purpose of the BAPCPA provision.

Cases that cite this headnote

[12] **Statutes**
Language

Court should begin its statutory analysis with the premise that it should adopt the approach that gives the most effective meaning possible to the actual words of statute.

Cases that cite this headnote

[13] **Bankruptcy**
Simultaneous or successive proceedings
Bankruptcy
Duration and termination

Temporary automatic stay in effect in successive Chapter 13 case of repeat filer terminated, 30 days after order for relief, not just as to debtor and property of debtor but in its entirety, including with respect to property of the estate, in the successive Chapter 13 filed by debtor, but not in case filed by debtor's spouse if spouse and debtor were joint filers, and if spouse was not him- or herself a repeat filer; abrogating *In re McFeeley*, 362 B.R. 121. 11 U.S.C.A. § 362(c)(3)(A).

2 Cases that cite this headnote

[14] **Statutes**
Superfluousness

Cardinal principle of statutory construction is that it is court's duty to give effect, if possible, to every clause and word of statute rather than to emasculate entire section.

Cases that cite this headnote

[15] **Statutes**
Mistakes and errors;misnomer and misdescription
Statutes
Superfluousness
Statutes
Conflict

Canon of statutory construction requiring a court to give effect to each word if possible is sometimes offset by the canon that permits a court to reject words as surplusage if inadvertently inserted, or if repugnant to the rest of the statute.

Cases that cite this headnote

[16] **Statutes**
Rules, principles, maxims, and canons of construction in general
Statutes
Intent

Canons of statutory construction are not mandatory rules, and other circumstances evidencing Congressional intent can overcome their force.

Cases that cite this headnote

[17] **Bankruptcy**
Simultaneous or successive proceedings
Bankruptcy
Duration and termination

In enacting statute governing the automatic stay in successive bankruptcy cases filed by repeat debtors, Congress intended to deter successive bankruptcy filings by imposing stricter limitations on the power of the automatic stay as subsequent bankruptcy cases are filed. 11 U.S.C.A. § 362(c)(3, 4).

1 Cases that cite this headnote

[18] **Bankruptcy**
Simultaneous or successive proceedings
Bankruptcy
Duration and termination

Creditor did not have to take formal judicial, administrative or other action against repeat filer before his successive Chapter 13 case was filed in order to benefit from early termination of stay 30 days after entry of order for relief; words "action taken," as used in bankruptcy statute providing for termination of stay in successive case of repeat filer, did not refer only to formal legal action. 11 U.S.C.A. § 362(c)(3)(A).

Cases that cite this headnote

[19] **Bankruptcy**
Simultaneous or successive proceedings
Bankruptcy
Duration and termination

Repeat filer would be granted 30-day extension of time to move for extension of temporary 30-day stay in his latest Chapter 13 case, running from date of entry of bankruptcy court's decision, where this decision upended existing district precedent on extent to which the stay terminated 30 days after order for relief, and where debtor had relied on existing precedent in choosing not to file timely motion for extension of temporary stay. 11 U.S.C.A. § 362(c)(3)(A).

1 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OF DECISION

GRANTING MOTION FOR RECONSIDERATION OF THIS COURT'S INTERPRETATION OF § 362(C)(3)(A), DENYING MOTION TO ADOPT LIMITED INTERPRETATION OF THAT STATUTE, AND DEFERRING DETERMINATION OF WHETHER STAY HAS EXPIRED IN THIS CASE

Colleen A. Brown, United States Bankruptcy Judge

***832** Jennifer Soutar, a creditor in this case, filed a motion asking the Court to reconsider and change its interpretation of the scope of property the automatic stay covers when a debtor files a second bankruptcy case within a one-year period, and declare that the automatic stay was no longer in effect in this case. Ms. Soutar (the "Movant") urges the Court to apply the rationale of In re Bender, 562 B.R. 578 (Bankr. E.D.N.Y. 2016) (hereafter Bender), rather than follow the rationale it articulated in its prior decision, In re McFeeley, 362 B.R. 121 (Bankr. D. Vt. 2007) (hereafter, "McFeeley").

There is no dispute Robert Goodrich filed this chapter 13 bankruptcy case within one year of the date this Court dismissed his prior chapter 13 case. Since this is his second chapter 13 case within one year, Mr. Goodrich (the "Debtor") is subject to § 362(c)(3)(A) of the Bankruptcy Code,[1] under which the automatic stay generally available to debtors throughout the entire bankruptcy case may instead be limited to 30 days.

After examining and reassessing the position this Court took in McFeeley, and considering the Supreme Court decisions interpreting BAPCPA provisions, and case law and scholarly articles addressing § 362(c)(3)(A), issued since McFeeley, the Court concludes there is cause to reconsider and change its position. Therefore, for the reasons set forth below, the Court grants the first request in the Movant's motion by reconsidering and changing the position it took in McFeeley.

The Court denies the Movant's second request, to adopt the interpretation of § 362(c)(3)(A) set out in Bender, and instead, adopts what is known as the "Minority Approach," holding that when a debtor files a second bankruptcy case within one year of his or her prior bankruptcy case being dismissed, the automatic stay terminates, in its entirety, 30 days after the filing of the second petition unless, within that initial 30-day period, the debtor or a party in interest proves the debtor filed the second bankruptcy case in good faith.

Since the Court is altering its position, upon which the Debtor reasonably relied, the 30-day period for the Debtor to establish he filed this case in good faith commences upon entry of this memorandum of decision. Therefore, the Court defers ruling on the Movant's request for a declaration as to whether the stay expired until after the Debtor has had an opportunity to exercise his rights during this period.

I. JURISDICTION

[1] The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Order of Reference entered on June 22, 2012. The Court declares the Movant's requests for confirmation of stay termination and reconsideration of the Court's interpretation of § 362(c)(3)(A), and the

Debtor's opposition to those requests, constitute a core proceeding for purposes of *833 28 U.S.C. § 157(b)(2)(A) & (G), over which this Court has constitutional authority to enter a final judgment.

II. LEGAL QUESTIONS PRESENTED

This contested matter presents four legal issues: First, has the Movant demonstrated cause for this Court to reconsider its interpretation of § 362(c)(3)(A), as set out in McFeeley? If so, what is the proper technique for interpreting a BAPCPA provision? Third, which interpretation of § 362(c)(3)(A) best aligns with the Supreme Court's guidance? Fourth, what impact do these determinations have on the Debtor in this case?

III. FACTUAL BACKGROUND

The relevant facts are not in dispute. On August 25, 2000, the Movant made a loan to the Debtor, secured by a mortgage on the Debtor's real property in Groton, Vermont, and the Debtor had not paid that loan as of the date he filed the instant bankruptcy case. See claim # 6-2. This is the third chapter 13 bankruptcy case the Debtor has filed in the past three years. The Debtor first filed a petition for relief under chapter 13 of the Bankruptcy Code in June of 2015 (case # 15-10287); the Court dismissed that case, on the Movant's motion, on September 22, 2015. The Debtor filed his second chapter 13 bankruptcy petition (case # 15-11033) on November 6, 2015; the Court dismissed that case on August 25, 2017, after the Debtor failed to comply with the terms of a conditional order of dismissal. Following the dismissal of the second case, the Movant commenced a foreclosure action (doc. # 17). [2] On November 23, 2017, approximately three months after the Court dismissed his prior case, the Debtor filed the instant chapter 13 case (case # 17-10500).

On December 21, 2017, 31 days after the Debtor filed the instant bankruptcy case, the Movant requested an order confirming the automatic stay had expired (doc. # 13, the "Motion"). On January 5, 2018, the Debtor filed a response, acknowledging he had a chapter 13 case pending within the last year and that the automatic stay terminated by operation of law after 30 days, but only to the extent set forth in McFeeley, i.e. only as to acts against him or his property (doc. # 16, the "Response"). On January 11, 2018, the Movant filed a reply, asking the Court to declare the automatic stay does not apply to her claim, to change its interpretation of § 362(c)(3)(A) (the "Controlling Statute"), and to adopt the rationale of In re Bender, 562 B.R. 578 (Bankr. E.D.N.Y. 2016) in construing that statute (doc # 18, the "Reply").

After holding a hearing on the Motion on January 21, 2018, the Court entered a scheduling order (doc. # 19), granting the Debtor, Movant, and Chapter 13 Trustee (the "Parties") an opportunity to file memoranda of law addressing two legal issues: whether there was cause for this Court to reconsider the position it took in McFeeley, and if so, whether it should apply Bender in determining the extent to which the automatic stay is limited in this case. The scheduling order stated that if the Court modified its interpretation of the Controlling Statute, it would grant the Debtor a reasonable period of time to seek an extension of the stay and present evidence that he filed this case in good faith as to the Movant. The Parties filed the supplemental documents (doc. ## 23, 24, 25) and the Court then took the matter under advisement.

*834 IV. DISCUSSION

A. Three Interpretations of § 362(c)(3)(A)

The Parties ask the Court to determine the scope of the stay in a second chapter 13 bankruptcy case filed within one year of the date the Court dismissed a prior chapter 13 case, after the second case has been pending 30 days.

Congress added § 362(c)(3)(A) to the Bankruptcy Code to address the extent of the stay in repeat filer cases as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 § 302 ("BAPCA"). In context, it reads as follows:

> (c) Except as provided in subsections (d), (e), (f), and (h) of this section—
>
> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
>
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of –

> (A) the time the case is closed;
>
> (B) the time the case is dismissed; or
>
> (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;
>
> (3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) –
>
> (A) the stay under subsection (a) **with respect to any action taken** with respect to a debt or property securing such debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case;
>
> (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed ...

§ 362(c) (emphases added).

The extent to which the automatic stay terminates – and what the remaining stay covers – under the Controlling Statute "is one of many portions of BAPCPA which courts have struggled to decipher." See Peter E. Meltzer, Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A), 86 AM. BANKR. L.J. 407, 416 n. 26 (2012) (citing nine BAPCPA passages in which courts have diverged in interpretation).[3] Among the "long string of incredibly poorly ***835** drafted statutory provisions under the BAPCPA," In re Grydzuk, 353 B.R. 564, 567 (Bankr. N.D. Ind. 2006), the Controlling Statute has generated more than its share of consternation among bankruptcy judges attempting to interpret the extent of stay termination. Judge A. Thomas Small succinctly captured the interpretative challenges this provision presents:

> In an Act [BAPCPA] in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out. It uses the amorphous phrase 'with respect to' a total of four times in short order and raises questions about the meaning of the words 'action taken' and 'to the debtor.' The language of the statute is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it's a puzzler.

In re Paschal, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006). The phrases Judge Small cites – 'action taken' and 'with respect to the debtor' – have split the courts and are the cutting edge of the dispute between the Parties in this case:

> (A) the stay under subsection (a) with respect to any **action taken** with respect to a debt or property securing such debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case;

§ 362(c)(3) (emphases added).

There are three distinct, and dueling, interpretations of the Controlling Statute. One interpretation, which is generally referred to as the "Majority Approach," construes the Controlling Statute, and specifically the phrase "with respect to the debtor," to effect a termination of the stay only with respect to property of the debtor, and not with respect to property of the estate. In re Jumpp, 356 B.R. 789, 793 (1st Cir. BAP 2006).[4] The Debtor and Trustee implore this Court to continue to implement that approach, as it did in McFeeley.

The second interpretation, known as the "Minority Approach," holds that the stay terminates in its entirety "as to a repeat-filing debtor, that debtor's property, and property of the debtor's estate, but not as to the debtor's spouse in a joint case if that spouse is not also a repeat filer." In re Smith, 573 B.R. 298, 301 (Bankr. D. Me. 2017). [5]

***836** The third interpretation follows In re Bender, 562 B.R. 578 (Bankr. E.D.N.Y. 2016) (the "Bender Approach"), which the Movant asks the Court to adopt. It holds that, under the Controlling Statute, the stay terminates as to the debtor's property and property of the estate, but only if the property was the subject of a judicial, administrative, or other formal proceeding commenced prepetition. The courts following this approach interpret the term "action taken" in subparagraph (A) of 362(c)(3) to refer only to formal action a creditor took on its claim prior to the filing of the current case. [6]

B. Has the Movant Demonstrated Cause for this Court to Reconsider Its Interpretation of § 362(c)(3)(A), as Set Out in McFeeley?

The Movant asks this Court to reconsider its interpretation of the Controlling Statute, in light of (i) the many rulings interpreting this statute that courts have issued in the 11 years since this Court construed it in McFeeley, and (ii) the intent of Congress in enacting the statute (doc. # 18).

[2] The Supreme Court and the Second Circuit have emphasized, "[c]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change [a] Court's interpretation of its legislation." General Dynamics Corp., Electric Boat Div. v. Benefits Review Bd., 565 F.2d 208, 212 (2d Cir. 1977) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)). However, "while stare decisis is undoubtedly of considerable importance to questions of statutory interpretation, the Supreme Court 'has never applied stare decisis mechanically to prohibit overruling ... earlier decisions determining the meaning of statutes.' " Shi Liang Lin v. United States DOJ, 494 F.3d 296, 310 (2d Cir. 2007) (quoting Monell v. Dep't of Social Servs., 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

[3] **[4]** The Movant bears the burden in "advocating for the abandonment of an established precedent[,]" which "is greater where the Court is asked to overrule a point of statutory construction." Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). To persuade the Court to modify the interpretation it articulated in McFeeley, the Movant must demonstrate that continuing the present interpretation will "lead[ ] to an irrational result or [ ] is founded upon implausible inferences as to congressional intent." United States v. Aguon, 851 F.2d 1158, 1178 (9th Cir. 1988) (Wallace, J. dissenting) (citing Busic v. United States, 446 U.S. 398, 404, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980)).

[5] **[6]** **[7]** As the Trustee states, the approach enunciated in McFeeley has been the controlling interpretation in this district and, "[f]or eleven years[,] ... has provided clarity and consistency as to the scope of the automatic stay in cases where ***837** a second case is filed within one year" (doc. # 25, p. 2). He is also correct that "[t]here have been no contrary controlling decisions from the Second Circuit" requiring a change in this Court's position (doc. # 25, p. 1). "Overruling precedent is never a small matter," Kimble v. Marvel Entm't, LLC, —— U.S. ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015), and this Court does not contemplate modifying its position lightly. See Janus v. Am. Fed'n of State, Cty., and Mun. Emp. Council 31, —— U.S. ——, 138 S.Ct. 2448, 2478, 201 L.Ed.2d 924 (2018) ("We will not overturn a past decision unless there are strong grounds for doing so."). Moreover, the concerns the Debtor expresses, namely that a departure from the longstanding and familiar McFeeley interpretation may cause "potentially massive uncertainty" (doc. # 23, p. 8), have merit. The Court is mindful of the consequences a change in precedential jurisprudence may bring, and weighs carefully the value of adopting what it views as a more legally sound interpretation against the impact of changing a well-established precedent, on an issue crucial to both debtors and creditors. It also recognizes that while consistency and stare decisis are "important to the rule of law, [ ] so are correct judicial decisions." Kimble, 135 S.Ct. at 2417 (Alito, J., dissenting). "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." Barden v. Northern Pacific R. Co., 154 U.S. 288, 322, 14 S.Ct. 1030, 38 L.Ed. 992 (1894); see also Janus, 138 S.Ct. at 2478 ("But as we have often

recognized, stare decisis is 'not an inexorable command.' ") (internal citations omitted).

[8] This Court decided McFeeley in early 2007, less than two years after the effective date of BAPCPA. Since McFeeley, it has the benefit of its additional experience with the impact of the BAPCPA revisions to the Code, developing bankruptcy court jurisprudence with respect to the Controlling Statute, and Supreme Court guidance on how to interpret BAPCPA provisions.

This Court finds cause to grant the Movant's request to reconsider its position on two grounds. First, the Supreme Court has issued several decisions interpreting unrelated BAPCPA provisions, which, while not directly on point, are instructive with regard to statutory construction of BAPCPA. See infra Part IV(C). These decisions, unavailable in 2007 when the Court issued McFeeley, provide guideposts for analyzing the Controlling Statute. Second, based upon the well-reasoned and sharply conflicting perspectives other courts have articulated, and the thoughtful and wide-ranging interpretations scholars have published, regarding BAPCPA in general and the Controlling Statute in particular, there is ample new thinking on the question to warrant this Court taking a fresh look at the decision it issued eleven years ago. See In re Smith, 573 B.R. 298, 299 (Bankr. D. Me. 2017) (collecting cases emblematic of the developing jurisprudence with respect to the Controlling Statute). After considering the Supreme Court guidance and scrutinizing the decisions issued since McFeeley, this Court concludes it is appropriate for it to reassess whether the rationale it applied in McFeeley "may [have] produce[d] a result at odds with the intention of the drafters," In re Jupiter, 344 B.R. 754, 761 (Bankr. D. S.C. 2006), or was founded "upon implausible inferences as to congressional intent." Busic v. United States, 446 U.S. 398, 404, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980).

Accordingly, the Court grants the Movant's first prayer for relief and reconsiders its position on the proper interpretation of § 362(c)(3)(A).

*838 C. Supreme Court Guidance for Interpreting BAPCPA Provisions

While it did not address § 362(c)(3)(A) in particular, in the years following McFeeley, the Supreme Court interpreted other provisions of BAPCPA in four cases (hereafter the "BAPCPA Cases").[7] "There is no one theory or process or method that can be teased out of the corpus of Supreme Court [bankruptcy] opinions that will neatly explain them[,]" but the Supreme Court's statutory analysis of the BAPCPA Cases serves as crucial guidance for how this Court should interpret the Controlling Statute. Lee Dembart and Bruce A. Markell, Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979 – 2004, 78 AM. BANKR. L.J. 373, 386 (2004).

In the BAPCPA Cases, the Court continued its practice of employing a "plain meaning" approach to statutory interpretation which, as Circuit Judge Rendell described, "often can be difficult to apply, and ... anything but plain." Marjorie O. Rendell, 2003 – A Year of Discovery: *Cybergenics* and Plain Meaning in Bankruptcy Cases, 49 VILL. L. REV. 887, 887 (2004). The Court frequently begins with an examination of statutory or dictionary definitions, but these tools may be of limited utility where a given statute is missing a critical definition, or where competing dictionaries yield contrasting definitions.[8] As a result, the Court often extends its approach beyond the text of the provision in question to examine related provisions within the same statute, as well as the broader statutory scheme as a whole. Rendell, supra, at 888–89. See also Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (considering the statute's "contextual features"). "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ..." United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

In the BAPCPA Cases, the Supreme Court began its consideration "with the language of the statute itself," see Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011), and considered statutory definitions as well as dictionary definitions in determining meaning. See Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 236, 240, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010); Hamilton v. Lanning, 560 U.S. 505, 513–14, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010); Ransom, 562 U.S. at 69–70, 131 S.Ct. 716; Hall v. United States, 566 U.S. 506, 511–12, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012).

The Court did not limit its analysis to the words of the salient BAPCPA provision in these cases. Instead, the Court expanded its consideration to include related provisions, both preceding, and originating within, BAPCPA. Examples in each case demonstrate this approach. In _ ***839** _ Milavetz, the Court compared the definition of "debt relief agency" in § 101(12A) to §§ 526(d) and 527(b) of the Bankruptcy Code in determining whether the term included attorneys. See 559 U.S. at 235–38, 130 S.Ct. 1324. In analyzing the meaning of "projected" in § 1325(b)(1)(B) in Lanning, the Court examined competing interpretations within the larger context of § 1325 as a whole, and through comparison to analogous provisions outside of chapter 12, such as § 1129(a)(15)(B), in order to identify potential conflicts. See 560 U.S. at 517–20, 130 S.Ct. 2464. In Ransom, the Court compared the contested phrase "applicable" in § 707(b)(2)(A)(ii)(I) to related provisions defining and determining "disposable income" and "amounts reasonably necessary" in §§ 1325(b)(2) and (3). See 562 U.S. at 70, 131 S.Ct. 716. In Hall, the Court compared the provision at issue, § 1222(a)(2), to other BAPCPA amendments addressing connections between the Bankruptcy Code and the Internal Revenue Code, looked for guidance in the textually similar § 1322(a)(2), and considered the impact a given reading would have upon longstanding interpretations of chapter 13 provisions. See 566 U.S. at 515–19, 132 S.Ct. 1882.

The Court also considered whether interpretations would render language superfluous, either in the statute at issue or in other Bankruptcy Code provisions. See, e.g., Hamilton v. Lanning, 560 U.S. 505, 526, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) (finding the mechanical approach "effectively reads [a] phrase out of the statute" in certain circumstances); Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 74, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (finding one interpretation "would render the term 'applicable' superfluous"); Hall v. United States, 566 U.S. 506, 517, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) (expressing a concern of rendering § 1305 "inoperative or superfluous"). While the BAPCPA Cases demonstrate the Court's continued proclivity to "sh[y] away from other, nontextual approaches to statutory interpretation" such as legislative history, see Dembart & Markell, supra at 386, the Court nevertheless considered extratextual sources, such as related provisions and statutory context to determine meaning. See Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 244–45, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010); Ransom, 562 U.S. at 78, 131 S.Ct. 716; Lanning, 560 U.S. at 520, 130 S.Ct. 2464; Hall 566 U.S. at 513–19, 132 S.Ct. 1882.

In these cases, the Court also continued its commitment to "avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history." Lamie v. United States Trustee, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). In Milavetz, the Court remarked in a footnote that, "[a]lthough reliance on legislative history is unnecessary in light of the statute's unambiguous language, we note the support that record provides for the Government's reading [of the statute in question]." Milavetz, 559 U.S. at 236 n. 3, 130 S.Ct. 1324. In Hall, the Court remarked in a footnote, "[f]or those of us for whom it is relevant, the legislative history confirms that Congress viewed § 346 as defining which estates were separate taxable entities." Hall, 566 U.S. at 514 n. 3, 132 S.Ct. 1882 (2012). Both Milavetz and Hall utilize legislative history as additional, though not required, support for the Court's chosen interpretation. [9]

***840** Most importantly, the BAPCPA Cases establish that the Court's plain meaning approach includes both a general skepticism of legislative history and a general deference to congressional purpose. Though the Court assiduously avoided finding the BAPCPA provision in each of these cases was ambiguous, thereby eliminating the obligation to consider legislative history, see Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985), it expressly pointed to the congressional intent behind two of the subject BAPCPA provisions. [10] At the outset, Milavetz finds Congress enacted BAPCPA "to correct perceived abuses of the bankruptcy system[,]" which included "provisions that regulate the conduct of 'debt relief agencies[.]' " Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231–32, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). To support this finding, the Court looked to pre-BAPCPA and BAPCPA provisions as evidence of Congress's concern with the "loading up of debt" prior to filing bankruptcy and, thus, its intention in passing the provision at issue. Id. at 244, 130 S.Ct. 1324. [11] In Ransom, the Court actually cited the 2005 House Judiciary Report as evidence of Congress's intention to "ensure that [debtors] repay creditors the maximum they can afford," even without finding the BAPCPA provision

ambiguous. Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64, 71, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (citing H.R. Rep. No. 19-31, pt. 1, p. 2 (2005)).

In the not infrequent instances in which competing interpretations of BAPCPA provisions produced "anomalies," the Court adopted the interpretation that more faithfully complied with congressional intent. See Ransom, 562 U.S. at 78, 131 S.Ct. 716. In Milavetz, the Court rejected the interpretation that it found "serve[d] none of the purposes of the Bankruptcy Code or the amendments enacted through the BAPCPA[,]" and observed, "no other solutions yield[ed] as sensible a result" as the reading the Court adopted. Milavetz, 559 U.S. at 245, 130 S.Ct. 1324. In Ransom, the Court acknowledged that each interpretation produced "anomalies," but defended its position by observing "the policy concerns Ransom emphasizes pale beside one his reading creates: His interpretation ... would frustrate BAPCPA's ***841** core purpose of ensuring that debtors devote their full disposable income to repaying creditors." Ransom, 562 U.S. at 78, 131 S.Ct. 716.

Even when it does not find a statutory provision ambiguous, the Supreme Court regularly considers whether an interpretation produces an objectively absurd result, and may consult congressional purpose, including legislative history, in doing so. See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118, 2157 (2016) ("Interestingly, in determining whether a statute produces an absurd result, even Justice Scalia agreed that judges may look to legislative history.") (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 388 (2012)). In the BAPCPA Cases, the Court examined whether an interpretation might produce "absurdities" or "senseless results" not intended by Congress. In Milavetz, the Court found that one proponent's "expansive view ... would produce absurd results." Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 245–46, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). In Lanning, the Court pronounced that its holding would avoid the "senseless result[ ] that we do not think Congress intended" of "deny[ing] creditors payments that the debtor could easily make." Hamilton v. Lanning, 560 U.S. 505, 520–21, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010); see also Baud v. Carroll, 634 F.3d 327, 353 (6th Cir. 2011). The Ransom Court reemphasized this point, declaring its interpretation did not produce "senseless results" and comported with BAPCPA's "core purpose of ensuring that debtors devote their full disposable income to repaying creditors." Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64, 78, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011). In Hall, the Court found that conflicting legislative history was insufficient to support an interpretation contrary to the statute's "plain language, context and structure," especially where such an interpretation would "upset[ ] the background norms in both Chapters 12 and 13" and "threaten[ ] ripple effects beyond [the] individual case for debtors in Chapter 13 and the broader bankruptcy scheme[.]" Hall v. United States, 566 U.S. 506, 523, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012).

[9] **[10]** **[11]** The BAPCPA Cases provide instructions that can be followed by reference to three guideposts: First, courts should apply the language as written where the definitions, context, and structure support a single, plain meaning. With the notable exception of Ransom, the Court looked to legislative history only to bolster its plain meaning interpretation. See Milavetz, 559 U.S. at 236 n. 3, 130 S.Ct. 1324; Hall, 566 U.S. at 514 n. 3, 132 S.Ct. 1882; but see Ransom, 562 U.S. at 71, 131 S.Ct. 716. Second, courts should be mindful of congressional purpose when weighing competing interpretations, and consider whether a particular reading of the statute will produce "absurdities" or "senseless results" not intended by Congress. Milavetz, 559 U.S. at 245–46, 130 S.Ct. 1324; Lanning, 560 U.S. at 520–21, 130 S.Ct. 2464; Ransom, 562 U.S at 78, 131 S.Ct. 716. Third, when congressional purpose is not apparent from the statute itself, or related provisions, courts are well advised to refer to the 2005 House Judiciary Report to discern the core purpose of a BAPCPA provision. Ransom, 562 U.S. at 71, 131 S.Ct. 716. This Court will embark on the interpretive quest to construe the scope and impact of § 362(c)(3)(A), following these three guideposts.

D. Does the Majority or Minority Approach More Closely Follow the Supreme Court's Guidance in Interpreting BAPCPA Provisions?

(1) THE TEXT OF § 362(c)(3)(A)

[12] **[13]** This Court begins its statutory analysis with the premise that it should ***842** adopt the approach that gives the most effective meaning possible to the actual words of the Controlling Statute. Unfortunately, adhering to this premise is a challenge since the language of the Controlling

Statute has generated several conflicting interpretations. It reads:

> (A) the stay under subsection (a) with respect to any **action taken** with respect to a debt or property securing such debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case;

§ 362(c)(3) (emphases added).

The Majority Approach relies on the plain language of the phrase "with respect to the debtor" to conclude the stay terminates only with respect to the debtor and the debtor's property, and not property of the estate. See, e.g., In re Holcomb, 380 B.R. 813, 815–16 (10th Cir. BAP 2008); In re Jumpp, 356 B.R. 789, 796 (1st Cir. BAP 2006). While courts adopting the Majority Approach may find the language "entirely plain," In re Jones, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006), the phrase "with respect to the debtor" is open to at least three additional readings beyond the "plain meaning" those courts assign to it.

The first of these readings is the "simplest explanation:" the stay terminates "both as to the debtor and the debtor's property (estate and non-estate) and so would allow 'any action' against property securing a debt to proceed." In re Daniel, 404 B.R. 318, 324 (Bankr. N.D. Ill. 2009). This interpretation would make no distinction between a debtor and co-debtor regarding the impact of stay termination. Id. Additionally, it renders the term "with respect to the debtor" superfluous as "[t]here is no need to emphasize that termination of the stay under § 362(c)(3)(A) applies in the debtors' case, since, after all, that is the only case to which it could apply." Id. at 325. Perhaps due to this superfluity, there do not appear to be any jurisdictions that have read the statute in this way.

[14] **[15]** **[16]** A second possible reading is that the phrase "means nothing at all; it is adscititious, the result of sloppy draftsmanship which permeates all of BAPCPA." Meltzer, supra, at 408. Not surprisingly, courts have been hesitant to reach this conclusion, probably because "[i]t is the 'cardinal principle of statutory construction' ... [that] it is our duty 'to give effect, if possible, to every clause and word of a statute' ... rather than to emasculate an entire section." Bennett v. Spear, 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting United States v. Menasche, 348 U.S. 528, 538, 75 S.Ct. 513, 99 L.Ed. 615 (1955)). However, "[t]he canon requiring a court to give effect to each word 'if possible' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute.' " Chickasaw Nation v. United States, 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001) (internal citation omitted). Importantly, the canons "are not mandatory rules ... [a]nd other circumstances evidencing congressional intent can overcome their force." Id. While there is contextual support for determining the phrase "with respect to the debtor" adds no additional meaning to § 362(c)(3)(A), [12] there do not ***843** appear to be any jurisdictions that have adopted this reading.

A third alternative rendition – and the one underlying the Minority Approach – reads the phrase "as referring to the serially-filing spouse, making that debtor subject to collection actions, both in personam and in rem (against estate and non-estate property), while leaving the stay completely in effect as to the newly-filing spouse's person and property." In re Daniel, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009). Reading "with respect to the debtor" as "distinguishing between a debtor and the debtor's spouse is entirely consistent with the references to 'a single or joint case' at the beginning of section 362(c)(3) ... [and] is consistent with other provisions of the bankruptcy code." [13] In re Reswick, 446 B.R. 362, 370 (9th Cir. BAP 2011).

(2) THE CONTEXT OF § 362(c)(3)(A)

As the Sixth Circuit observed in evaluating a different BAPCPA provision, the initial step of examining the plain language of the Controlling Statute "does not end our inquiry" because "the plain-language arguments supporting each approach are nearly in equipoise[.]" Baud v. Carroll, 634 F.3d 327, 351 (6th Cir. 2011). Thus we turn to the second step, considering the Controlling Statute in context with the rest of § 362(c), other BAPCPA provisions, and the Bankruptcy Code writ large, see, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 244, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010).

This Court assesses, first, the contextual landscape in which the Controlling Statute is located, and whether that context lends support to the Majority Approach. The Majority Approach's interpretation of "with respect to the debtor" renders the Controlling Statute "internally inconsistent" because "the opening clause ... would be surplusage." In re Reswick, 446 B.R. 362, 368 (9th Cir. BAP 2011). The Majority Approach also "requires one to read into the statute words that are not there ... [by] expand[ing] the phrase 'with respect to the debtor' to say 'with respect to the debtor and the debtor's property[,]' " In re Bender, 562 B.R. 578, 583–84 (Bankr. E.D.N.Y. 2016), which "somewhat undermines the persuasiveness of their 'plain language' argument." In re Reswick, 446 B.R. at 369. See also In re Johns, No. 08-24311, at 3 (Bankr. E.D. Wis. July 11, 2008) ("It is unclear to this Court why the majority finds it clear that the phrase 'with respect to the debtor' should be read to mean 'with respect to the property of the debtor,' when that is not what the statute says.") (emphasis original). The Majority Approach also creates an inconsistency with § 362(j), which provides a procedure by which a party in interest may confirm, "that the automatic stay has been terminated" pursuant to § 362(c). "If § 362(c)(3)(A) did not terminate the stay in its entirety, § 362(j) would be rendered inconsistent 'because § 362(j) does not carve out exceptions for property that remains protected by the stay but broadly and summarily allows parties to confirm that the stay has been terminated under § 362(c).' " In re Curry, 362 B.R. 394, 402 (Bankr. N.D. Ill. 2007) (quoting In re Jupiter, 344 B.R. 754, 760 (Bankr. D.S.C. 2006)). See In re Reswick, 446 B.R. at 369 n. 7.

This Court turns next to the Minority Approach, which reads the Controlling Statute to terminate the stay in its entirety as to only the repeat-filing spouse in a joint case. This construction raises some ***844** contextual conundrums. First, use of a singular term in the Bankruptcy Code generally includes the plural of the same term, see § 102(7). If we apply this rule of construction to the Controlling Statute, it "would yield the conclusion that the stay terminates as to both debtors in a joint case, even if one of the debtors did not have a prior case dismissed within the prior year ... [and then] there would be no reason for Congress to have used the phrase 'with respect to the debtor' to differentiate between the debtors in a joint case." In re Smith, 573 B.R. 298, 302 n. 2 (Bankr. D. Me. 2017). This is not a fatal flaw, however, since this potential clash with § 102(7) is present in other parts of the Bankruptcy Code. Id. (citing § 101(10A)). Second, this Court agrees that while the Minority Approach's distinction between co-debtor spouses "does not comport perfectly with the rule of construction in § 102(7), it is preferable to the majority interpretation, which suffers from more serious defects." Id. at 302 n. 2. Thus it is "the most plausible [interpretation] in the context of the language of § 362 and of the Bankruptcy Code as a whole." In re Daniel, 404 B.R. 318, 327 (Bankr. N.D. Ill. 2009).

(3) THE CONGRESSIONAL PURPOSE BEHIND § 362(c)(3)(A)

As the Supreme Court instructed in the BAPCPA Cases, this Court will consider next which interpretation is most reflective of congressional purpose. See Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231–32, 244, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010); Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64, 71, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011).

BAPCPA added new subsections to § 362(c) expressly to address the duration and termination of the automatic stay. Subsections 362(c)(3) and (4) apply when an individual has multiple bankruptcy filings within a one-year period. The specific provision at issue here, § 362(c)(3)(A), limits the duration of the stay to 30 days if the individual debtor had a prior case pending within the one-year period preceding the current filing. Subsections 362(c)(3)(B) and (C) provide the means by which a party in interest can move to continue the stay beyond the 30-day deadline upon a showing that "the filing of the later case is in good faith as to the creditors to be stayed." § 362(c)(3)(B). If a debtor had two cases pending within the preceding one-year period, § 362(c)(4)(A) mandates that the automatic stay "shall not go into effect" upon the filing of the later case. In that circumstance the debtor will enjoy the benefits of the stay only if he or she can demonstrate the later case was filed in good faith as to the creditors to be stayed. Based upon this surrounding "statutory context," there is a solid basis for finding Congress enacted the Controlling Statute to limit the extent of protection afforded by the automatic stay to debtors who filed multiple bankruptcy cases within a one-year period. The BAPCPA Cases reach the same conclusion. In Milavetz, the Court declared, "Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system." 559 U.S. at 231–32, 130 S.Ct. 1324.

The desire to limit protection to repeat-filers aligns with other BAPCPA provisions intended to "correct perceived abuses of the bankruptcy system." Id. See §§ 707(b)(2), 522(p)(1), 522(b)(3)(A).

In Ransom, the Supreme Court specifically referred to the 2005 House Judiciary Report to ascertain the congressional purpose underlying the means test, and found that Congress "designed the means test to 'ensure that [debtors] repay creditors the maximum they can afford.' " Ransom, 562 U.S. at 64, 131 S.Ct. 716. In the section-by-section description of the 2005 House Report, ***845** the proposed changes to § 362(c), including what would become the Controlling Statute, are in "Title III," entitled "Discouraging Bankruptcy Abuse." See H.R. Rep. No. 109-31, pt. 1, p. 69 (2005). The proposed change embodied in the Controlling Statute is labelled "Sec. 302. Discouraging Bad Faith Repeat Filings." Id. As further evidenced by the statutory context, the 2005 Report demonstrates that the Controlling Statute was emblematic of Congress's intention to "correct perceived abuses of the bankruptcy system." Milavetz, 559 U.S. at 231–32, 130 S.Ct. 1324.

The Minority Approach is consistent with congressional intent behind the Controlling Statute since its interpretation of the statute meaningfully penalizes a debtor who files multiple bankruptcy cases within a year and fails to show a good faith basis for doing so. In re Jupiter, 344 B.R. 754, 761 (Bankr. D.S.C. 2006). This analysis affords the repeat-filing debtor a 30-day breathing period, and the opportunity to extend the automatic stay through § 362(c)(3)(B), but protects creditors by terminating the stay after that initial 30-day period if the debtor cannot demonstrate the recent filing was in good faith. This outcome better "advances BAPCPA's objectives" by serving as a significant deterrent to bad-faith repeat filers. See Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 71, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (finding the government's interpretation "advances BAPCPA's objectives.")

By contrast, the Majority Approach would have scant practical effect in deterring repeat filings. Under its interpretation, in a chapter 13 case, a creditor benefiting from the termination of the stay would not be able to continue a foreclosure, nor gain access to any property the debtor acquired after the filing of the case, such as postpetition earnings. In re Daniel, 404 B.R. 318, 323 (Bankr. N.D. Ill. 2009). While some courts have found the Majority Approach would still allow creditors to make dunning phone calls, bring eviction actions, and reduce their claims to judgment, see, e.g., In re Jumpp, 356 B.R. 789, 796–97 (1st Cir. BAP 2006), this is, at best, of de minimus value. The reality is that "very few creditors would seek to pursue only the debtor personally, or only property of the debtor." In re Reswick, 446 B.R. 362, 368 (9th Cir. BAP 2011). [14] The Majority Approach also allows debtors who are unable to demonstrate they filed the new case in good faith to nevertheless receive the benefit of the automatic stay. In re Keeler, 561 B.R. 804, 808 (Bankr. N.D. Ga. 2016); see also In re Smith, 573 B.R. 298, 306 (Bankr. D. Me. 2017) ("It makes little sense to conclude that Congress meant to protect most, if not all, of a debtor's property – by virtue of its status as property of the estate – in a case that was, at least presumptively, not filed in good faith."). "Such an interpretation is not consistent with the intent of Congress nor the new statutory scheme set forth in § 362(c)(3)." In re Jupiter, 344 B.R. 754, 761 (Bankr. D.S.C. 2006). The "practical consequences" of adopting the Majority Approach are thus "hard to reconcile with the notion that Congress intended a severe punishment for serial filers." Laura B. Bartell, Staying the Serial Filer – Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code, 82 AM. BANKR. L.J. 201, 226 (2008).

***846** Additionally, there are two points of contrast between the Majority Approach to the Controlling Statute and congressional purpose that may produce "senseless results." First, under the Majority Approach, the automatic stay terminates only as to the debtor and the debtor's property – and not as to property of the estate – and thus only the debtor has an incentive to continue the stay. Though subparagraph (c)(3)(B) allows for "a party in interest" to move to continue the stay, the trustee and creditors "would have no reason to seek an extension of the stay simply to prevent assessments of personal liability against the debtor or collection actions against non-estate property that could not benefit them in any event." In re Daniel, 404 B.R. 318, 323 (Bankr. N.D. Ill. 2009). This narrow scope of benefits seems inconsistent with congressional intent and strikes this Court as a serious weakness in the Majority Approach. Second, there is the question of how one can reconcile the Majority Approach with Congress's mandate for an expedited hearing at which debtors must prove they filed their petition in good faith as the sine qua non for continuation of the

stay. This Court finds the Jupiter rationale persuasive and "does not believe Congress enacted this section, which both requires an extraordinary amount of work on the part of the moving parties and the courts, only to have no meaningful penalty if the stay is not extended." In re Jupiter, 344 B.R. 754, 761 (Bankr. D.S.C. 2006). The Minority Approach avoids the potentially "senseless results" that may accompany the Majority Approach's interpretation and this Court finds " 'no other solution yields as sensible a result.' " Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 245, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010) (internal citation omitted).

Because the Controlling Statute's text, context, and purpose support adoption of the Minority Approach, it is not necessary for this Court to revisit the question of whether § 362(c)(3)(A) is ambiguous. [15] Instead, the Court concludes the pertinent legislative history reinforces its revised position, acting as "extra icing on a cake already frosted." Yates v. United States, —— U.S. ——, 135 S.Ct. 1074, 1093, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting).

[17] The legislative history [16] underlying § 362(c)(3)(A) "demonstrates that Congress intended to deter successive bankruptcy filings by imposing stricter limitations on the power of the automatic stay as subsequent bankruptcy cases are filed." In re Reswick, 446 B.R. 362, 372 (9th Cir. BAP 2011).

> During the seven years in which a provision for termination of the automatic stay 'with respect to the debtor' was pending in Congress, none of the several committee reports that discussed the provision ever suggested that the phrase drew a distinction between actions against the debtor personally, actions against the debtor's estate property, and action's against the debtors' non-estate property.

***847** In re Daniel, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009). See H.R. Rep. No. 105-540, p. 80 (1998); S. Rep. No. 105-253, p. 39 (1998); H.R. Rep. No. 109-31, pt. 1, p. 69 (2005). As originally proposed on February 3, 1998, section 121 of H.R. 3150, entitled "Discouraging Bad Faith Repeat Filings[,]" did not contain language that would become § 362(c)(3)(4). Therefore, the 1998 hearings held on H.R. 3150 only considered language that would become § 362(c)(3)(A), and none of the witnesses, over the multiple days of testimony and through written statements, expressed an understanding that the stay termination contemplated in section 121 only applied to a debtor and the debtor's non-estate property. [17]

Consequently, and contrary to the Debtor's assertions (doc. # 23, p. 5), [18] "there is no indication in the legislative history that § 362(c)(3) [which applies to repeat-filers who had two cases pending during a one-year period] effects a partial termination of the automatic stay while § 362(c)(4) [which applies to repeat-filers who had three cases pending during a one-year period] terminates the automatic stay in its entirety." In re Curry, 362 B.R. 394, 402 (Bankr. N.D. Ill. 2007).

In sum, after following the guideposts the Supreme Court has planted, and reexamining this question with the benefit of over a decade of experience, scholarly study, and case law, this Court is persuaded the Minority Approach to interpreting the Controlling Statute is the most truly aligned with the congressional goal of deterring successive bankruptcy filings by an individual debtor and should be applied in this district. The Minority Approach meaningfully implements a deterrent to repeat filings by terminating the stay as to all creditors. It prudently balances a potent, across-the-board limitation on the stay when a debtor files a case within one year of having had another bankruptcy case dismissed, on the one hand, with the opportunity for individuals who file in good faith to retain the full impact of the stay even if their life circumstances led them to need a second bite at the bankruptcy apple.

E. The Bender Approach

[18] The Movant asserts, in reliance upon the Bender Approach, that only a creditor who initiated legal action against the debtor before the debtor filed the current bankruptcy case should get the benefit of the statute's early stay termination (doc. # 24, p. 2). The Trustee and Debtor oppose adoption of the Bender Approach, cautioning Bender is just "one [and the only] decision from a bankruptcy court in our Circuit[,]" and "Bender is

simply a further narrowing of the minority position rather than a new interpretation" (doc. ## 25, 23, respectively).

An analysis of the statutory text and, specifically, when, where, and how often ***848** the words "action taken" and "act" are used in the Code, leads this Court to disagree with the narrow interpretation of the Bender Approach. Including the Controlling Statute, the words "action taken" are used together four times in the Code, [19] and one can only read two of those usages as limited to a formal action. In re James, 358 B.R. 816, 820 (Bankr. S.D. Ga. 2007). "Section 362(k)(2)[,]" for instance, "uses 'action taken' in limiting awards for stay violations to actual damages when the violation 'is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor.' " Bartell, supra, at 216 (quoting § 362(k)(2)). "This protective provision, enacted at the same time as § 362(c)(3), could not have been meant to shield creditors when they commence litigation or similar proceedings, but not when they take lesser steps in the good faith belief that the stay has terminated under § 362(h)." Id. at 216–17. The Bender Approach is further undercut by the fact that "three provisions of § 362(b) refer to 'any action by' a specified agency or licensing body in a way that must include non-adjudicative acts." Bartell, supra, at 215. See also In re Betty Owen Schools, Inc., 195 B.R. 23, 27 n. 5 (Bankr. S.D.N.Y. 1996). These contextual considerations persuade the Court to reject the narrow reading of "action taken," which the Bender Approach describes and the Movant promotes.

Additionally, the Bender interpretation does not align as clearly with congressional purpose as the Minority Approach. The Movant's argument that "[t]he Bender court's rationale strikes a balance between the rights of repeat filers and creditors who have already undertaken lawful efforts to collect debts owed to them" (doc. # 24, p. 2) misses the mark. The Movant has failed to show any policy basis for preferring creditors who have initiated judicial, administrative, or other formal proceedings over creditors who have not.

> The Code embodies a principal of equality, treating similarly-situated [sic] creditors similarly. Congress cannot have intended to subvert that principle by giving creditors who had begun actions against the debtor prepetition 'get-out-of-bankruptcy-free' cards and forcing others (perhaps less aggressive creditors who tried to keep the debtor out of bankruptcy) to abide by the stay.

Bartell, supra, at 218. Moreover, this Court finds nothing in the legislative history to support the Bender view that the Controlling Statute was intended to limit stay termination to formal actions or proceedings. See Eugene R. Wedoff, The Automatic Stay and Serial Filings: How the Courts have Interpreted §§ 362(c)(3) and (4), CONSUMER BANKR. COMM. NEWSLETTER, AM. BANKR. INST. (2006).

For the foregoing reasons, the Court denies the Movant's request to adopt the Bender Approach's interpretation of "action taken."

F. What Impact Does the Court's New Interpretation of § 362(c)(3)(A) have on this Case?

[19] The Debtor reasonably relied upon the precedent this Court established in McFeeley when he chose not to file a motion to extend the stay, within 30 days of filing this case, pursuant to § 362(c)(3)(B). Therefore, in order to avoid manifest injustice, and pursuant to the scheduling order of January 12, 2018 (doc. # 19), and through the exercise of its powers under § 105, the Court grants the ***849** Debtor thirty (30) days from the date of entry of this memorandum of decision to proceed as set out in § 362(c)(3)(B), if he so desires.

V. CONCLUSION

At the Movant's behest, the Court has considered whether it should reconsider the interpretation of § 362(c)(3)(A) it adopted in In re McFeeley, 362 B.R. 121 (Bankr. D. Vt. 2007), adopt the interpretation set out in the Bender case, and declare that the stay in this case expired, by operation of law, after the case had been pending 30 days. Based upon the foregoing analysis, the Court grants the first element of the Movant's Motion, and both reconsiders and changes its position.

The Court denies the second element of the Movant's Motion, asking that this Court adopt the Bender Approach to § 362(c)(3)(A), because it does not find that interpretation of the Controlling Statute to be consistent with the purpose of the statute, namely, to discourage repeat filings. Instead, the Court adopts the Minority Approach, construing § 362(c)(3)(A) to terminate the stay entirely – i.e., against both the debtor's property and property of the estate, and for all creditors – unless the debtor or another party in interest makes the requisite showing, and court orders otherwise, within 30 days of the date the debtor filed the second case. This interpretation allows for the most straightforward understanding of the text, is consistent with the contextual landscape changes BAPCPA imposed, and coincides most thoroughly with Congress's stated purpose.

The Court defers a determination on the third element of the Movant's Motion, whether the stay expired in this case by operation of law under the Controlling Statute, until the earlier of (i) the expiration of the 30-day period described in § 362(c)(3)(B), or (ii) the hearing held pursuant to that provision, as extended by this decision,

This memorandum constitutes the Court's findings of fact and conclusions of law.

All Citations

587 B.R. 829

Footnotes

1 In this memorandum, the Court refers to Title 11 of the United States Code as the Bankruptcy Code, and all statutory citations refer to the Bankruptcy Code, unless otherwise indicated.

2 All document references pertain to documents filed in case # 17-10500, which is the Debtor's current bankruptcy case.

3 Courts and analysts have been nearly unanimous in their criticism of BAPCPA's drafting and structure. See, e.g., In re Donald, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) (“Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturing defect.”); In re Steinhaus, 349 B.R. 694, 706 (Bankr. D. Idaho 2006) (“[I]t appears unmistakable that Congress drafted, or allowed to be drafted by others and then enacted, provisions with ‘loose’ and imprecise language.”).

4 Other cases in which the court adopted the Majority Approach include Witkowski v. Knight, 523 B.R. 291, 296–97 (1st Cir. BAP 2014); In re Holcomb, 380 B.R. 813, 815–16 (10th Cir. BAP 2008); In re Jumpp, 356 B.R. 789, 793–97 (1st Cir. BAP 2006); In re Weil, 2013 WL 1798898, 2013 U.S. Dist. LEXIS 60500 (D. Conn. 2013); In re Roach, 555 B.R. 840, 842–48 (Bankr. M.D. Ala. 2016); In re Hale, 535 B.R. 520, 527–28 (Bankr. E.D.N.Y. 2015); In re Rinard, 451 B.R. 12, 17–20 (Bankr. C.D. Cal. 2011); In re Dowden, 429 B.R. 894, 902–03 (Bankr. S.D. Ohio 2010); In re Tubman, 364 B.R. 574, 582-84 (Bankr. D. Md. 2007); In re Gillcrese, 346 B.R. 373, 373-77 (Bankr. W.D. Pa. 2006); In re Brandon, 349 B.R. 130, 131-32 (Bankr. M.D.N.C. 2006); In re Harris, 342 B.R. 274, 276-280 (Bankr. N.D. Ohio 2006); In re Hollingsworth, 359 B.R. 813, 814 (Bankr. D. Utah 2006); In re Johnson, 335 B.R. 805, 806-07 (Bankr. W.D. Tenn. 2006); In re Jones, 339 B.R. 360, 363-65 (Bankr. E.D.N.C. 2006); In re Pope, 351 B.R. 14, 15-16 (Bankr. D.R.I. 2006); In re Rice, 392 B.R. 35, 38 (Bankr. W.D.N.Y. 2006); In re Williams, 346 B.R. 361, 368-70 (Bankr. E.D. Pa. 2006).

5 Cases in which the court adopted the Minority Approach include In re Reswick, 446 B.R. 362, 365-73 (9th Cir. BAP 2011); St. Anne's Credit Union v. Ackell, 490 B.R. 141, 143-45 (D. Mass. 2013); In re Smith, 573 B.R. 298, 304 (Bankr. D. Me. 2017), aff'd sub nom. Smith v. Maine Bureau of Revenue Servs., 2018 WL 2248586, 2018 U.S. Dist. LEXIS 82211 (D. Me. 2018); In re Wilson, 2014 WL 183210, *1, 2014 Bankr. LEXIS 194, *1 (Bankr. D. Conn. 2014); In re Furlong, 426 B.R. 303, 307 (Bankr. C.D. Ill. 2010); In re Daniel, 404 B.R. 318, 321-26 (Bankr. N.D. Ill. 2009); In re Johns, No. 08-24311, at 3 (Bankr. E.D. Wis. July 11, 2008); In re Curry, 362 B.R. 394, 398-402 (Bankr. N.D. Ill. 2007); In re Jupiter, 344 B.R. 754, 757-62 (Bankr. D.S.C. 2006).

6 This approach pre-dates the Bender decision. See In re Curry, 362 B.R. 394, 400 (Bankr. N.D. Ill. 2007); In re Paschal, 337 B.R. 274, 280 (Bankr. E.D.N.C. 2006) (finding that, under the Controlling Statute, a creditor must have taken a formal action prior to the filing of the debtor's second bankruptcy petition to obtain stay relief, but reserving any decision on the meaning of the term ‘with respect to the debtor.’ ”)

7 See Hall v. United States, 566 U.S. 506, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012); Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011); Hamilton v. Lanning, 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010).

8 See Clark Cunningham, et. al., Plain Meaning and Hard Cases, 103 YALE L.J. 1561, 1563 (1994) (citing National Org. of Women, Inc. v. Scheidler, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994)) (noting a case in which "leading dictionaries have definitions that differ exactly as the parties differ over the meaning of the statutory term, and thus provide no objective way of resolving that dispute over ordinary language meaning.")

9 In Milavetz, the Court also provided guidance as to the extent of its review of legislative history, if and when it found a BAPCPA provision ambiguous. It stated that in future instances of ambiguous BAPCPA provisions, its review would be broad, including committee reports accompanying the earlier iterations of the bill that would eventually become BAPCPA in 2005. See Milavetz, 559 U.S. 229, 236 n. 3, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). The Court cited the 2005 House Judiciary Report and the 1998 House Committee on the Judiciary Hearings, finding that, "[w]hile the 1998 Hearings preceded the BAPCPA's enactment by several years, they form part of the record cited by the 2005 House Report." Id. In a case decided after Milavetz, the Second Circuit similarly cited to the same 2005 House Judiciary Report and the 1998 Judiciary Hearings as evidence of the "backdrop" against which Congress enacted BAPCPA. See Conn. Bar Ass'n v. United States, 620 F.3d 81, 96–97 (2d Cir. 2010).

10 A plain meaning approach does consider congressional purpose, even in the absence of direct reliance on legislative history. See John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387, 2408 n. 75 (2003) ("To exclude legislative history ... is not to deny the potential utility of purpose. Few would deny the possibility of gleaning a statute's overall purpose from its structure or from the aims suggested by the text itself.").

11 In efforts to decipher the meaning of newly added provisions, three of the four BAPCPA decisions considered pre-BAPCPA bankruptcy statutes and practice. See Milavetz, 559 U.S. at 244, 130 S.Ct. 1324; Lanning, 560 U.S. at 515–17, 130 S.Ct. 2464; Hall 566 U.S. at 513–14, 132 S.Ct. 1882. The Court did not need to consider pre-BAPCPA practice in Ransom because it found the provision in question, § 707(b)(2)(A)(ii)(I), "eliminate[ed] the pre-BAPCPA case-by-case adjudication of above-median-income debtors' expenses[.]" 562 U.S. at 78, 131 S.Ct. 716.

12 See Meltzer, supra, at 408–09 ("[T]he phrases 'with respect to the debtor' and 'with respect to a debtor' do not appear at all in the pre-BAPCPA Bankruptcy Code but appear 17 times in BAPCPA and, excluding § 362(c)(3)(A) itself, in every one of the other instances where the phrases appear as a stand-alone clause, they add nothing at all to the sections in question.").

13 "[S]everal provisions regarding joint cases added to the Code by BAPCPA distinguish between 'the debtor' and 'the debtor's spouse.' " In re Daniel, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009) (citing §§ 101(10A), 707(b)(7), and 1325(b)).

14 In a 2012 analysis of courts adopting the Majority Approach, Peter Meltzer was unable to find "a single case in which a creditor has sought to terminate the automatic stay under § 362(c)(3)(A)," rendering the Controlling Statute in those jurisdictions "invisible because most stay relief motions are seeking relief with respect to property of the estate and not the debtor." Meltzer, supra at 409 n. 7.

15 Other courts have made a compelling case for doing so. See, e.g., In re Reswick, 446 B.R. 362, 370–71 (9th Cir. BAP 2011).

16 While, some courts find "Congress did not give the Court the benefit of any legislative history clarifying its intent on this point," In re Moon, 339 B.R. 668, 672 (Bankr. N.D. Ohio 2006), earlier versions of the bill enacted as BAPCPA in 2005 are more than sufficiently similar to warrant consideration as legislative history. "With minor changes, the relevant portions of §§ 362(c)(3) and 362(c)(4) as enacted in 2005 are identical to what was proposed in 1998 and passed by Congress in 2000." Bartell, supra, at 225. See also Conn. Bar Ass'n v. United States, 620 F.3d 81, 97 (2d Cir. 2010) (citing the 2005 House Report as well as testimony from the 1998 congressional committee hearings).

17 See, e.g., Hearings on H.R. 3150 before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 105th Cong., 2d Sess., pt. III (1998).

18 The Debtor argues that if Congress intended the entirety of the stay to terminate under § 362(c)(3)(A), it would have modeled the language "as it did in § 362(c)(4)" (doc. # 23, p. 5). Courts adopting the majority interpretation have used this rationale. See, e.g., In re Jumpp, 356 B.R. 789, 795–96 (1st Cir. BAP 2006); In re Paschal, 337 B.R. 274, 279 (Bankr. E.D.N.C. 2006). However, this argument is not persuasive. While the phrase "with respect to the debtor" appeared in both the original House and Senate bills, "[n]either bill included a provision comparable to § 362(c)(4) ... [t]herefore, there could have been no congressional intent expressed by the failure to make the language in § 362(c)(3) correspond to the language in the yet-to-be-drafted § 362(c)(4)." Bartell, supra, at 224.

19 See §§ 362(c)(3)(A), 362(k)(2) ("if such violation is based on an action taken by an entity"), 507(a)(8) ("collection action taken"), and 524(g)(6) ("does not bar an action taken by or at the direction of an appellate court").

KeyCite Yellow Flag - Negative Treatment

111 S.Ct. 654
Supreme Court of the United States

Coy R. GROGAN, et al., Petitioners
v.
Frank J. GARNER, Jr.

No. 89-1149.
|
Argued Oct. 29, 1990.
|
Decided Jan. 15, 1991.

Synopsis

Creditors brought adversary proceeding against Chapter 11 debtor, seeking determination that debt was nondischargeable for fraud. The United States Bankruptcy Court for the Western District of Missouri, Frank W. Koger, J., 73 B.R. 26, entered judgment for creditors, and the District Court, Dean Whipple, J., affirmed. Debtor appealed. The Court of Appeals for the Eighth Circuit, 881 F.2d 579, reversed, and certiorari was granted. The Supreme Court, Justice Stevens, held that preponderance of the evidence standard, rather than clear and convincing evidence standard, applies to all exceptions from dischargeability of debts contained in Bankruptcy Code § 523(a), including nondischargeability for fraud provision.

Judgment of Court of Appeals reversed.

West Headnotes (6)

[1] Bankruptcy
Effect of state law, in general

Validity of creditor's claim is determined by rules of "state law," defined expansively to refer to all nonbankruptcy law that creates substantive claims, including substantive federal law such as federal securities law or federal antifraud law.

116 Cases that cite this headnote

[2] Judgment
Courts or Other Tribunals Rendering Judgment

Collateral estoppel principles apply in nondischargeability proceedings under the Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 523(a).

987 Cases that cite this headnote

[3] Bankruptcy
Degree of Proof Required

Bankruptcy
Particular cases

Preponderance of the evidence standard, rather than clear and convincing evidence standard, applies to all exceptions from dischargeability of debts contained in Bankruptcy Code § 523(a), including nondischargeability for fraud provision. Bankr.Code, 11 U.S.C.A. §§ 523(a), (a)(2)(A).

2944 Cases that cite this headnote

[4] Evidence
Degree of Proof in General

Because the "preponderance-of-the-evidence" standard results in roughly equal allocation of risk of error between litigants, Supreme Court presumes that such standard is applicable in civil actions between private litigants unless particularly important individual interests or rights are at stake.

1101 Cases that cite this headnote

[5] Bankruptcy
Protection Against Discrimination or Collection Efforts in General;"Fresh Start."

Bankruptcy
Dischargeable Debtors

Although a central purpose of Bankruptcy Code is to provide procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy new opportunity in life with clear field for future effort, unhampered by pressure and discouragement of preexisting

debt, Code limits opportunity for completely unencumbered new beginning to honest but unfortunate debtor. Bankr.Code, 11 U.S.C.A. § 101 et seq.

1297 Cases that cite this headnote

[6] Judgment
Courts or Other Tribunals Rendering Judgment

In light of application of preponderance of evidence standard of proof to nondischargeability for fraud claims, all fraud claims which creditors have successfully reduced to judgment will be nondischargeable in bankruptcy, under collateral estoppel, whether judgment was based on preponderance of evidence or clear and convincing evidence standard of proof. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(A).

2332 Cases that cite this headnote

****655** *Syllabus* *

Respondent Garner filed a petition for relief under Chapter 11 of the Bankruptcy Code, listing a fraud judgment in petitioners' favor as a dischargeable debt. Petitioners then filed a complaint in the proceeding requesting a determination that their claim should be exempted from discharge pursuant to § 523(a), which provides that a debtor may not be discharged from, *inter alia,* obligations for money obtained by "actual fraud." Presented with portions of the fraud case record, the Bankruptcy Court found that the elements of actual fraud under § 523 were proved and that the doctrine of collateral estoppel required a holding that the debt was not dischargeable. It and the District Court rejected Garner's argument that collateral estoppel does not apply because the fraud trial's jury instructions required that fraud be proved by a preponderance of the evidence, whereas § 523 requires proof by clear and convincing evidence. The Court of Appeals reversed, concluding that the clear-and-convincing evidence standard applies in fraud cases, since Congress would not have silently changed pre-§ 523(a) law, which generally applied the higher standard in common-law fraud litigation and in resolving dischargeability issues, and since the Code's general "fresh start" policy militated in favor of a broad construction favorable to the debtor.

Held: Preponderance of the evidence is the standard of proof for § 523(a)' s dischargeability exceptions. Neither § 523 and its legislative history nor the legislative history of § 523's predecessor prescribes a standard of proof, a silence that is inconsistent with the view that Congress intended to require a clear-and-convincing evidence standard. The preponderance standard is presumed to be applicable in civil actions between private parties unless particularly important individual interests or rights are at stake, and, in the context of the discharge exemption provisions, a debtor's interest in discharge is insufficient to require a heightened standard. Such a standard is not required to effectuate the Code's "fresh start" policy. Since the Code limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor by exempting certain debts from discharge, it is unlikely that Congress would have fashioned a proof standard that favored an interest in giving the perpetrators of fraud a fresh start over an interest in protecting the victims of fraud. It is also fair to infer from § 523(a)'s structure that ***280** Congress intended the preponderance standard to apply to all of the discharge exceptions. That they are grouped together in the same subsection with no suggestion that any particular exception is subject to a special standard implies that the same standard should govern all of them, and it seems clear that a preponderance standard is sufficient to establish nondischargeability of some claims. The fact that many States required proof of fraud by clear and convincing evidence at the time the current Code was enacted does not mean that Congress silently endorsed such a rule for the fraud discharge exception. Unlike many States, ****656** Congress has chosen a preponderance standard when it has created substantive causes of action for fraud. In addition, it amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the underlying claim's validity, which is determined by state law. Moreover, both before and after 1970, courts were split over the appropriate proof standard for the fraud discharge exception. Application of the preponderance standard will also permit exception from discharge of all fraud claims creditors have reduced to judgment, a result that accords with the historical development of the discharge exceptions, which have been

altered to broaden the coverage of the fraud exceptions. Pp. 657-661.

881 F.2d 579 (CA8 1989), reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Michael J. Gallagher argued the cause for petitioners. With him on the briefs was *J. Michael Dryton*.

*Deputy Solicitor General**Roberts* argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Starr, James R. Doty, Paul Gonson, Jacob H. Stillman, Richard A. Kirby,* and *Alfred J. T. Byrne*.

Timothy K. McNamara argued the cause for respondent. With him on the brief were *Jonathan R. Haden* and *Larry E. Sells*.

Opinion

Justice STEVENS delivered the opinion of the Court.

Section 523(a) of the Bankruptcy Code provides that a discharge in bankruptcy shall not discharge an individual debtor from certain kinds of obligations, including those for money ***281** obtained by "actual fraud." [1] The question in this case is whether the statute requires a defrauded creditor to prove his claim by clear and convincing evidence in order to preserve it from discharge.

Petitioners brought an action against respondent alleging that he had defrauded them in connection with the sale of certain corporate securities. App. 16-25. Following the trial court's instructions that authorized a recovery based on the preponderance of the evidence, a jury returned a verdict in favor of petitioners and awarded them actual and punitive damages. *Id.,* at 28-29. Respondent appealed from the judgment on the verdict, and, while his appeal was pending, he filed a petition for relief under Chapter 11 of the Bankruptcy Code, listing the fraud judgment as a dischargeable debt.

The Court of Appeals for the Eighth Circuit reduced the damages award but affirmed the fraud judgment as modified. *Grogan v. Garner,* 806 F.2d 829 (1986). Petitioners then filed a complaint in the bankruptcy proceeding requesting a determination that their claim based on the fraud judgment should be exempted from discharge pursuant to § 523. App. 3-4. In support of their complaint, they introduced portions of the record in the fraud case. The Bankruptcy Court found that all of the elements required to establish actual fraud under § 523 had been proved and that the doctrine of collateral estoppel required a holding that the debt was therefore not dischargeable. *In re Garner,* 73 B.R. 26 (WD Mo.1987).

***282** Respondent does not challenge the conclusion that the elements of the fraud claim proved in the first trial are sufficient to establish "fraud" within the meaning of ****657** § 523. [2] Instead, he has consistently argued that collateral estoppel does not apply because the jury instructions in the first trial merely required that fraud be proved by a preponderance of the evidence, whereas § 523 requires proof by clear and convincing evidence. Both the Bankruptcy Court [3] and the District Court [4] rejected this argument.

The Court of Appeals, however, reversed. *In re Garner,* 881 F.2d 579 (CA8 1989). It recognized that the "Bankruptcy Code is silent as to the burden of proof necessary to establish an exception to discharge under section 523(a), including the exception for fraud," *id.,* at 581, but concluded that two factors supported the imposition of a "clear and convincing" standard, at least in fraud cases. First, the court stated that the higher standard had generally been applied in both common-law fraud litigation and in resolving dischargeability ***283** issues before § 523(a) was enacted, and reasoned that it was unlikely that Congress had intended silently to change settled law. [5] Second, the court opined that the general "fresh start" policy that undergirds the Bankruptcy Code militated in favor of a broad construction favorable to the debtor. [6]

The Eighth Circuit holding is consistent with rulings in most other Circuits, [7] but conflicts with recent decisions by the Third and Fourth Circuits. [8] The conflict, together with the importance of the issue, prompted us to grant certiorari, 495 U.S. 918, 110 S.Ct. 1945, 109 L.Ed.2d 308. We now reverse.

I

[1] At the outset, we distinguish between the standard of proof that a creditor must satisfy in order to establish a valid claim against a bankrupt estate and the standard that a creditor who has established a valid claim must still satisfy in order to avoid dischargeability. The validity of a creditor's claim is determined by rules of state law. See ***284** *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 161, 67 S.Ct. 237, 239, 91 L.Ed. 162 1946).[9] Since 1970, however, ****658** the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code. See *Brown v. Felsen,* 442 U.S. 127, 129-130, 136, 99 S.Ct. 2205, 2208-2209, 2211, 60 L.Ed.2d 767 (1979).[10]

[2] This distinction is the wellspring from which cases of this kind flow. In this case, a creditor who reduced his fraud claim to a valid and final judgment in a jurisdiction that requires proof of fraud by a preponderance of the evidence seeks to minimize additional litigation by invoking collateral estoppel. If the preponderance standard also governs the question of nondischargeability, a bankruptcy court could properly give collateral estoppel effect to those elements of the claim that are identical to the elements required for discharge and which were actually litigated and determined in the prior action. See Restatement (Second) of Judgments § 27 (1982).[11] If, however, the clear-and-convincing standard applies ***285** to nondischargeability, the prior judgment could not be given collateral estoppel effect. § 28(4). A creditor who successfully obtained a fraud judgment in a jurisdiction that requires proof of fraud by clear and convincing evidence would, however, be indifferent to the burden of proof regarding nondischargeability, because he could invoke collateral estoppel in any event.[12]

In sum, if nondischargeability must be proved only by a preponderance of the evidence, all creditors who have secured fraud judgments, the elements of which are the same as those of the fraud discharge exception, will be exempt from discharge under ****659** collateral estoppel principles. If, however, nondischargeability must be proved by clear and convincing evidence, creditors who secured fraud judgments based only on the preponderance standard would not be assured of qualifying for the fraud discharge exception.

***286** II

[3] With these considerations in mind, we begin our inquiry into the appropriate burden of proof under § 523 by examining the language of the statute and its legislative history. The language of § 523 does not prescribe the standard of proof for the discharge exceptions. The legislative history of § 523 and its predecessor, 11 U.S.C. § 35 (1976 ed.), is also silent. This silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof.

[4] Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless "particularly important individual interests or rights are at stake." *Herman & MacLean v. Huddleston,* 459 U.S. 375, 389-390, 103 S.Ct. 683, 691, 74 L.Ed.2d 548 (1983); see also *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979). We have previously held that a debtor has no constitutional or "fundamental" right to a discharge in bankruptcy. See *United States v. Kras,* 409 U.S. 434, 445-446, 93 S.Ct. 631, 637-638, 34 L.Ed.2d 626 (1973). We also do not believe that, in the context of provisions designed to exempt certain claims from discharge, a debtor has an interest in discharge sufficient to require a heightened standard of proof.

[5] We are unpersuaded by the argument that the clear-and-convincing standard is required to effectuate the "fresh start" policy of the Bankruptcy Code. This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934). But in the same breath that we have invoked this "fresh start" policy, we have been careful to explain that the Act ***287** limits the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor." *Ibid.*

The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the

general policy of discharge certain categories of debts-such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud. Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start. We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud. Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests.

III

Our conviction that Congress intended the preponderance standard to apply to the discharge exceptions is reinforced by the structure of § 523(a),[13] which groups together in **660 the same subsection a variety of exceptions without any indication that any particular exception is subject to a special standard of proof. The omission of any suggestion that different exemptions have different burdens of proof implies that the legislators intended the same standard to govern the nondischargeability under § 523(a)(2) of fraud claims and, for example, the nondischargeability under § 523(a)(5) of claims for child support and alimony. Because it seems clear that a preponderance *288 of the evidence is sufficient to establish the nondischargeability of some of the types of claims covered by § 523(a),[14] it is fair to infer that Congress intended the ordinary preponderance standard to govern the applicability of all the discharge exceptions.

We are therefore not inclined to accept respondent's contention that application of the ordinary preponderance standard to the fraud exception is inappropriate because, at the time Congress enacted the current Bankruptcy Code, the majority of states required proof of fraud by clear and convincing evidence.[15] Even if we believed that Congress had contemplated the application of different burdens of proof for different exceptions, the fact that most States required fraud claims to be proved by clear and convincing evidence would not support the conclusion that *Congress* intended to adopt the clear-and-convincing standard for the fraud *discharge* exception.

Unlike a large number, and perhaps the majority, of the States, Congress has chosen the preponderance standard when it has created substantive causes of action for fraud. See, *e.g.,* 31 U.S.C. § 3731(c) (False Claims Act); 12 U.S.C.A. § 1833a(e) (civil penalties for fraud involving financial institutions); 42 CFR § 1003.114(a) (1989) (Medicare and Medicaid fraud under 42 U.S.C. § 1320a-7a); *Herman & MacLean v. Huddleston,* 459 U.S., at 388-390, 103 S.Ct., at 690-692 (civil enforcement of the antifraud provisions of *289 the securities laws); *Steadman v. SEC,* 450 U.S. 91, 96, 101 S.Ct. 999, 1005, 67 L.Ed.2d 69 (1981) (administrative proceedings concerning violation of antifraud provisions of the securities laws); *SEC v. C.M. Joiner Leasing Corp.,* 320 U.S. 344, 355, 64 S.Ct. 120, 125, 88 L.Ed. 88 (1943) (§ 17(a) of the Securities Act of 1933); *First National Monetary Corp. v. Weinberger,* 819 F.2d 1334, 1341-1342 (CA6 1987) (civil fraud provisions of the Commodity Exchange Act). Cf. *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 491, 105 S.Ct. 3275, 3282, 87 L.Ed.2d 346 (1985) (suggesting that the preponderance standard applies to civil actions under the Racketeer Influenced and Corrupt Organizations Act). Most notably, Congress chose the preponderance standard to govern determinations under 11 U.S.C. § 727(a)(4), which denies a debtor the right to discharge altogether if the debtor has committed a fraud on the bankruptcy court. See H.R.Rep. No. 95-595, p. 384 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6340 ("The fourth ground for denial of discharge is the commission of a bankruptcy crime, though the standard of proof is preponderance of the evidence"); S.Rep. No. 95-989, p. 98 (1978), U.S.Code Cong. & Admin.News 1978, p. 5884 **661 (same).[16]

Moreover, as we explained in Part I, *supra,* Congress amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the validity of the underlying claim. Even before 1970, many courts imposed the preponderance burden on creditors invoking the fraud discharge exception. See, *e.g., Sweet v. Ritter Finance Co.,* 263 F.Supp. 540, 543 (WD Va.1967); *Nickel Plate Cloverleaf Federal Credit Union v. White,* 120 Ill.App.2d 91, 93-94, 256 N.E.2d 119, 120-121 (1970); *Gonzales v. Aetna Finance Co.,* 86 Nev. 271, 275, 468 P.2d 15, 18 (1970); *Beneficial Finance Co. of Manchester v. Machie,* 6 Conn.Cir. 37,

41, 263 A.2d 707, 710 (1969); ***290** *Budget Finance Plan v. Haner,* 92 Idaho 56, 59, 436 P.2d 722, 725 1968); *Atlas Credit Corp. v. Miller,* 216 So.2d 100, 101 (La.Ct.App.1968); *Household Finance Corp. v. Altenberg,* 5 Ohio St.2d 190, 193, 214 N.E.2d 667, 669 (1966); *MAC Finance Plan of Nashua, Inc. v. Stone,* 106 N.H. 517, 521-522, 214 A.2d 878, 882 (1965). And, following the 1970 amendments, but prior to the enactment of § 523 in 1978, the courts continued to be nearly evenly split over the appropriate standard of proof. Compare, *e.g., Fierman v. Lazarus,* 361 F.Supp. 477, 480 (ED Pa.1973); *In re Scott,* 1 BCD 581, 583 (Bkrtcy.Ct. WD Mich.1975) with *Brown v. Buchanan,* 419 F.Supp. 199, 203 (ED Va.1975); *In re Arden,* 75 B.R. 707, 710 (Bkrtcy.Ct.R.I.1975). Thus, it would not be reasonable to conclude that in enacting § 523 Congress silently endorsed a background rule that clear-and-convincing evidence is required to establish exemption from discharge.

IV

[6] A final consideration supporting our conclusion that the preponderance standard is the proper one is that, as we explained in Part I, *supra,* application of that standard will permit exception from discharge of all fraud claims creditors have successfully reduced to judgment. This result accords with the historical development of the discharge exceptions. As we explained in *Brown v. Felsen,* the 1898 Bankruptcy Act provided that "judgments" sounding in fraud were exempt from discharge. 30 Stat. 550. In the 1903 revisions, Congress substituted the term "liabilities" for "judgments." 32 Stat. 798. This alteration was intended to broaden the coverage of the fraud exceptions. See *Brown v. Felsen,* 442 U.S., at 138, 99 S.Ct., at 2212. Absent a clear indication from Congress of a change in policy, it would be inconsistent with this earlier expression of congressional intent to construe the exceptions to allow some debtors facing fraud judgments to have those judgments discharged.

***291** For these reasons, we hold that the standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard.

The judgment of the Court of Appeals is reversed.

It is so ordered.

All Citations

498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755, 70 A.F.T.R.2d 92-5639, 59 USLW 4072, 24 Collier Bankr.Cas.2d 1, 21 Bankr.Ct.Dec. 342, Bankr. L. Rep. P 73746A

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Title 11 U.S.C. § 523(a) provides, in pertinent part:
"Exceptions to discharge.
"(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
. . . . .
"(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-
"(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;...."

2 We therefore do not consider the question whether § 523(a)(2)(A) excepts from discharge that part of a judgment in excess of the actual value of money or property received by a debtor by virtue of fraud. See *In re Rubin,* 875 F.2d 755, 758, n. 1 (CA9 1989). Arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6). See 11 U.S.C. § 523(a)(6) (excepting from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity"); *In re Rubin,* 875 F.2d, at 758, n. 1.

3 The Bankruptcy Court concluded that "there is no real distinction between 'preponderance of the evidence' and 'clear and convincing' as regards Section 523 litigation." *In re Garner,* 73 B.R. 26, 29 (WD Mo.1987).

4 The District Court explained:
"A re-litigation of this case in Bankruptcy Court on the identical fact issues would be to permit the party who loses at a jury trial to have a second day in court on the same issue he and his opponent were fully heard previously. If permitted, all like cases would result in duplicitous litigation resulting in an unreasonable burden on the bankruptcy court." App. to Pet. for Cert. 28a.

5 "While the legislative history is scant on this issue, we feel that it is fair to presume that Congress was aware that the prevailing view at the time of adoption was that fraud, for both section 523 and state common law purposes, had to be proved by clear and convincing evidence." *In re Garner,* 881 F.2d, at 582.

6 "This Circuit concluded that the stricter standard was appropriate since the general policy of bankruptcy is to provide the debtor with the opportunity for a fresh start and the courts should, thereby, construe provisions of the Bankruptcy Code favoring the debtor broadly. *Matter of Van Horne,* 823 F.2d [1285, 1287 (CA8 1987).]" *Ibid.*

7 See *In re Phillips,* 804 F.2d 930, 932 (CA6 1986); *In re Kimzey,* 761 F.2d 421, 423-424 (CA7 1985); *In re Black,* 787 F.2d 503, 505 (CA10 1986); *Chrysler Credit Corp. v. Rebhan,* 842 F.2d 1257, 1262 (CA11 1988); *In re Hunter,* 780 F.2d 1577, 1579 (CA11 1986); *In re Dougherty,* 84 B.R. 653 (CA9 BAP 1988).

8 *In re Braen,* 900 F.2d 621 (CA3 1990); *Combs v. Richardson,* 838 F.2d 112 (CA4 1988).

9 We use the term "state law" expansively herein to refer to all nonbankruptcy law that creates substantive claims. We thus mean to include in this term claims that have their source in substantive federal law, such as federal securities law or other federal antifraud laws. As the *amici* point out, many federal antifraud laws that may give rise to nondischargeable claims require plaintiffs to prove their right to recover only by a preponderance of the evidence. See Brief for United States et al. as *Amici Curiae* 1-3, and n. 2.

10 Before 1970, the bankruptcy courts had concurrent jurisdiction with the state courts to decide whether debts were excepted from discharge. In practice, however, bankruptcy courts generally refrained from deciding whether particular debts were excepted and instead allowed those questions to be litigated in the state courts. See *Brown v. Felsen,* 442 U.S., at 129, 99 S.Ct., at 2208; 1A Collier on Bankruptcy ¶ 17.28, pp. 1726-1727 (14th ed. 1978). The state courts therefore determined the applicable burden of proof, often applying the same standard of proof that governed the underlying claim. The 1970 amendments took jurisdiction over certain dischargeability exceptions, including the exceptions for fraud, away from the state courts and vested jurisdiction exclusively in the bankruptcy courts. See *Brown v. Felsen,* 442 U.S., at 135-136, 99 S.Ct., at 2211-2212; S.Rep. No. 91-1173, pp. 2-3 (1970); H.R.Rep. No. 91-1502, p. 1 (1970), U.S.Code Cong. & Admin.News 1970, p. 4156.

11 Our prior cases have suggested, but have not formally held, that the principles of collateral estoppel apply in bankruptcy proceedings under the current Bankruptcy Code. See, *e.g., Kelly v. Robinson,* 479 U.S. 36, 48, n. 8, 107 S.Ct. 353, 360, n. 8, 93 L.Ed.2d 216 (1986); *Brown v. Felsen,* 442 U.S., at 139, n. 10, 99 S.Ct., at 2213, n. 10. Cf. *Heiser v. Woodruff,* 327 U.S. 726, 736, 66 S.Ct. 853, 857, 90 L.Ed. 970 (1946) (applying collateral estoppel under an earlier version of the bankruptcy laws). Virtually every court of appeals has concluded that collateral estoppel is applicable in discharge exception proceedings. See *In re Braen,* 900 F.2d 621, 630 (CA3 1990); *Combs v. Richardson,* 838 F.2d 112, 115 (CA4 1988); *Klingman v. Levinson,* 831 F.2d 1292, 1295 (CA7 1987); *In re Shuler,* 722 F.2d 1253, 1256 (CA5), cert. denied *sub nom. Harold V. Simpson & Co. v. Shuler,* 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984); *Goss v. Goss,* 722 F.2d 599, 604 (CA10 1983); *Lovell v. Mixon,* 719 F.2d 1373, 1376 (CA8 1983); *Spilman v. Harley,* 656 F.2d 224, 228 (CA6 1981). Cf. *In re Rahm,* 641 F.2d 755, 757 (CA9) (prior judgment establishes only a prima facie case of nondischargeability), cert. denied *sub nom. Gregg v. Rahm,* 454 U.S. 860, 102 S.Ct. 313, 70 L.Ed.2d 157 (1981). We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a).

12 This indifference would not be shared, however, by a creditor who either did not try, or tried *unsuccessfully,* to prove fraud in a jurisdiction requiring clear and convincing evidence but who nonetheless established a valid claim by proving, for example, a breach of contract involving the same transaction. See, *e.g., In re Black,* 787 F.2d 503 (CA10 1986); *In re Rubin,* 875 F.2d, at 758, n. 1.

13 See *Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language but to the design of the statute as a whole and to its object and policy"); *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291, 108 S.Ct. 1811, 1818, 100 L.Ed.2d 313 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

14 For example, § 523(a) provides for the nondischargeability of debts not only for child support and alimony, but also for certain fines and penalties, educational loans, and tax obligations. See 11 U.S.C. § 523(a)(1); § 523(a)(5); § 523(a)(7); § 523(a)(8).

15 Respondent claims that the vast majority of States applied the heightened standard. See Brief for Respondent 8-14. Petitioners and the *amici* acknowledge that the clear-and-convincing standard applied in many jurisdictions but contend that respondent overstates the number of States that required the heightened standard. See Brief for Petitioners 17-20, and n. 1; Brief for United States et al. as *Amici Curiae* 21-25. Resolution of this dispute is not necessary for our decision.

16 Prior to the enactment of the 1978 Bankruptcy Code, the Courts of Appeals had held that the preponderance standard applied in this situation. See, *e.g., In re Robinson,* 506 F.2d 1184, 1187 (CA2 1974); *Union Bank v. Blum,* 460 F.2d 197, 200-201 (CA9 1972).

 KeyCite Yellow Flag - Negative Treatment
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555 B.R. 877
United States Bankruptcy Court, S.D. Florida.

IN RE Donald Jerome KIPNIS, Debtor.
Barry E. Mukamal, as Chapter 7 Trustee, Plaintiff,
v.
Citibank N.A. et al, Defendants.
Barry E. Mukamal, as Chapter 7 Trustee, Plaintiff,
v.
Donald Jerome Kipnis, and
Analia Kipnis, Defendants.

CASE NO. 14-11370-RAM
|
ADV. NO. 16-01044-RAM,
ADV. NO. 16-01045-RAM
|
Signed August 31, 2016

Synopsis

Background: Chapter 7 trustee brought adversary proceeding to avoid allegedly fraudulent transfers made by Chapter 7 debtor to his wife several years prior to commencement of debtor's bankruptcy case, and wife moved to dismiss on ground that trustee's claims were barred by Florida's four-year statute of limitations on fraudulent transfer claims.

[Holding:] The Bankruptcy Court, Robert A. Mark, J., held that trustee, in order to avoid allegedly fraudulent transfers that debtor had made more than four years prepetition, outside Florida's four-year statute of limitations on fraudulent transfer claims, could select the IRS as existing creditor holding an allowable unsecured claim, in whose shoes the trustee was authorized to step by strong-arm statute, and which was not subject to state statute of limitations.

Motion denied.

West Headnotes (7)

[1] **Internal Revenue**
Income and Excess Profits Taxes
Internal Revenue
Transferees in general

Provision of the Internal Revenue Code authorizing collection of taxes from taxpayer's transferee provides only a procedural remedy against alleged transferee; substantive state law controls whether transferee is liable for taxpayer-transferor's tax liabilities. 26 U.S.C.A. § 6901(a)(1).

1 Cases that cite this headnote

[2] **Bankruptcy**
Time limitations;computation
Internal Revenue
Income and Excess Profits Taxes

While the IRS, in order to collect assessed tax from taxpayer's transferee, must prove that transfer is avoidable under applicable state law, the limitations period for filing avoidance action is governed by federal, not state, law. 26 U.S.C.A. § 6901(a)(1).

1 Cases that cite this headnote

[3] **Limitation of Actions**
Government, state or officer thereof
United States
Time to sue, limitations, and laches

United States is not bound by state statutes of limitation, whether the United States brings suit in federal or in state court.

Cases that cite this headnote

[4] **Bankruptcy**
Trustee as representative of debtor or creditors
Bankruptcy
Time limitations;computation

Chapter 7 trustee, in order to avoid allegedly fraudulent transfers that debtor had made more than four years prepetition, outside Florida's four-year statute of limitations on fraudulent transfer claims, could select the IRS as existing creditor holding an allowable unsecured claim, in whose shoes the trustee was authorized to step by strong-arm statute, and which was not subject to state statute of limitations, but could pursue fraudulent transfer claim in attempt to recover unsecured tax debt for up to ten years after tax was assessed. 11 U.S.C.A. § 544(b); 26 U.S.C.A. §§ 6502(a)(1), 6901(a)(1)(A)(i); Fla. Stat. Ann. §§ 726.105, 726.106, 726.110(1, 2).

5 Cases that cite this headnote

[5] Statutes
Plain Language;Plain, Ordinary, or Common Meaning

When interpreting statute, court must begin by looking at the statute's plain meaning.

2 Cases that cite this headnote

[6] Statutes
Purpose and intent;unambiguously expressed intent

Statutes
Relation to plain, literal, or clear meaning;ambiguity

If statutory language is clear, then policy concerns and legislative intent may not be considered, unless the result from applying statute's plain meaning would be absurd.

Cases that cite this headnote

[7] Bankruptcy
Trustee as representative of debtor or creditors

Bankruptcy
Time limitations;computation

While interpreting strong-arm provision as allowing trustee to step into shoes of any existing creditor of debtor holding an allowable unsecured claim, including the IRS, which is not subject to state statutes of limitation on avoidance of fraudulent transfers, might result in major change in existing practice and greatly expand "look-back" period for avoidance of transfers in numerous bankruptcy cases, such policy considerations did not permit bankruptcy court to ignore plain language of strong-arm provision, which permitted trustee to choose any creditor holding an allowable unsecured claim. 11 U.S.C.A. § 544(b); 26 U.S.C.A. §§ 6502(a)(1), 6901(a)(1)(A)(i).

2 Cases that cite this headnote

Attorneys and Law Firms

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ORDER DENYING MOTIONS TO DISMISS

Robert A. Mark, Judge, United States Bankruptcy Court

Trustees typically use 11 U.S.C. § 544(b) to "step into the shoes" of unsecured creditors in order to apply state statutes of limitations in avoidance actions. While this has been the general use, the language in § 544(b) is broad, and some trustees have brought avoidance actions that would have been time-barred under state law by relying on the Internal Revenue Service ("IRS") as the triggering creditor. Under federal law, the IRS may pursue collection of taxes for ten years from the assessment date and its collection remedies include the right to avoid transfers under state law without being bound by state statutes of limitations.

The chapter 7 trustee in this case is seeking to do just that, to step into the shoes of the IRS as an unsecured creditor in order to avoid transfers that occurred in 2005. Unless the trustee can pursue all avoidance remedies available to the IRS, avoidance of the transfers would be time-barred under applicable Florida law. The Court, for the reasons

more fully explained below, finds that the language of § 544(b) is clear and allows trustees to step into the shoes of the IRS and to pursue avoidance actions that the IRS, outside of bankruptcy, could have timely pursued on the petition date.

Factual and Procedural History

Prior to the filing of the bankruptcy case, the Debtor was in the construction business and, together with his partner Lawrence Kibler, owned Miller & Solomon General Contractors, Inc. ("M&S"). Both complaints in the above-styled adversary proceedings allege that in December of 2000, the Debtor and Mr. Kibler, in order to "increase the bonding capacity of M&S," ***879** entered into a custom adjustable rate debt structure (the "CARDS Transaction"). The Debtor then claimed the losses generated from the CARDS transaction in his 2000 and 2001 personal income tax returns.

In June 13, 2003, the IRS notified the Debtor that his 2000 and 2001 taxes were under investigation, which ultimately resulted in a March 22, 2005 examination report that determined the Debtor's deficiency for tax year 2000 to be $701,113 and his deficiency for tax year 2001 to be $346,495. The Debtors filed an appeal of the examination report in the United States Tax Court. On November 1, 2012, the Tax Court ruled in favor of the IRS, disallowing the losses claimed by the Debtor, and affirming the tax deficiencies in the examination report.

The Debtor filed a chapter 11 bankruptcy petition on January 21, 2014 (the "Petition Date") and converted his case to chapter 7 on February 6, 2014. Barry Mukamal was appointed chapter 7 trustee (the "Trustee"). The IRS has filed a proof of claim totaling $1,911,787.23 [Claim 1-2 in the Main Case]. The claim asserts that $1,886,158.02 is secured and $25,629.51 is unsecured. The claim also asserts that $25,253.45 is a priority claim under 11 U.S.C. § 507(a)(8).

On January 15, 2016 the Trustee filed two adversary complaints. Both complaints allege, in general, that after the 2005 examination report the Debtor "engaged in various asset conversion strategies" in order to evade creditors. The complaint in Adv. No. 16-1044 seeks to set aside the Debtor's transfer, in August 5, 2005, of a bank account titled solely in his name, to himself and Defendant Analia Kipnis as tenants by the entireties (the "Bank Account Transfer"). The complaint in Adv. No. 16-1045 seeks to avoid the "attempted" [1] transfer of real property located at 2333 Brickell Avenue, Terrace C, in Miami, Florida (the "Property") by the Debtor to Defendant Analia Kipnis (the "Condominium Transfer"). The attempted transfer of the Property was implemented by execution of a quit-claim deed dated August 5, 2015, and pursuant to a Premarital Settlement Agreement entered into by the parties earlier on July 5, 2005.

On June 17, 2016 Defendant Analia Kipnis filed motions to dismiss in both adversary proceedings [DE #18 in Adv. No. 16-01045 and DE #36 in Adv. No. 16-01044] (the "Motions to Dismiss"). [2] The Defendant argues that both complaints are barred by applicable statutes of limitation and that § 544(b) does not give the Trustee the right to apply the ten-year IRS collection period. The Trustee filed a response to the Motions to Dismiss [DE #22 in Adv. No. 16-01045 and DE #41 in Adversary No. 16-01044]. The Trustee argues that because the IRS is an unsecured creditor in this case, he can step into its shoes under § 544(b) and not be bound by state statutes of limitation. The Defendant filed a reply in support of her Motions to Dismiss [DE #26 in Adv. No. 16-01045 and DE #46 in Adv. No. 16-01044]. The Court held a hearing on the Motions to Dismiss on August 2, 2016. Although the pending motions are in separate adversary proceedings, the relevant background facts and the legal issues in both Motions to Dismiss are the same.

***880** The Court has reviewed the complaints and considered the legal arguments and the applicable law as presented in the Motions to Dismiss, the response, the reply, and at the August 2nd hearing. For the reasons that follow, the Motions to Dismiss will be denied.

Discussion

In his Motions to Dismiss, the Debtor acknowledges that the facts alleged in the complaints must be assumed as true [DE #18 in Adv. No 16-1045, p. 2, n. 1]. Therefore the Court assumes that the Bank Account Transfer and the Condominium Transfer are avoidable under § 726.105 and § 726.106 of the Florida Statutes, unless the claims are barred by the four year statute of limitations in Fla. Stat. § 726.110(1)-(2). If the statute of limitations applies, the avoidance claims must be dismissed. If not, the claims

survive. To decide this issue, the Court must determine whether the Florida statute of limitations is inapplicable because the Trustee is purporting to step into the shoes of the IRS, which is not subject to state statutes of limitations.

We start with a review of the strong-arm provision in the Bankruptcy Code that the Trustee relies on and the applicable sections of the Internal Revenue Code ("IRC") which render state statutes of limitation inapplicable to IRS avoidance actions brought within ten (10) years of a tax assessment. Section 544(b) of the Bankruptcy Code states that:

> the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(emphasis added). For purposes of the Motions to Dismiss, the Defendant concedes that the IRS is a creditor with an allowable unsecured claim within the meaning of § 544(b).

Section 6502(a)(1) of the IRC provides as follows:

> [w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—(1) within 10 years after the assessment of the tax....

26 U.S.C. § 6502(a)(1).

While § 6502(a)(1) establishes the ten year deadline for the IRS to collect taxes, another IRC section, 26 U.S.C. § 6901(a)(1)(A), provides the authority for the IRS to pursue avoidance actions against transferees of the taxpayers' property. Section 6901 of the IRC is titled "Transferred Assets" and § 6901(a)(1)(A)(i) provides the specific authority for avoiding transfers by a taxpayer who has income tax liability:

> (a) METHOD OF COLLECTION The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:
>
> (1) INCOME, ESTATE, AND GIFT TAXES
>
> (A) The liability, at law or in equity, of a transferee of property—
>
> (i) of a taxpayer in the case of a tax imposed by subtitle A (relating to income taxes)

26 U.S.C. § 6901(a)(1)(A)(i).

[1] Although § 6901(a)(1)(A) is silent as to what "law" or "equity" means, courts interpret the statute as merely establishing a procedure for the collection of taxes, ***881** not as a statute that sets the standard for establishing transferee liability. To establish transferee liability the IRS must rely on applicable state law. *Frank Sawyer Trust of May 1992 v. Comm'r*, 712 F.3d 597, 602–603 (1st Cir.2013) ("[T]he federal statute authorizing the collection of taxes from transferees, 26 U.S.C. § 6901(a)(1), provides only a procedural remedy against an alleged transferee; substantive state law controls whether a transferee is liable for a transferor's tax liabilities.")

[2] **[3]** Although the IRS must prove that a transfer is avoidable under the applicable state law, the limitations period for filing the avoidance action is governed by federal law. As described earlier, 26 U.S.C. § 6502(a)(1) provides the IRS with authority to collect taxes for ten year after the assessment. In turn, § 6901(a) allows collection from transferees of the taxpayer "subject to the same limitations" applicable to collection from the taxpayer. Therefore, under federal law, the IRS has ten years from the date of assessment to pursue an avoidance action. *Ebner v. Kaiser (In re Kaiser)* 525 B.R. 697, 710 (Bankr.N.D.Ill.2014) ("*Kaiser*"). [3] At the August 2, 2016 hearing, the Defendant stipulated that on the Petition

Date, the IRS, notwithstanding the bankruptcy, could have timely sought to avoid the Bank Account Transfer and the Condominium Transfer.

A. The Trustee's Claims Are Not Time-Barred

[4] The Trustee's argument is very simple. The IRS is a creditor holding an unsecured claim allowable under § 502 and, on the filing date of this bankruptcy case, the IRS could have timely filed a complaint to avoid the Bank Account Transfer and the Condominium Transfer under applicable Florida fraudulent transfer law. Therefore, the Trustee, pursuant to § 544(b), can now step into the shoes of the IRS to avoid these transfers.

There is a split of authority on whether a trustee can step into the shoes of the IRS under § 544(b) and utilize the IRS ten-year collection window. Several courts have concluded that § 544(b) is clear and trustees have the right to step into the shoes of the IRS and take advantage of the longer limitations period. *Kaiser* (cited earlier); *Finkel v. Polichuk (In re Polichuk)*, No. 10–003ELD, 2010 WL 4878789, at *3 (Bankr.E.D.Pa. Nov. 23, 2010); *Alberts v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 365 B.R. 293, 299–306 (Bankr.D.D.C.2006); *Shearer v. Tepsic (In re Emergency Monitoring Technologies, Inc.)*, 347 B.R. 17, 19 (Bankr.W.D.Pa.2006); *Osherow v. Porras (In re Porras)*, 312 B.R. 81, 97 (Bankr.W.D.Tex.2004).

Only one court has reached the opposite conclusion. *Wagner v. Ultima Holmes, Inc. (In re Vaughan Co.)* 498 B.R. 297 (Bankr.D.N.M.2013) ("*Vaughan*"). *Vaughan*, of course, is the decision relied upon by the Defendant. That court held that the IRS immunity from state statutes of limitation is a public right that cannot be invoked by a bankruptcy trustee under § 544(b). The Trustee, in turn, relies on *Kaiser* and the other cases like it, which hold that a plain reading of § 544(b) allows trustees to step into the shoes of the IRS in order to utilize the ten-year collection period. *Vaughan* is the only published decision denying relief similar to the relief sought by the Trustee in this case. Nevertheless, none of these ***882** decisions are binding on this Court, so an independent review of the issues is appropriate.

The debtor in *Vaughan* paid over $500,000 to a construction company to build a home for the Debtor's principal, receiving no consideration in return. Over four years after the payments were made, the debtor filed for chapter 11 relief. The IRS filed a claim for $972,597.36 in a case which had approximately $67 million in unsecured non-priority claims. Because the challenged payments were outside of New Mexico's four-year fraudulent transfer statute of limitations, the chapter 11 trustee, like the Trustee in this case, relied on § 544(b) and the claim filed by the IRS, to apply the ten-year collection period. *Vaughan,* at 300–304.

The *Vaughan* court explained that the IRS is not bound by state law statutes of limitations because of the concept of *nullum tempus occurrit regi*, which translates to "no time runs against the king." *Id.* at 304. The idea, as explained in *Vaughan*, is that the federal government, in defending public rights or serving the public interest, should not be bound by state law statutes of limitations. *Id.* The court then stated its belief that, in enacting § 544, Congress did not intend to vest these sovereign powers in a bankruptcy trustee. *Id.* The *Vaughan* court also expressed concern that because the IRS holds a claim in most cases, allowing bankruptcy trustees to use § 544(b) to override state law statutes of limitations would result in an unintended and "dramatic change in the law." *Id.* at 306.

[5] The fundamental problem with *Vaughan's* analysis is its failure to start where courts must start in interpreting statutes and that is to look at the statute's plain meaning. *Kaiser*, on the other hand, appropriately starts its analysis with the text of § 544(b).

The facts in *Kaiser* are substantially similar to the facts in this case. The debtor, in the early 2000's, began having trouble with his health club businesses and contemporaneously started transferring assets to relatives and into trusts. The debtor then filed a chapter 7 petition on October 12, 2011, with liabilities totaling $18,570,778.80. The IRS filed a $5,000 claim in the case for unpaid taxes in 2010. Like the Trustee in this case, the *Kaiser* trustee also relied on § 544(b) and 26 U.S.C. § 6502 to pursue the avoidance of transfers that were otherwise time-barred by Illinois' four-year fraudulent transfer statute of limitations. *Kaiser*, at 702–704.

[6] In interpreting § 544(b), the *Kaiser* court first looked at the plain meaning of the statute as required by the Supreme Court. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). The *Kaiser* court found that the clear language in the text of § 544(b) imposed no limitation on the meaning of "applicable law" or on the type of unsecured creditor

a trustee can choose as a triggering creditor. *Id.* at 711. Under the plain meaning analysis, if the language is clear, then policy concerns and legislative intent may not be considered, unless the result from applying the plain meaning would be absurd. *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' ")(internal citations omitted). Neither *Kaiser*, nor this Court, finds the plain-meaning interpretation of § 544(b) to be absurd.

The *Kaiser* court also directly addressed the arguments and concerns raised by Bankruptcy Judge Jacobvitz in *Vaughan*. As to the *nullum tempus occurrit regi* analysis, Bankruptcy Judge Barnes in *Kaiser* found that it is "misplaced here." ***883** *Id.* at 713. Section 544(b) is a derivative statute. Because the trustee is stepping into the shoes of a creditor that has sovereign immunity, the focus is not on whether the trustee is performing a public or private function, but rather, the focus is on whether the IRS, the creditor from whom the trustee is deriving her rights, would have been performing that public function if the IRS had pursued the avoidance actions under "applicable law." *Id.* As explained in an earlier decision adopting the majority view, "the unsecured creditor's ability to trump the applicable state statute of limitations might derive from its sovereign immunity, but the estate representative's ability to override that same limitation derives from § 544(b)." *In re Greater Southeast Cmty. Hosp. Corp. I*, 365 B.R. at 304.

In sum, this Court agrees with *Kaiser* and the majority of decisions that the language in § 544(b) is clear and allows the Trustee in this case to step into the shoes of the IRS to take advantage of the ten-year collection period in 26 U.S.C. § 6502.

B. Policy Implications

[7] *Vaughan* expressed concern that allowing use of § 544(b) to avoid state statutes of limitation will "eviscerate" the current practice and create a ten-year look-back period in most cases. *Kaiser* disagreed with this "slippery slope argument" and found it to be a "logical fallacy" because section 544(b) has read the same since its enactment in 1978 and the cases that address this issue are "few and far" between. *Kaiser,* at 712. This Court does not adopt the *Kaiser* court's conclusion that this ruling will have limited impact. The IRS is a creditor in a significant percentage of bankruptcy cases. The paucity of decisions on the issue may simply be because bankruptcy trustees have not generally realized that this longer reach-back weapon is in their arsenal. If so, widespread use of § 544(b) to avoid state statutes of limitations may occur and this would be a major change in existing practice.

So, the *Vaughan* court's policy concerns may be justified and *Vaughan* may be right in believing that Congress intended that § 544(b) be limited to avoidance actions that only non-governmental creditors could bring. But the statute does not say that and this Court cannot simply read such a limitation into the text. To do so would require the Court to ignore basic and important rules of statutory construction. Based upon the Court's interpretation of the law, it is—

ORDERED as follows:

1. The Motions to Dismiss are denied.

2. By **September 15, 2016**, Defendant, Analia Kipnis, shall file her answer and affirmative defenses to all Counts of the Complaint in Adv. No. 16-1045 and her answer and affirmative defenses to Count XXV of the Complaint in Adv. No. 16-1044.

ORDERED in the Southern District of Florida on August 31, 2016.

All Citations

555 B.R. 877, 118 A.F.T.R.2d 2016-5639, 26 Fla. L. Weekly Fed. B 89

Footnotes

1 The Court uses the word "attempted" because the Trustee alleges in the complaint in Adversary Case No. 16-01045 that the Debtor currently has an interest in the apartment.

2 The motion to dismiss in Adv. No. 16-01045 seeks dismissal of all counts except for count VII, which alleges unjust enrichment. The complaint in Adv. No. 16-01044 includes counts against several other defendants and that motion to dismiss only seeks dismissal of count XXV, the only count against Defendant Analia Kipnis.

3 In addition to the specific IRC section granting the IRS a ten-year collection period, it is well settled that the United States is not bound by state statutes of limitation whether the United States brings suit in federal court or in state court. *U.S. v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940) ("*Summerlin*"). The *Summerlin* rule applies to fraudulent transfer actions brought by an unsecured government creditor. *Bresson v. Comm'r*, 213 F.3d 1173, 117–79 (9th Cir.2000).

2011 WL 5325792
Only the Westlaw citation is currently available.
United States Bankruptcy Court, D. Connecticut.

In re Susan KOCHMAN and
Gregory Kochman, Debtors.

No. 11–50111.
|
Nov. 3, 2011.

Attorneys and Law Firms

Timothy Miltenberger, Esq., Coan, Lewendon, Gulliver & Miltenberger, LLC, New Haven, CT, for the Ch. 7 Trustee.

David S. Torrey, Esq., Medina, Torrey, Mamo & Camacho, P.C., Norfolk, CT, for the Debtors.

MEMORANDUM AND ORDER ON OBJECTION TO EXEMPTION

ALAN H.W. SHIFF, Bankruptcy Judge.

***1** The chapter 7 trustee objects to a homestead exemption the debtors have claimed in property owned by their limited liability company, Kochman Holdings Group, LLC. For the reasons that follow, the trustee's objection is sustained.

Background [1]

The debtors are joint owners of Kochman Holdings Group, LLC ("LLC"), a single asset real estate holding company established in 2000 to hold title to 9 Railroad Street in West Cornwall, Connecticut (hereafter, "Property"). A two-story building is located on the Property. The debtors conduct their respective businesses on the first floor and use a portion of the second floor as their residence. The remainder of the second floor is utilized by them for personal and business purposes. There is no evidence in the record regarding the percentage of floor space on the second floor that is used by the debtors as their residence.

On January 25, 2011, the debtors filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. On the cover sheet of their petition, they stated that their street address was that of the Property. On "Schedule B —Personal Property" at No. 13, "Stock and interests in incorporated and unincorporated businesses", the debtors disclosed, *inter alia:* their joint ownership in the LLC which is a "Single Asset Real Estate Holding Company *Being used as Debtor's [sic] Primary Residence* " and valued at $200,000. (Doc. # . 15 at 3) (emphasis added). On "Schedule C—Property Claimed As Exempt", the debtors designated 11 U.S. C § 522(b)(3) as the statute under which they would claim exemptions; § 522(b)(3) permits them to elect exemptions under state law. They then listed the LLC on Schedule C under the column entitled "Description of Property" and again noted that it was "Being used as Debtor's [*sic*] Primary Residence". (*Id.* at 6.). Under the column requiring a debtor to "Specify Law Providing Each Exemption", the debtors designated "Conn. Gen.Stat. § 52–362(t)", Connecticut's homestead exemption. (*Id.*) Under the column relating to the "Value of Claimed Exemption", the debtors stated "$88,306.79". (*Id.*) Under the column relating to the "Current Value of the Property without Deducting Exemption", they stated $"200,000.00". (*Id.*) It is undisputed that there is an outstanding mortgage of $111,693.21 on the Property (*see id.* at 8 ("Schedule D—Creditors Holding Secured Claims"), which cannot be the subject of an exemption, *see* Conn. Gen.Stat. § 52–362(t). Accordingly, the debtors have claimed as a homestead exemption 100% of the value of the Property less the mortgage.

On March 30, 2011, the trustee objected to the debtors' claimed homestead exemption. As the objecting party, the trustee has the burden of proving that the homestead exemption is not properly claimed. *See* Fed. R. Bankr.P. 4003(c).

Discussion

In Connecticut, "any *natural person* shall be" entitled to exempt, *inter alia,* "(t) [t]he homestead of the exemptioner to the value of seventy-five thousand dollars ... provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it ..." Conn. Gen.Stat. § 52–352b(t) (2009) (emphasis added). A "homestead" is defined as "*owner-occupied* real property ... used as a

primary residence." *Id.* at § 52–352a (e) (2005) (emphasis added). *See also In re Kujan,* 286 B.R. 216, 220–21 (Bankr.D.Conn.2002). [2]

***2** Under Connecticut law, exemptions-including the homestead exemption—"afforded by General Statutes § 52–352a, apply only to 'property of any natural person'." *Shawmut Bank, N.A. v. Valley Farms, et al.,* 222 Conn. 361, 366 (1992). The *Valley Farms* court stated that "[a]lthough the term 'natural person' is not defined ..., it clearly means a human being, *as opposed to an artificial or juristic entity.*" *Id.* (emphasis added). It further concluded that persons are "free to own their ... assets in individual or joint ownership forms and thereby retain the statutory exemption available to natural persons." *Id.* at 367 (further citation omitted). However, where persons choose to do so through an artificial entity, "presumably [for] some legal advantage, ... they must accept any legal disadvantage that arises from the limitation of § 52–352b to property owned by a natural person." *Id.*

As Mrs. Kochman admitted, the Property is owned by the LLC. *(See also* Trial Exhibit B (Warranty Deed dated Oct. 30, 2000, granting the Property to the LLC.) Thus, while there is no dispute that it is real property and that part of it is being used as the debtors' primary residence, it is conceded that the LLC, and not the debtors, is the owner of the Property. *Cf., Valley Farms,* 222 Conn. at 367 (affirming a trial court's finding that the homestead exemption does not apply to property of partnerships). *See also Kujan,* 286 B.R. at 220–21 (the threshold requirement to claim a homestead exemption is that "the *individual* must 'own' the subject real property within the meaning of Section 52–352a" (emphasis added)).

The debtors argue that under the "equitable doctrine" of "negative piercing of the corporate veil", they, as the owners of the LLC, should be deemed the owners of the Property. Their trial counsel appears to argue that so long as the debtors acted in good faith when the LLC was formed, the Property should be treated as though it was owned by them for homestead exemption purposes. In support of that theory, Mrs. Kochman testified that, in 2000, she had no understanding as to why her attorney [3] advised her to establish the LLC and then put legal title of the Property in the name of the LLC. Instead, according to Mrs. Kochman, doing so was merely a "technical" transaction and done with no improper motive.

Although the court is persuaded that Mrs. Kochman did not understand the purpose of placing title in the LLC, it is also confident that the debtors' attorney fully understand the benefits that flow from putting title to the Property in an artificial entity, *e.g.,* keeping it beyond the reach of the debtors' creditors. Therefore, the court is troubled by the argument, raised in the name of equity in this court of equity, that an individual can place ownership of property into an artificial entity and, therefore, out of the reach of creditors asserting a claim against that individual, but at some later time, that same individual can claim ownership in the property, albeit equitably, so as the be entitled to claim a homestead exemption in it. Simply put, as did the *Valley Farm* court, when an individual chooses to take advantage of the benefits of an artificial entity, he or she must also bear the corresponding burdens. Accordingly, there is no basis upon which the Property can be claimed exempt by the debtors.

***3** The same result follows from the fact that the debtors have failed to define the percentage of the Property that might be a homestead. Rather, they claim the entire Property as exempt and make that claim notwithstanding their concession that they only use a portion of the second floor as their residence. As noted, *supra* at 2, the debtors valued the Property at $200,000, and it is encumbered with a mortgage of approximately $112,000. Thus, the net equity in the Property is approximately $88,000, the amount claimed as exempt under Conn. Gen.Stat. § 52–352b(t). However, since only an unknown portion of the second floor is used as the debtors' primary residence, and no evidence was offered as to the value of that residential portion, there is no way to calculate the amount of the exemption. In sum, even if the debtors were entitled to claim a homestead exemption, their claim for the entire $88,000 is patently objectionable.

Conclusion

For the foregoing reasons, IT IS ORDERED that the trustee's objection is sustained.

All Citations

Not Reported in B.R., 2011 WL 5325792

Footnotes

1 At the October 25, 2011 hearing on the Trustee's Objection, the parties stipulated to the relevant facts and, upon consent, admitted into evidence several documents. In addition, Mrs. Kochman gave credible testamentary evidence at the hearing. The court relies on the stipulations, exhibits, and testimony in this "Background" section.

2 [T]here are three requisites for real property to constitute an individual's statutory homestead. First, the individual must "onw[ ]" the subject real property within the meaning of Section 52–352a as of the relevant time. Second, the individual must "occup[y]" the subject real property within the meaning of Section 52–352a as of the relevant time. Third, the subject real property must be "used as a primary residence" within the meaning of Section 52–352a as of the relevant time. *Kujan,* 286 B.R. at 220–21.

3 The court notes that this was not Attorney Torrey.

362 B.R. 67
United States Bankruptcy Court, D. Connecticut.

In re Charles MAJEWSKI, Debtor.
Charles Majewski, Movant,
v.
Connecticut Natural Gas, Respondent.

No. 05–24959.
|
Feb. 12, 2007.

Synopsis
Background: In Chapter 7 case, debtor filed motion to avoid, as impairing his homestead exemption, judicial lien on debtor's one-half interest in three-family residential property.

[Holding:] The Bankruptcy Court, Robert L. Krechevsky, J., held that debtor was entitled to claim homestead in his entire interest in property.

Motion granted.

West Headnotes (3)

[1] Statutes
Plain language;plain, ordinary, common, or literal meaning

Under Connecticut law, when statute's language is clear and unmistakable, construction is prohibited and legislative intent is conclusively established by statute's plain meaning.

Cases that cite this headnote

[2] Exemptions
Construction of exemption laws in general

In order to effectuate purpose of exemptions, such laws are to be liberally construed in favor of debtor.

Cases that cite this headnote

[3] Homestead
Extent of occupancy

Homestead
Part of tract, lot, or building

Under Connecticut law, as predicted by the bankruptcy court, debtor was entitled to claim homestead in his entire one-half interest in three-family residential property, even though he resided in only one unit and rented out other two units. C.G.S.A. § 52–352b(t).

1 Cases that cite this headnote

Attorneys and Law Firms

***68** Mitchell A. Cohen, Law Offices of Mitchell A. Cohen, Hartford, CT, for Movant—Debtor.

Walter J. Onacewicz, Nair & Levin, P.C., Bloomfield, CT, for Respondent Connecticut Natural Gas.

RULING ON DEBTOR'S MOTION TO AVOID JUDICIAL LIEN

ROBERT L. KRECHEVSKY, Bankruptcy Judge.

I.

ISSUE

This proceeding involves the question of the extent to which a natural person may utilize the Connecticut homestead exemption statute when he owns a one-half interest in a three-family residence, resides in one of the units, and rents out the other two floors. The court held a brief hearing on December 27, 2006, after which the two parties filed memoranda of law in support of their positions.

II.

BACKGROUND

Charles Majewski ("the debtor") filed a Chapter 7 bankruptcy petition on October 15, 2005 and received a discharge on February 13, 2006. The debtor, on February 3, 2006, filed a motion ("the motion"), pursuant to Bankruptcy Code § 522(f), to avoid, as impairing his homestead exemption, the judicial lien of Connecticut Natural Gas ("CNG") on the debtor's one-half interest in a three-family residential property ("the property") located at 233 South Whitney Street, Hartford, Connecticut. CNG filed an objection to the motion, arguing that the debtor's homestead exemption should be limited to one-third of his one-half interest in the property because he actually resides in only one of the three units. The debtor denies his exemption right should be so limited.

While the parties differ in their interpretation of the Connecticut homestead statute as it applies to a multi-family property, they do not dispute the following facts pertinent to the motion. The debtor and his mother each own a one-half interest in the property. Prior to and as of the petition date, the debtor resided in one of the three units. The other two units, also residential, were intended for rental. The property had a value of $215,000 as of the petition date, and was subject to the following prepetition encumbrances, all recorded on the Hartford Land Records in the stated sequence.

***69** 1. A first mortgage to the Bank of America, having a balance of $108,622.90;

2. A second mortgage to the Bank of America, having a balance of $26,749.21;

3. A statutory water lien in favor of the Metropolitan District, in the original principal amount of $264.13; and

4. A judgement lien in favor of CNG with a current balance of $6,969.00.

The debtor, in his amended Schedule C of his petition, has claimed a $75,000 homestead exemption for his interest in the property, pursuant to Conn, Gen.Stat. § 52–352b(t).

III.

DISCUSSION

A.

Neither the parties nor the court have located any Connecticut case law on the issue presented. Case law from other jurisdictions, applying the applicable exemption statutes, is somewhat divided, with the rulings, for the most part, favoring the debtor's position. *Compare, e.g. In re Shell,* 295 B.R. 129 (Bankr.D.Alaska 2003) (debtor-owner who resided in one unit and rented other 5 units was entitled to Alaska homestead exemption in entire 6–unit building); *In re Carey,* 282 B.R. 118 (Bankr.D.Mass.2002) (debtor-owner who resided in one unit and rented other 2 units was entitled to Massachusetts homestead exemption in entire 3–unit building); *In re Trigonis,* 224 B.R. 152 (Bankr.D.Nev.1998) (debtor-owners who resided in one unit and rented other 3 units were entitled to Nevada homestead exemption in entire 4–unit building); *with, e.g. In re Aliotta,* 68 B.R. 281 (Bankr.M.D.Fla.1986) (debtor-owners who resided in one unit and rented other 3 units of building were entitled to Florida homestead exemption only for the unit they used as a residence).

> Homestead laws vary from state to state and there is no consensus among all the states as to whether a homestead claim is lost if a portion of the premises is used for rental or other commercial purposes. Several bankruptcy courts addressing this issue have reached the conclusion that a debtor is entitled to a full homestead exemption in property with dual uses, so long as the debtor actually resides on the property. When a debtor has claimed a homestead exemption under state law, his entitlement to the exemption must he determined by examining the applicable state law, rather than

> relying upon decisions from other jurisdictions.

In re Shell, 295 B.R. 129, 131 (Bankr.D.Alaska 2003).

Conn. Gen.Stat. § 52–352b(t), Connecticut's homestead exemption statute, inter alia, describes as exempt property of any natural person "[t]he homestead of the exemptioner to the value of seventy-five thousand dollars ... provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it." Section 52–352a(e) defines "homestead" as "owner-occupied real property ... used as a primary residence." Conn. Gen.Stat. § 52–352a(e).

> Thus, there are three requisites for real property to constitute an individual's statutory homestead. First, the individual must "own[ ]" the subject real property within the meaning of Section 52–352a as of the relevant time.[8] Second, the individual must "occup[y]" the subject real property within the meaning of Section 52–352a as of the relevant time. Third, the subject real property must be "used as a primary residence" ***70** within the meaning of Section 52–352a as of the relevant time.

In re Kujan, 286 B.R. 216, 220 –221 (Bankr.D.Conn.2002).

[1] "When the language of the statute is clear and unmistakable, construction is prohibited and legislative intent is conclusively established by the statute's plain meaning." *In re Caraglior,* 251 B.R. 778, 782 (Bankr.D.Conn.2000). *See also United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290, 295 (1989) ("the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (citations omitted).

[2] **[3]** "In addition, in attempting to construe the Connecticut homestead exemption, we must bear in mind the firmly established canon of interpretation instructing that, in order to effectuate the purpose of exemptions, such laws are to be liberally construed in favor of the debtor." *KLC, Inc. v. Trayner,* 426 F.3d 172, 176 (2d Cir.2005). Connecticut's homestead exemption statute does not require that a homestead be used exclusively as the debtor's residence, nor does it pro-rate the exemption if some portion of the property claimed as a homestead is utilized for other purposes. Had the legislature intended to impose further limitations on the uses of the property for additional purposes, it could have done so. Rather, it has broadly defined the nature of the homestead, but limited the amount that may be exempted to $75,000.[1]

The court concludes that the debtor is entitled to claim a homestead in his entire one-half interest in the property.

B.

In accordance with § 522(f)(2), CNG's judgment lien impairs the debtor's exemption to the extent that it exceeds (1) the debtor's one-half ownership interest in the fair market value of the property, reduced by the sum of the consensual mortgages and statutory liens; less (2) the debtor's claimed exemption of $75,000, calculated as follows:

Fair Market Value of the Property:		$215,000.00
First Mortgage	-	$108,622.90
Second Mortgage	-	$26,749.21
Statutory Water Lien [2]	-	$ 264.13

Total “Equity” in Property		$79,363.76
Multiplied by Debtor's 50%	x	.50
Debtor's “Equity”		$39,681.88
Exemption Claimed		$75,000.00
Debtor's “Net Equity” (negative)	-	$35,318.12

F N2. Pursuant to Conn. Gen.Stat. § 7–239.

Because the above calculation results in a negative value, CNG's lien may be avoided in its entirety as to the debtor's one-half interest in the property.

IV.

CONCLUSION

In accordance with the forgoing discussion, the court concludes that CNG's objection is overruled and the debtor's motion to avoid the fixing of CNG's judicial lien on his one-half interest in the property is granted. Judgment will so enter.

All Citations

362 B.R. 67

Footnotes

1 It is noteworthy that Florida, the leading source of case law pro-rating homestead exemptions to exclude rental units in the same building, imposes no dollar limit on the exemption.

145 F.3d 513
United States Court of Appeals,
Second Circuit.

Thomas W. OLICK, Appellant,
Mary Ann Maywalt, Mary White, John Vosefski, Vivienne Galligan, on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,
v.
PARKER & PARSLEY PETROLEUM COMPANY, Smith Barney, Harris Upham & Co., Inc., Barrie M. Damson, William T. Ouzts, Robert F. Carr, III, J. William Pierce, Robert S. Rose, Jerol M. Sonosky, Garth M. Ramsay, Scott D. Sheffield, Herbert C. Williamson, Timothy M. Dunn, James D. Moring, Robert J. Castor, Frank A. Kubica, Defendants.

Docket No. 97–7788.
|
Argued April 27, 1998.
|
Decided May 27, 1998.

Synopsis

Class counsel filed supplemental fee applications to cover time and expenses spent in defending settlement of underlying class action securities litigation. Chapter 13 debtor-class member filed application for award of supplemental fees for consulting services allegedly provided to the class, and he sought to stay distribution of settlement fund pending resolution of adversary proceeding in bankruptcy court. The United States District Court for the Southern District of New York, Robert W. Sweet, J., denied stay, granted class counsel's application, and granted class member's fee application in part and denied it in part. Class member appealed. The Court of Appeals held that: (1) as matter of first impression, Chapter 13 debtor, unlike Chapter 7 debtor, has standing to litigate causes of action that are not part of case under Title 11, and, thus, class member had standing in district court to pursue his supplemental application in his own name without joinder or substitution of bankruptcy trustee as necessary party; (2) district court shared concurrent jurisdiction with bankruptcy court, and properly exercised its jurisdiction to rule on class member's fee application; (3) automatic bankruptcy stay did not apply to stay distribution of settlement proceeds; and (4) district court did not abuse its discretion with respect to its rulings on parties' supplemental fee applications.

Affirmed.

See also: 67 F.3d 1072.

West Headnotes (7)

[1] Federal Courts
Time of Taking Proceeding or Filing Notice of Appeal

On appeal of district court's decisions on postsettlement supplemental fee applications, Court of Appeals lacked jurisdiction to entertain class member's challenges to district court's prior judgment approving settlement in class action litigation or prior order denying class member's motion for reconsideration of order denying member's fee application, since member failed to file notice of appeal within 30 days of date of entry of order disposing of his motion for reconsideration. F.R.A.P.Rule 4(a)(4)(F), 28 U.S.C.A.

2 Cases that cite this headnote

[2] Federal Courts
Time of Taking Proceeding or Filing Notice of Appeal

Time limit for filing notice of appeal is mandatory and jurisdictional. F.R.A.P.Rule 4(a)(1), (a)(4)(F), 28 U.S.C.A.

1 Cases that cite this headnote

[3] Bankruptcy
Bankruptcy courts and other federal courts

District court properly exercised its jurisdiction to rule on class member's supplemental fee application in class action securities litigation, notwithstanding class member's filing of Chapter 13 bankruptcy

petition; district court was not divested of its jurisdiction by reason of class member's bankruptcy, and it shared concurrent jurisdiction with bankruptcy court regardless of whether class member's application for supplemental fee award fell within bankruptcy court's "related to" jurisdiction. 28 U.S.C.A. § 1334(b).

4 Cases that cite this headnote

[4] Bankruptcy
In general;standing

Class member had standing in district court to pursue his application for supplemental award for fees and expenses in class action securities litigation in his own name without joinder or substitution of bankruptcy trustee as necessary party to the action, even though class member filed his supplemental fee application after he had filed his Chapter 13 petition, and his supplemental fees claim belonged to bankruptcy estate. Bankr.Code, 11 U.S.C.A. §§ 323(a, b), 541(a)(1), 1306(a)(1).

54 Cases that cite this headnote

[5] Bankruptcy
In general;standing

Unlike Chapter 7 debtor, Chapter 13 debtor has standing to litigate causes of action that are not part of a case under Title 11. Bankr.Code, 11 U.S.C.A. §§ 541(a)(1), 1306(a)(1).

89 Cases that cite this headnote

[6] Bankruptcy
Judicial proceedings in general

Automatic stay did not apply to stay distribution of settlement proceeds in class action securities litigation, based on fact that Chapter 13 debtor-class member had filed supplemental fee application for award of consulting fees and expenses for services to the class; no party sought to recover claim "against" debtor, but, rather, debtor sought to recover from settlement fund. Bankr.Code, 11 U.S.C.A. § 362(a).

22 Cases that cite this headnote

[7] Bankruptcy
Judicial proceedings in general

Automatic stay prevents commencement or continuation, after bankruptcy petition has been filed, of lawsuits and proceedings to recover claim against debtor that arose before filing of petition. Bankr.Code, 11 U.S.C.A. § 362(a).

4 Cases that cite this headnote

Attorneys and Law Firms

***514** Thomas W. Olick, pro se, Easton, PA.

Richard J. Kilsheimer, Kaplan, Kilsheimer & Fox LLP (Robert N. Kaplan, Paul B. Lyons, on the brief), New York City; Michael A. LaBazzo, Sullivan Hill Lewin Rez Engel & LaBazzo, San Diego, CA; Donald R. Bradford, John R. Decker, Bradford & Decker, Tulsa, OK; Stephen D. Oestreich, Wolf Popper LLP, New York City, for Plaintiffs–Appellees.

Before: VAN GRAAFEILAND, MESKILL, and CABRANES, Circuit Judges.

Opinion

PER CURIAM:

Appellant Thomas Olick, a member of the plaintiff class in the underlying securities class action, appeals from orders of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) granting class counsel's motion for supplemental fees and expenses and, with the exception of a small portion of expenses, denying Olick's motion for an award of consulting fees and expenses for services rendered to the class.

I.

In conjunction with a proposed $8.25 million settlement of the underlying class action litigation, class counsel and Olick filed fee applications. Although Olick was not a class representative or an attorney, Olick's application sought consulting fees and expenses that he claimed to have incurred on behalf of the class. In an opinion entered on October 6, 1994, the district court approved the proposed settlement, granted for the most part the attorneys' fee applications, and granted a portion of Olick's request for fees and expenses. The district court entered final judgment and an order of dismissal on November 21, 1994, and this Court affirmed that judgment in *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072 (2d Cir.1995). In the interim, on March 30, 1995, the district court denied Olick's motion for reconsideration of the order denying the bulk of his fee application and for sanctions against class counsel. Olick did not file a notice of appeal from either the November 1994 final judgment or the March 1995 denial of his motion for reconsideration.

In August 1996, class counsel moved for a supplemental award of attorneys' fees and expenses to cover time and expenses spent defending the settlement. Olick filed objections to class counsel's applications, arguing principally that class counsel had breached an alleged retainer agreement specifying ***515** counsel's hourly rates. Olick, who had filed a Chapter 13 bankruptcy petition in 1993, also sought a stay of any distribution of the settlement fund until the resolution of an adversary proceeding that he had filed in bankruptcy court. He filed an application for an award of supplemental fees for consulting services that he claimed to have provided to the class.

The district court granted Olick's supplemental application in part and denied it in part on January 9, 1997, and granted class counsel's application for supplemental fees and expenses on May 12, 1997. The district court subsequently entered an order directing distribution of the settlement fund, and on June 3, 1997 it entered a final order stating that "no further proceedings are necessary and the action is closed." Olick filed a notice of appeal two days later.

II.

[1] **[2]** To the extent that Olick challenges the district court's November 1994 judgment approving the settlement or the March 1995 order denying his motion for reconsideration, we are without jurisdiction to entertain the appeal. Olick failed to file a notice of appeal within thirty days of the date of entry of the March 1995 order disposing of his motion for reconsideration. *See* Fed. R.App. P. 4(a)(1) & 4(a)(4)(F). This time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam).

Olick is able, however, to appeal from the January 1997 and May 1997 orders regarding his own and class counsel's supplemental fee applications. He timely filed his notice of appeal as to these orders on June 5, 1997, following the district court's entry of a final order on June 3, 1997. Accordingly, we entertain Olick's appeal insofar as it challenges those two orders.

III.

On appeal, Olick raises three issues related to the filing of his Chapter 13 bankruptcy petition: jurisdiction, standing, and the denial of his motion to stay the district court proceedings. We address each in turn.

[3] *Jurisdiction:* The district court properly exercised its jurisdiction to rule on Olick's supplemental fee application, notwithstanding Olick's filing of a Chapter 13 bankruptcy petition. The district court was not divested of its jurisdiction by reason of Olick's bankruptcy; whether or not his application for a supplemental fee award fell within the jurisdiction of the bankruptcy court, as a civil proceeding "related to" a case under the Bankruptcy Code, 28 U.S.C. § 1334(b), the district court nevertheless shared concurrent jurisdiction with the bankruptcy court. *Cf., e.g., Brock v. Morysville Body Works, Inc.,* 829 F.2d 383 (3d Cir.1987).

[4] *Standing:* Recognizing that Olick filed his application for a supplemental award for fees and expenses after he had filed his Chapter 13 petition, we nevertheless find that Olick had standing in district court to pursue that action in his own name without joinder or substitution of the trustee as a necessary party to the action.

Olick's bankruptcy estate contained his claim for a supplemental award for fees and expenses. *See* 11 U.S.C. §§ 541(a)(1), 1306(a)(1); *Seward v. Devine,* 888 F.2d 957, 963 (2d Cir.1989) (bankruptcy estate includes "any causes of action possessed by the debtor"). Pursuant to § 323(a) and (b), the trustee is the representative of the estate and has capacity to sue and be sued. The Bankruptcy Code itself is silent as to whether a debtor retains the capacity to sue others when a cause of action belongs to the bankruptcy estate.

[5] Although this Court has not previously ruled on the issue, we conclude that a Chapter 13 debtor, unlike a Chapter 7 debtor, has standing to litigate causes of action that are not part of a case under title 11. *See, e.g., In re Freeman,* 72 B.R. 850, 854 (Bankr.E.D.Va.1987) ("The reality of a filing under Chapter 13 is that the debtors are the true representatives of the estate and should be given the broad latitude essential to control the progress of their case."). Although some courts of appeals have held that Chapter ***516** 7 debtors have no standing to pursue causes of actions that belong to the estate, *see, e.g., Bauer v. Commerce Union Bank,* 859 F.2d 438, 441 (6th Cir.1988), we reach the contrary holding with respect to Chapter 13 debtors who pursue such causes of action. The legislative history of § 1303, which sets out the exclusive rights of a Chapter 13 debtor, supports the holding that a Chapter 13 debtor's standing is different. Both the House of Representatives and Senate floor managers of the Uniform Law on Bankruptcies, Pub.L. No. 95–598 (1978), stated that:

> Section 1303 ... specifies rights and powers that the debtor has exclusive of the trustees. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although Section [323] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.

124 Cong. Rec. H. 11,106 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); S. 17,423 (daily ed. Oct. 5, 1978) (remarks of Sen. DeConcini). It is also the case that in Chapter 13 proceedings (unlike Chapter 7 proceedings) the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate; it is only the Chapter 13 debtor who stands to gain or lose from efforts to pursue a cause of action that is an asset of the bankruptcy estate. Accordingly, the trustee's participation in such an action is generally not needed to protect the Chapter 13 creditors' rights.

Inasmuch as Olick's activities before the district court did not involve any attempt to assert the trustee's avoiding powers, *see* 11 U.S.C. §§ 544–53, we need not consider, and deliberately express no opinion regarding, whether a Chapter 13 debtor would be able to invoke those powers in an action to augment the bankruptcy estate. *Cf. In re Hamilton,* 125 F.3d 292, 295–97 (5th Cir.1997) (describing courts' divergent holdings regarding Chapter 13 debtor's use of avoiding powers).

[6] **[7]** *The Automatic Stay:* The district court did not err in denying Olick's motion to stay the proceedings. As the district court correctly pointed out, the automatic stay pursuant to 11 U.S.C. § 362 enjoins actions "*against* the debtor" (emphasis supplied). It prevents the commencement or continuation, after a bankruptcy petition has been filed, of lawsuits and proceedings to recover a claim against the debtor that arose before the filing of the petition. 11 U.S.C. § 362(a); *Koolik v. Markowitz,* 40 F.3d 567 (2d Cir.1994) (per curiam). In the case at bar, the opposite occurred: No party sought to recover a claim "against" Olick; rather, Olick sought to recover from the settlement fund.

IV.

We have carefully considered all of Olick's challenges to the district court's grant of a supplemental award to class counsel, and to the district court's denial of the bulk of Olick's supplemental application, and we find that the district court did not abuse its discretion with respect to these rulings. *See, e.g., Orchano v. Advanced Recovery, Inc.,* 107 F.3d 94, 98 (2d Cir.1997).

V.

For the reasons set forth above, we affirm the orders of the district court that denied in part and granted in part

Olick's supplemental fee application and granted class counsel's supplemental fee application.

All Citations

145 F.3d 513, Bankr. L. Rep. P 77,702

KeyCite Yellow Flag - Negative Treatment

130 S.Ct. 2652
Supreme Court of the United States

William G. SCHWAB, Petitioner,
v.
Nadejda REILLY.

No. 08–538.
|
Argued Nov. 3, 2009.
|
Decided June 17, 2010.

Synopsis

Background: Chapter 7 trustee filed motion to sell debtor's business equipment. The United States Bankruptcy Court for the Middle District of Pennsylvania denied the motion, and trustee appealed. The District Court, James M. Munley, J., affirmed, and trustee appealed. The Court of Appeals for the Third Circuit, Ambro, Circuit Judge, 534 F.3d 173, affirmed. Certiorari was granted.

[Holding:] The United States Supreme Court, Justice Thomas, held that when the Bankruptcy Code defines the property a debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the "value of [the] claimed exemption" in that asset to be an amount within the limits that the Code prescribes, an interested party is entitled to rely upon that value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt, abrogating *In re Green,* 31 F.3d 1098, and *In re Anderson*, 377 B.R. 865.

Reversed and remanded.

Justice Ginsburg, joined by Chief Justice Roberts and Justice Breyer, filed a dissenting opinion.

West Headnotes (13)

[1] Bankruptcy
Time

Federal Rules of Bankruptcy Procedure generally require interested parties to object to a debtor's claimed exemptions within 30 days after the conclusion of the creditors' meeting. Fed.Rules Bankr.Proc.Rule 4003(b), 11 U.S.C.A.

14 Cases that cite this headnote

[2] Bankruptcy
Time

If an interested party fails to object within the time allowed, a claimed exemption will exclude the subject property from the estate even if the exemption's value exceeds what the Bankruptcy Code permits. Fed.Rules Bankr.Proc.Rule 4003(b), 11 U.S.C.A.

30 Cases that cite this headnote

[3] Bankruptcy
Construction and Operation

Sentimental value is not a basis for construing the Bankruptcy Code.

2 Cases that cite this headnote

[4] Bankruptcy
Operation and effect

Bankruptcy
Objections

When the Bankruptcy Code defines the property a debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the "value of [the] claimed exemption" in that asset to be an amount within the limits that the Code prescribes, an interested party is entitled to rely upon that

value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt; abrogating *In re Green,* 31 F.3d 1098, and *In re Anderson*, 377 B.R. 865. 11 U.S.C.A. § 522(b, d, *l*); Fed.Rules Bankr.Proc.Rule 4003(b), 11 U.S.C.A.

86 Cases that cite this headnote

[5] **Bankruptcy**
Construction and Operation

Court may look to dictionaries and the bankruptcy rules to determine the meaning of words that the Bankruptcy Code does not define.

11 Cases that cite this headnote

[6] **Bankruptcy**
Claim of Exemption or Lien Avoidance

Bankruptcy
Proceedings

Chapter 7 trustee was entitled to evaluate the propriety of debtor's claimed exemptions based on three, and only three, entries on debtor's Schedule C: the description of the property in which debtor claimed the exempt interests, the provisions of the Bankruptcy Code governing the claimed exemptions, and the amounts debtor listed in the column titled "value of claimed exemption." 11 U.S.C.A. § 522(b, d, *l*); Fed.Rules Bankr.Proc.Rule 4003(b), 11 U.S.C.A.

79 Cases that cite this headnote

[7] **Bankruptcy**
Valuation, in general

Proper role of the market value estimate on a debtor's Schedule C is to aid the trustee in administering the estate by helping him identify assets that may have value beyond the dollar amount the debtor claims as exempt, or whose full value may not be available for exemption because a portion of the interest is, for example, encumbered by an unavoidable lien.

24 Cases that cite this headnote

[8] **Bankruptcy**
Interest of debtor in general

Most of a debtor's assets become property of the estate upon commencement of a bankruptcy case. 11 U.S.C.A. § 541.

57 Cases that cite this headnote

[9] **Bankruptcy**
Exemptions

Exemptions represent a debtor's attempt to reclaim those assets that have become property of the estate upon commencement of the case or, more often, certain interests in those assets, to the creditors' detriment. 11 U.S.C.A. §§ 522, 541.

24 Cases that cite this headnote

[10] **Bankruptcy**
Objections

Pursuant to the Supreme Court's decision in *Taylor v. Freeland & Kronz*, an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits. 11 U.S.C.A. § 522(*l*).

79 Cases that cite this headnote

[11] **Bankruptcy**
Protection Against Discrimination or Collection Efforts in General;"Fresh Start."

Bankruptcy
Exemptions

Exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a "fresh start."

18 Cases that cite this headnote

[12] **Bankruptcy**

Protection Against Discrimination or Collection Efforts in General;"Fresh Start."

Bankruptcy

Exemptions

To help a debtor obtain a fresh start, the Bankruptcy Code permits the debtor to withdraw from the estate certain interests in property, such as the debtor's car or home, up to certain values. 11 U.S.C.A. §§ 522, 541.

57 Cases that cite this headnote

[13] Bankruptcy

Property Exempt

Bankruptcy Code limits a debtor's exemptions because every asset the Code permits a debtor to withdraw from the estate is an asset that is not available to his creditors. 11 U.S.C.A. §§ 522, 541.

28 Cases that cite this headnote

****2654** *Syllabus* [*]

Respondent Reilly filed for Chapter 7 bankruptcy when her catering business failed. She supported her petition with, *inter alia,* Schedule B, on which debtors must list their assets, and Schedule C, on which they must list the property they wish to reclaim as exempt. Her Schedule B assets included cooking and other kitchen equipment, to which she assigned an estimated market value of $10,718. On Schedule C, she claimed two exempt interests in this "business equipment": a "tool[s] of the trade" exemption for the statutory-maximum "$1,850 in value," 11 U.S.C. § 522(d)(6); and $8,868 under the statutory provisions allowing miscellaneous, or "wildcard," exemptions up to $10,225 in value. The claimed exemptions' total value ($10,718) equaled Reilly's estimate of the equipment's market value. Property claimed as exempt will be excluded from the bankruptcy estate "[u]nless a party in interest" objects, § 522(*l*), within a certain 30–day period, see Fed. Rule Bkrtcy. Proc. 4003(b). Absent an objection, the property will be excluded from the estate even if the exemption's value exceeds what the Code permits. See, *e.g.,* § 522(*l*); *Taylor v. Freeland & Kronz,* 503 U.S. 638, 642–643, 112 S.Ct. 1644, 118 L.Ed.2d 280.

Although an appraisal revealed that the equipment's total market value could be as much as $17,200, petitioner Schwab, the bankruptcy estate's trustee, did not object to the claimed exemptions because the dollar value Reilly assigned to each fell within the limits of §§ 522(d)(5) and (6). Schwab moved the Bankruptcy Court for permission to auction the equipment so Reilly could receive the $10,718 she claimed exempt and the estate could distribute the remaining value to her creditors. Reilly countered that by equating on Schedule C the total value of her claimed exemptions in the equipment with the equipment's estimated market value, she had put Schwab and her creditors on notice that she intended to exempt the equipment's full value, even if it turned out to be more than the amounts she declared and that the Code allowed. She asserted that the estate had forfeited its claim to any portion of that value because Schwab had not objected within the Rule 4003(b) period, and that she would dismiss her petition rather than sell her equipment.

The Bankruptcy Court denied Schwab's motion and Reilly's conditional motion to dismiss. The District Court denied Schwab relief, rejecting his argument that neither the Code nor Rule 4003(b) requires a trustee to object to a claimed exemption where the amount the debtor declares as the exemption's value is within the limits the Code prescribes. Affirming, the Third Circuit agreed that Reilly's Schedule C entries indicated her intent to exempt the equipment's full value. Relying on *Taylor,* it held that Schwab's failure to object entitled Reilly to exempt the full value of her equipment, even though that value exceeded the amounts that Reilly declared and the Code permitted.

Held: Because Reilly gave "the value of [her] claimed exemption[s]" on Schedule C dollar amounts within the range the Code allows for what it defines as the ****2655** "property claimed as exempt," Schwab was not required to object to the exemptions in order to preserve the estate's right to retain any value in the equipment beyond the value of the exempt interest. Pp. 2659 – 2669.

(a) Reilly's complicated view of the trustee's statutory obligation, and her reading of Schedule C, does not accord with the Code. Pp. 2659 – 2665.

(1) The parties agree that this case is governed by § 522(*l*), which states that a Chapter 7 debtor must "file a list of property that the debtor claims as exempt under

subsection (b) of this section," and that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." Reilly asserts that the "property claimed as exempt" refers to all of the information on Schedule C, including the estimated market value of each asset. Schwab and *amicus* United States counter that because the Code defines such property as an interest, not to exceed a certain dollar amount, in a particular asset, *not* as the asset itself, the value of the property claimed exempt should be judged on the dollar value the debtor assigns the interest, *not* on the value the debtor assigns the asset. Pp. 2659 – 2661.

(2) Schwab and the United States are correct. The portion of § 522(*l*) that resolves this case is not, as Reilly asserts, the provision stating that the "property claimed as exempt on [Schedule C] is exempt" unless an interested party objects. Rather, it is the portion that defines the objection's target, namely, the "list of property that the debtor claims as exempt under subsection (b)." Section 522(b) does *not* define the "property claimed as exempt" by reference to the estimated market value. It refers only to property defined in § 522(d), which in turn lists 12 categories of property that a debtor may claim as exempt. Most of these categories and all the ones applicable here define "property" as the debtor's "interest"—up to a specified dollar amount—in the assets described in the category, *not* as the assets themselves. Schwab had no duty to object to the property Reilly claimed as exempt because its stated value was within the limits the Code allows. Reilly's contrary view does not withstand scrutiny because it defines the target of a trustee's objection based on Schedule C's language and dictionary definitions of "property" at odds with the Code's definition. The Third Circuit failed to account for the Code's definition and for provisions that permit debtors to exempt certain property in kind or in full regardless of value. See, *e.g.,* § 522(d)(9). Schwab was entitled to evaluate the claimed exemptions' propriety based on three Schedule C entries: the description of the business equipment in which Reilly claimed the exempt interests; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled "value of claimed exemption." This conclusion does not render Reilly's market value estimate superfluous. It simply confines that estimate to its proper role: aiding the trustee in administering the estate by helping him identify assets that may have value beyond the amount the debtor claims as exempt, or whose full value may not be available for exemption. This interpretation is consistent with the historical treatment of bankruptcy exemptions. Pp. 2661 – 2665.

(b) *Taylor* does not dictate a contrary conclusion. While both *Taylor* and this case concern the consequences of a trustee's failure to object to a claimed exemption within Rule 4003's time period, *Taylor* establishes and applies the straightforward proposition that an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits. In *Taylor,* the value listed in ****2656** Schedule C ("$ unknown") was not plainly within those limits, but here, the values ($8,868 and $1,850) are within Code limits and thus do not raise the warning flag present in *Taylor*. Departing from *Taylor* would not only ignore the presumption that parties act lawfully and with knowledge of the law; it would also require the Court to expand the statutory definition of "property claimed as exempt" and the universe of information an interested party must consider in evaluating an exemption's validity. Even if the Code allowed such expansions, they would be ill advised. Basing the definition of "property claimed exempt," and thus an interested party's obligation to object under § 522(*l*), on inferences that party must draw from preprinted bankruptcy schedules that evolve over time, rather than on the facial validity of the value the debtor assigns the "property claimed as exempt" as defined by the Code, would undermine the predictability the statute is designed to provide. Pp. 2665 – 2666.

(c) Reilly's argument threatens to convert the Code's goal of giving debtors a fresh start into a free pass. By permitting a debtor "to withdraw from the estate certain interests in property, ... up to certain values," *Rousey v. Jacoway,* 544 U.S. 320, 325, 125 S.Ct. 1561, 161 L.Ed.2d 563, Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors. This Court should not alter that balance by requiring trustees to object to claimed exemptions based on form entries beyond those governing an exemption's validity under the Code. In rejecting Reilly's approach, the Court does not create incentives for trustees and creditors to sleep on their rights. The decision reached here encourages a debtor wishing to exempt an asset's full market value or the asset itself to declare the value of the claimed exemption in a way that makes its scope clear. Such declarations will encourage the trustee to object promptly and preserve for the estate any value in the asset beyond

relevant statutory limits. If the trustee fails to object, or his objection is overruled, the debtor will be entitled to exclude the asset's full value. If the objection is sustained, the debtor will be required either to forfeit the portion of the exemption exceeding the statutory allowance or to revise other exemptions or arrangements with creditors to permit the exemption. See Rule 1009(a). Either result will facilitate the expeditious and final disposition of assets, and thus enable the debtor and creditors to achieve a fresh start free of Reilly's finality and clouded-title concerns. Pp. 2667 – 2669.

534 F.3d 173, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which ROBERTS, C.J., and BREYER, J., joined, *post*, pp. 2669 – 2678.

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Opinion

Justice THOMAS delivered the opinion of the Court.

***774** When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate, see 11 U.S.C. § 541, subject to the debtor's right to reclaim certain property as "exempt," § 522(*l*). The Bankruptcy Code specifies the types of property debtors may exempt, § 522(b), as well as the maximum value of the exemptions a debtor may claim in certain assets, § 522(d). Property a debtor claims as exempt will be excluded from the bankruptcy estate "[u]nless a party in interest" objects. § 522(*l*).

This case presents an opportunity for us to resolve a disagreement among the Courts of Appeals about what constitutes a claim of exemption to which an interested party must object under § 522(*l*). The issue is whether an interested party must object to a claimed exemption where, as here, the Code defines the property the debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the "value of [the] claimed exemption" in that asset to be an amount within the limits that the Code prescribes. Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule C (1991) (hereinafter Schedule C). We hold that, in cases such as this, an interested party need not object to an exemption claimed in this manner in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt.

I

Respondent Nadejda Reilly filed for Chapter 7 bankruptcy when her catering business failed. She supported her petition with various schedules and statements, two of which are relevant here: Schedule B, on which the Bankruptcy Rules ***775** require debtors to list their assets (most of which become property of the estate), and Schedule C, on which the Rules require debtors to list the property they wish to reclaim as exempt. The assets Reilly listed on Schedule B included an itemized list of cooking and other kitchen equipment that she described as "business equipment," and to which she assigned an estimated market value of $10,718. App. 40a, 49a–55a.

On Schedule C, Reilly claimed two exempt interests in this equipment pursuant to different sections of the Code. Reilly claimed a "tool[s] of the trade" exemption of $1,850 in the equipment under § 522(d)(6), which permits a debtor to exempt his "aggregate interest, not to exceed [$1,850] in

value, in any implements, professional books, or tools, of [his] trade." See also 69 Fed.Reg. 8482 (2004) (Table). And she claimed a miscellaneous exemption of $8,868 in the equipment under § 522(d)(5), which, at the time she filed for bankruptcy, permitted a debtor to take a "wildcard" exemption equal to the "debtor's aggregate interest in any property, not to exceed" $10,225 "in value." [1] See **2658 App. 58a. The total value of these claimed exemptions ($10,718) equaled the value Reilly separately listed on Schedules B and C as the equipment's estimated market value, see *id.,* at 49a, 58a.

[1] [2] Subject to exceptions not relevant here, the Federal Rules of Bankruptcy Procedure require interested parties to object to a debtor's claimed exemptions within 30 days after the conclusion of the creditors' meeting held pursuant to Rule 2003(a). See Fed. Rule Bkrtcy. Proc. 4003(b). If an interested party fails to object within the time allowed, a claimed exemption will exclude the subject property from the estate *776 even if the exemption's value exceeds what the Code permits. See, *e.g.,* § 522(*l*); *Taylor v. Freeland & Kronz,* 503 U.S. 638, 642–643, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992).

Petitioner William G. Schwab, the trustee of Reilly's bankruptcy estate, did not object to Reilly's claimed exemptions in her business equipment because the dollar value Reilly assigned each exemption fell within the limits that §§ 522(d)(5) and (6) prescribe. App. 163a. But because an appraisal revealed that the total market value of Reilly's business equipment could be as much as $17,200, [2] Schwab moved the Bankruptcy Court for permission to auction the equipment so Reilly could receive the $10,718 she claimed as exempt, and the estate could distribute the equipment's remaining value (approximately $6,500) to Reilly's creditors. *Id.*, at 141a–143a.

[3] Reilly opposed Schwab's motion. She argued that by equating on Schedule C the total value of the exemptions she claimed in the equipment with the equipment's estimated market value, she had put Schwab and her creditors on notice that she intended to exempt the equipment's full value, even if that amount turned out to be more than the dollar amount she declared, and more than the Code allowed. *Id.*, at 165a. Citing § 522(*l*), Reilly asserted that because her Schedule C notified Schwab of her intent to exempt the full value of her business equipment, he was obliged to object if he wished to preserve the estate's right to retain any value in the equipment in excess of the $10,718 she estimated. Because Schwab did not object within the time prescribed by Rule 4003(b), Reilly asserted that the estate forfeited its claim to such value. *Id.*, at 165a. Reilly further informed the Bankruptcy Court that exempting her business equipment from the estate was so important to her that she would *777 dismiss her bankruptcy case if doing so was the only way to avoid the equipment's sale at auction. [3]

**2659 The Bankruptcy Court denied both Schwab's motion to auction the equipment and Reilly's conditional motion to dismiss her case. See *In re Reilly,* 403 B.R. 336 (Bkrtcy.M.D.Pa.2006). Schwab sought relief from the District Court, arguing that neither the Code nor Rule 4003(b) requires a trustee to object to a claimed exemption where the amount the debtor declares as the "value of [the debtor's] claimed exemption" in certain property is an amount within the limits the Code prescribes. The District Court rejected Schwab's argument, and the Court of Appeals affirmed. See *In re Reilly,* 534 F.3d 173 (C.A.3 2008).

The Court of Appeals agreed with the Bankruptcy Court that by equating on Schedule C the total value of her exemptions in her business equipment with the equipment's market value, Reilly "indicate[d] the intent" to exempt the equipment's full value. *Id.,* at 174. In reaching this conclusion, the Court of Appeals relied on our decision in *Taylor:*

> "[W]e believe this case to be controlled by *Taylor*. Just as we perceive it was important to the *Taylor* Court that the debtor meant to exempt the full amount of the property by listing 'unknown' as both the value of the property and the value of the exemption, it is important to us that Reilly valued the business equipment at *778 $10,718 and claimed an exemption in the same amount. Such an identical listing put Schwab on notice that Reilly intended to exempt the property fully.
>
> . . . . .
>
> " '[A]n unstated premise' of *Taylor* was 'that a debtor who exempts the entire reported value of an asset is claiming the "full amount," whatever it turns out to be.' " 534 F.3d, at 178–179.

Relying on this "unstated premise," the Court of Appeals held that Schwab's failure to object to Reilly's claimed exemptions entitled Reilly to the equivalent of an in-

kind interest in her business equipment, even though the value of that exemption exceeded the amount that Reilly declared on Schedule C and the amount that the Code allowed her to withdraw from the bankruptcy estate. *Ibid.*

As noted, the Court of Appeals' decision adds to disagreement among the Circuits about what constitutes a claim of exemption to which an interested party must object under § 522(*l*).[4] We granted certiorari to resolve this conflict. See 556 U.S. 1207, 129 S.Ct. 2049, 173 L.Ed.2d 1131 (2009). We conclude that the Court of Appeals' approach fails to account for the text of the relevant Code provisions and misinterprets our decision in *Taylor*. Accordingly, we reverse.

***779** II

[4] The starting point for our analysis is the proper interpretation of Reilly's Schedule C. If we read the Schedule Reilly's way, she claimed exemptions in her ****2660** business equipment that could exceed statutory limits, and thus claimed exemptions to which Schwab should have objected if he wished to enforce those limits for the benefit of the estate. If we read Schedule C Schwab's way, Reilly claimed valid exemptions to which Schwab had no duty to object. The Court of Appeals construed Schedule C Reilly's way and interpreted her claimed exemptions as improper, and therefore objectionable, even though their declared value was facially within the applicable Code limits. In so doing, the Court of Appeals held that trustees evaluating the validity of exemptions in cases like this cannot take a debtor's claim at face value, and specifically cannot rely on the fact that the amount the debtor declares as the "value of [the] claimed exemption" is within statutory limits. Instead, the trustee's duty to object turns on whether the interplay of various schedule entries supports an inference that the debtor "intended" to exempt a dollar value different than the one she wrote on the form. 534 F.3d, at 178. This complicated view of the trustee's statutory obligation, and the strained reading of Schedule C on which it rests, is inconsistent with the Code.[5]

The parties agree that this case is governed by § 522(*l*), which states that a Chapter 7 debtor must "file a list of property that the debtor claims as exempt under subsection (b) of this section," and further states that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." The parties further agree that the "list" to which § 522(*l*) refers is the "list of property ... claim[ed] as exempt" ***780** currently known as "Schedule C." See Schedule C.[6] The parties, like the Courts of Appeals, disagree about what information on Schedule C defines the "property claimed as exempt" for purposes of evaluating an exemption's propriety under § 522(*l*). Reilly asserts that the "property claimed as exempt" is defined by reference to all the information on Schedule C, including the estimated market value of each asset in which the debtor claims an exempt interest. Schwab and the United States as *amicus curiae* argue that the Code specifically defines the "property claimed as exempt" as an interest, the value of which may not exceed a certain dollar amount, in a particular asset, *not* as the asset itself. Accordingly, they argue that the value of the property claimed exempt, *i.e.*, the value of the debtor's exempt interest in the asset, should be judged on the value the debtor assigns the interest, *not* on the value the debtor assigns the asset. The point of disagreement is best illustrated by the relevant portion of Reilly's Schedule C:

****2661** ***781** According to Reilly, Schwab was required to treat the estimate of market value she entered in column 4 as part of her claimed exemption in identifying the "property claimed as exempt" under § 522(*l*). See Brief for Respondent 22–28. Relying on this premise, Reilly argues that where, as here, a debtor equates the total value of her claimed exemptions in a certain asset (column 3) with her estimate of the asset's market value (column 4), she establishes the "property claimed as exempt" as the full value of the asset, whatever that turns out to be. See *ibid.* Accordingly, Reilly argues that her Schedule C clearly put Schwab on notice that she "intended" to claim an exemption for the full value of her business equipment, and that Schwab's failure to oppose the exemption in a timely manner placed the full value of the equipment outside the estate's reach.

Schwab does not dispute that columns 3 and 4 apprised him that Reilly equated the total value of her claimed exemptions in the equipment ($1,850 plus $8,868) with the equipment's market value ($10,718). He simply disagrees with Reilly that this "identical listing put [him] on notice that Reilly intended to exempt the property fully," regardless of whether its value exceeded the exemption limits the Code prescribes. 534 F.3d, at 178. Schwab and *amicus* United States instead contend that the Code defines the "property" Reilly claimed as exempt under

§ 522(*l*) as an "interest" whose value cannot exceed a certain dollar amount. Brief for Petitioner 20–26; Reply Brief for Petitioner 3–6; Brief for United States as *Amicus Curiae* 12–18. Construing Reilly's Schedule C in light of this statutory definition, they contend that Reilly's claimed exemption was facially unobjectionable because the "property claimed as exempt" (*i.e.*, two interests in her business equipment worth $8,868 and $1,850, respectively) is property Reilly was clearly entitled to exclude from her estate under the Code provisions she referenced in column 2. See *supra,* at 2660 – 2661 (citing §§ 522(d)(5) and (6)). Accordingly, Schwab and the United States conclude ***782** that Schwab had no obligation to object to the exemption in order to preserve for the estate any value in Reilly's business equipment beyond the total amount ($10,718) Reilly properly claimed as exempt.

We agree. The portion of § 522(*l*) that resolves this case is not, as Reilly asserts, the provision stating that the "property claimed as exempt on [Schedule C] is exempt" unless an interested party objects. Rather, it is the portion of § 522(*l*) that defines the target of the objection, namely, the portion that says Schwab has a duty to object to the "list of property that the debtor claims as exempt *under subsection (b)*." (Emphasis added.) That subsection, § 522(b), does *not* define the "property claimed as exempt" by reference to the estimated market value on which Reilly and the Court of Appeals rely. Brief for Respondent 22–23; 534 F.3d, at 178. Section 522(b) refers only to property defined in § 522(d), which in turn lists 12 categories of property that a debtor may claim as exempt. As we have recognized, most of these categories (and all of the categories applicable to Reilly's exemptions) define the "property" a debtor may "clai[m] as exempt" as the debtor's "interest"—up to ****2662** a specified dollar amount—in the assets described in the category, *not* as the assets themselves. §§ 522(d)(5)-(6); see also §§ 522(d)(1)-(4), (8); *Rousey v. Jacoway,* 544 U.S. 320, 325, 125 S.Ct. 1561, 161 L.Ed.2d 563 (2005); *Owen v. Owen,* 500 U.S. 305, 310, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991). Viewing Reilly's form entries in light of this definition, we agree with Schwab and the United States that Schwab had no duty to object to the property Reilly claimed as exempt (two interests in her business equipment worth $1,850 and $8,868) because the stated value of each interest, and thus of the "property claimed as exempt," was within the limits the Code allows. [7]

[5] ***783** Reilly's contrary view of Schwab's obligations under § 522(*l*) does not withstand scrutiny because it defines the target of a trustee's objection—the "property claimed as exempt"—based on language in Schedule C and dictionary definitions of "property," see Brief for Respondent 24–25, 40–41, that the definition in the Code itself overrides. [8] Although we may look to dictionaries and the Bankruptcy Rules to determine the meaning of words the Code does not define, see, *e.g., Rousey, supra,* at 330, 125 S.Ct. 1561, the Code's definition of the "property claimed as exempt" in this case is clear. As noted above, §§ 522(d)(5) and (6) define the "property claimed as exempt" as an "interest" in Reilly's business equipment, *not* as the equipment *per se*. Sections 522(d)(5) and (6) further and plainly state that claims to exempt such interests are statutorily permissible, and thus unobjectionable, if the value of the claimed interest is below a particular dollar amount. [9] That is the case here, ***784** and Schwab was entitled to rely upon these provisions in evaluating whether Reilly's exemptions were objectionable under the Code. See *Lamie v. United States Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). The Court of Appeals' contrary holding not only fails to account for the Code's definition ****2663** of the "property claimed as exempt." It also fails to account for the provisions in § 522(d) that permit debtors to exempt certain property in kind or in full regardless of value. See, *e.g.,* §§ 522(d)(9) (professionally prescribed health aids), (10)(C) (disability benefits), (7) (unmatured life insurance contracts). We decline to construe Reilly's claimed exemptions in a manner that elides the distinction between these provisions and provisions such as §§ 522(d)(5) and (6), see, *e.g., Duncan v. Walker,* 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), particularly based upon an entry on Schedule C—Reilly's estimate of her equipment's market value—to which the Code does not refer in defining the "property claimed as exempt." [10]

[6] **[7]** **[8]** **[9]** ***785** For all of these reasons, we conclude that Schwab was entitled to evaluate the propriety of the claimed exemptions based on three, and only three, entries on Reilly's Schedule C: the description of the business equipment in which Reilly claimed the exempt interests; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled "value of claimed exemption." In

reaching this conclusion, we do not render the market value estimate on Reilly's Schedule C superfluous. We simply confine the estimate to its proper role: aiding the trustee in administering the estate by helping him identify assets that may have value beyond the dollar amount the debtor claims as exempt, or whose full value may not be available for exemption because a portion of the interest is, for example, encumbered by an unavoidable lien. See, *e.g.,* 3 W. Norton & W. Norton, Bankruptcy Law and Practice § 56:7 (3d ed.2009); Brief for United States as *Amicus Curiae* 16; Dept. of Justice, Executive Office for U.S. Trustees, Handbook for Chapter 7 Trustees, p. 8–1 (2005), http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/7handbook1008/Ch7_Handbook.pdf (as visited June 14, 2010, and available in Clerk of Court's case file). As noted, ****2664** most assets become property of the estate upon commencement of a bankruptcy case, see 11 U.S.C. § 541, and exemptions represent the debtor's attempt to reclaim those assets or, more often, certain interests in those assets, to the creditors' detriment. Accordingly, it is at least useful for a trustee to be able to compare the value of the claimed exemption (which typically represents the debtor's interest in a particular asset) with ***786** the asset's estimated market value (which belongs to the estate subject to any valid exemption) without having to consult separate schedules. [11]

Our interpretation of Schwab's statutory obligations is not only consistent with the governing Code provisions; it is also consistent with the historical treatment of bankruptcy exemptions. Congress has permitted debtors to exempt certain property from their bankruptcy estates for more than two centuries. See Act of Apr. 4, 1800, ch. 19, § 5, 2 Stat. ***787** 23. [12] Throughout these periods, debtors have validly exempted property based on forms that required the debtor to list the value of a claimed exemption without also estimating the market value of the asset in which the debtor claimed the exempt interest. See Brief for Respondent 46, n. 7 (citing Sup.Ct. Bkrtcy. Form 20 (1877)). [13] Indeed, it was not until 1991 that Schedule B–4 was redesignated as Schedule C and amended to require the estimate of market value on which Reilly so heavily relies. See Schedule C. This amendment was not occasioned by legislative changes that altered the Code's definition of "the property claimed as exempt" in this case as an "interest," not to exceed a certain ****2665** dollar amount, in Reilly's business equipment. [14] Accordingly, we agree with Schwab and the United States that this recent amendment to the exemption form does not compel Reilly's view of Schwab's statutory obligations, or render the claimed exemptions in this case objectionable under the ***788** Code. See Reply Brief for Petitioner 9–11; Brief for United States as *Amicus Curiae* 16–17. [15]

III

The Court of Appeals erred in holding that our decision in *Taylor* dictates a contrary conclusion. See 534 F.3d, at 178. *Taylor* does not rest on what the debtor "meant" to exempt. 534 F.3d, at 178. Rather, *Taylor* applies to the face of a debtor's claimed exemption the Code provisions that compel reversal here.

The debtor in *Taylor,* like the debtor here, filed a schedule of exemptions with the Bankruptcy Court on which the debtor described the property subject to the claimed exemption, identified the Code provision supporting the exemption, and listed the dollar value of the exemption. Critically, however, the debtor in *Taylor* did *not,* like the debtor here, state the value of the claimed exemption as a specific dollar amount at or below the limits the Code allows. Instead, the debtor in *Taylor* listed the value of the exemption itself as "$ *unknown*":

Schedule B–4.—Property Claimed Exempt

Type of Property	Location, Description, and, So Far as Relevant to the Claim of Exemption, Present Use of Property	Specify the Statute Creating the Exemption	Value Claimed Exempt

Proceeds from lawsuit	Winn v. TWA Claim for lost wages	11 U.S.C. 522(b)(d)	*unknown*

****2666** ***789** The interested parties in *Taylor* agreed that this entry rendered the debtor's claimed exemption objectionable on its face because the exemption concerned an asset (lawsuit proceeds) that the Code did not permit the debtor to exempt beyond a specific dollar amount. See 503 U.S., at 642, 112 S.Ct. 1644. Accordingly, although this case and *Taylor* both concern the consequences of a trustee's failure to object to a claimed exemption within the time specified by Rule 4003, the question arose in *Taylor* on starkly different facts. In *Taylor,* the question concerned a trustee's obligation to object to the debtor's entry of a "value claimed exempt" that was *not* plainly within the limits the Code allows. In this case, the opposite is true. The amounts Reilly listed in the Schedule C column titled "Value of Claimed Exemption" *are* facially within the limits the Code prescribes and raise no warning flags that warranted an objection. [16] See *supra,* at 2660 – 2661.

[10] ***790** *Taylor* supports this conclusion. In holding otherwise, the Court of Appeals focused on what it described as *Taylor*' s " 'unstated premise' " that " 'a debtor who exempts the entire reported value of an asset is claiming the "full amount," whatever it turns out to be.' " 534 F.3d, at 179. But *Taylor* does not rest on this premise. It establishes and applies the straightforward proposition that an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits, a test the value ($ *unknown*) in *Taylor* failed, and the values ($8,868 and $1,850) in this case pass.

We adhere to this test. Doing otherwise would not only depart from *Taylor* and ignore the presumption that parties act lawfully and with knowledge of the law, cf. *United States v. Budd,* 144 U.S. 154, 163, 12 S.Ct. 575, 36 L.Ed. 384 (1892); it would also require us to expand the statutory definition of "property claimed as exempt" and the universe of information an interested party must consider in evaluating the validity of a claimed exemption. Even if the Code allowed such expansions, they would be ill advised. As evidenced by the differences between Reilly's Schedule C and the schedule in *Taylor,* preprinted bankruptcy schedules change over time. Basing the definition of the "property claimed as exempt," and thus an interested party's obligation to object under § 522(*l*), on inferences that party must draw from evolving forms, rather than on the facial validity of the value the debtor assigns the "property claimed as exempt" as defined by the Code, would undermine the predictability the statute is designed to provide. [17] ****2667** For all of these reasons, we take Reilly's exemptions ***791** at face value and find them unobjectionable under the Code, so the objection deadline we enforced in *Taylor* is inapplicable here.

IV

[11] In a final effort to defend the Court of Appeals' judgment, Reilly asserts that her approach to § 522(*l*) is necessary to vindicate the Code's goal of giving debtors a fresh start, and to further its policy of discouraging trustees and creditors from sleeping on their rights. See Brief for Respondent 21, 55–68. Although none of Reilly's policy arguments can overcome the Code provisions or the aspects of *Taylor* that govern this case, our decision fully accords with all of the policies she identifies. We agree that "exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start.' " Brief for Respondent 21 (quoting *Rousey,* 544 U.S., at 325, 125 S.Ct. 1561); see *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). We disagree that this policy required Schwab to object to a facially valid claim of exemption on pain of forfeiting his ability to preserve for the estate any value in Reilly's business equipment beyond the value of the interest she declared exempt. This approach threatens to convert a fresh start into a free pass.

[12] **[13]** As we emphasized in *Rousey,* "[t]o help the debtor obtain a fresh start, the Bankruptcy Code permits him to *withdraw from the estate* certain *interests in* property, such as his car or home, *up to certain values*." 544 U.S., at 325, 125 S.Ct. 1561 (emphasis added). The Code limits exemptions in this fashion because every asset the Code permits a debtor to withdraw from the estate is an asset that is not available to his creditors. See §

522(b)(1). Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors, and it is not for us to ***792** alter this balance by requiring trustees to object to claimed exemptions based on form entries beyond those that govern an exemption's validity under the Code. See *Lamie,* 540 U.S., at 534, 538, 124 S.Ct. 1023; *Hartford,* 530 U.S., at 6, 120 S.Ct. 1942; *United States v. Locke,* 471 U.S. 84, 95, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985).

Reilly nonetheless contends that our approach creates perverse incentives for trustees and creditors to sleep on their rights. See Brief for Respondent 64, n. 10, 67–69. Again, we disagree. Where a debtor intends to exempt nothing more than an interest worth a specified dollar amount in an asset that is not subject to an unlimited or in-kind exemption under the Code, our approach will ensure clear and efficient resolution of competing claims to the asset's value. If an interested party does not object to the claimed interest by the time the Rule 4003 period expires, title to the asset will remain with the estate pursuant to § 541, and the debtor will be guaranteed a payment in the dollar amount of the exemption. If an interested party timely objects, the court will rule on the objection and, if it is improper, allow ****2668** the debtor to make appropriate adjustments. [18]

Where, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as ***793** "full fair market value (FMV)" or "100% of FMV." [19] Such a declaration will encourage the trustee to object promptly to the exemption if he wishes to challenge it and preserve for the estate any value in the asset beyond relevant statutory limits. [20] If the trustee fails to object, or if the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset. If the trustee objects and the objection is sustained, the debtor will be required either to forfeit the portion of the exemption that exceeds the statutory allowance, or to revise other exemptions or arrangements with her creditors to permit the exemption. See Fed. Rule Bkrtcy. Proc. 1009(a). Either result ***794** will facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start free of the finality and clouded-title concerns Reilly describes. See Brief for Respondent 57–59 (arguing that "[u]nder [Schwab's] interpretation of Rule 4003(b), a debtor would never have the certainty of knowing whether or not he or she may keep her exempted property until the case had ended"); *id.,* at 66. [21]

****2669** For all of these reasons, the policy considerations Reilly cites support our approach. Where, as here, a debtor accurately describes an asset subject to an exempt interest and on Schedule C declares the "value of [the] claimed exemption" as a dollar amount within the range the Code allows, interested parties are entitled to rely upon that value as evidence of the claim's validity. Accordingly, we hold that Schwab was not required to object to Reilly's claimed exemptions in her business equipment in order to preserve the estate's right to retain any value in the equipment beyond the ***795** value of the exempt interest. In reaching this conclusion, we express no judgment on the merits of, and do not foreclose the courts from entertaining on remand, procedural or other measures that may allow Reilly to avoid auction of her business equipment.

* * *

We reverse the judgment of the Court of Appeals for the Third Circuit and remand this case for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom THE CHIEF JUSTICE and Justice BREYER join, dissenting.

In Chapter 7 bankruptcies, debtors must surrender to the trustee-in-bankruptcy all their assets, 11 U.S.C. § 541, but may reclaim for themselves exempt property, § 522. Within 30 days after the meeting of creditors, the trustee or a creditor may file an objection to the debtor's designation of property as exempt. Fed. Rule Bkrtcy. Proc. 4003(b). Absent timely objection, "property claimed [by the debtor] as exempt ... is exempt." § 522(*l*).

The trustee in this case, petitioner William G. Schwab, maintains that the obligation promptly to object to exemption claims extends only to the qualification of an asset as exemptible, not to the debtor's valuation

of the asset. Respondent Nadejda Reilly, the debtor-in-bankruptcy, urges that the timely objection requirement applies not only to the debtor's designation of an asset as exempt; the requirement applies as well, she asserts, to her estimate of the asset's market value. That is so, she reasons, because the asset's current dollar value is critical to the determination whether she may keep the property intact and outside bankruptcy, or whether the trustee, at any time during the course of the proceedings, may sell it.

**2670 The Court holds that challenges to the debtor's valuation of exemptible assets need not be made within the 30–day *796 period allowed for "objection[s] to the list of property claimed as exempt." Rule 4003(b). Instead, according to the Court, no time limit constrains the trustee's (or a creditor's) prerogative to place at issue the debtor's evaluation of the property as fully exempt.

The Court's decision drastically reduces Rule 4003's governance, for challenges to valuation have been, until today, the most common type of objection leveled against exemption claims. See 9 Collier on Bankruptcy ¶ 4003.04, p. 4003–15 (rev. 15th ed.2009) (hereinafter Collier) ("Normally, objections to exemptions will focus primarily on issues of valuation."). In addition to departing from the prevailing understanding and practice, the Court's decision exposes debtors to protracted uncertainty concerning their right to retain exempt property, thereby impeding the "fresh start" exemptions are designed to foster. In accord with the courts below, I would hold that a debtor's valuation of exempt property counts and becomes conclusive absent a timely objection.

I

Nadejda Reilly is a cook who operated a one-person catering business. Unable to cover her debts, she filed a Chapter 7 bankruptcy petition appending all required schedules and statements. Relevant here, her filings included a form captioned "Schedule B—Personal Property," which called for enumeration of "all personal property of the debtor of whatever kind." App. 40a. On that all-encompassing schedule, Reilly listed "business equipment," *i.e.,* her kitchen equipment, with a current market value of $10,718. *Id.,* at 49a.

Reilly also filed the more particular form captioned "Schedule C—Property Claimed as Exempt." *Id.,* at 56a. Schedule C contained four columns, the first headed "Description of Property"; the second, "Specify Law Providing Each Exemption"; the third, "Value of Claimed Exemption"; and the fourth, "Current Market Value of Property Without *797 Deducting Exemptions." *Id.,* at 57a. In the first column of Schedule C, Reilly wrote, as she did in Schedule B's description-of-property column: "See attached list of business equipment." *Id.,* at 58a. On the list appended to Schedules B and C, Reilly set out by hand a 31–item inventory of her restaurant-plus-catering-venture equipment. Next to each item, *e.g.*, "Dough Mixer," "Gas stove," "Hood," she specified, first, the purchase price and, next, "Today's Market Value," which added up to $10,718 for the entire inventory. *Id.,* at 51a–55a. [1]

As the laws securing exemption of her kitchen equipment, Reilly specified in the second Schedule C column, § 522(d)(6), the exemption covering trade tools, and § 522(d)(5), the "wildcard" exemption. *Id.,* at 58a. [2] In the value-of-claimed-exemption column, she listed $1,850, then the maximum trade-tools exemption, and $8,868, drawn from her wildcard exemption, amounts adding up to $10,718. *Ibid.* **2671 And in the fourth, current-market-value, column, she recorded $10,718, corresponding to the total market value she had set out in her inventory and reported in Schedule B. *Ibid.*

Before the 30–day clock on filing objections had begun to run, an appraiser told Schwab that Reilly's equipment was worth at least $17,000. Brief for Petitioner 15; App. 164a. Nevertheless, Schwab did not object to the $10,718 market value Reilly attributed to her business equipment in Schedule C and the attached inventory. Instead, he allowed the limitations period to lapse and then moved, unsuccessfully, *798 for permission to sell the equipment at auction. *Id.,* at 141a–143a. [3]

From Reilly's filings, the Bankruptcy Judge found it evident that Reilly had claimed the property itself, not its dollar value, as exempt. *Id.*, at 168a–169a ("I know there's an argument ... that ... the property identified as exempt is really the [valuation] column, [*i.e.,* $10,718,] but that's not what the forms say. The forms say property declared as exempt and to see attached list. So, they're exempting all the property .... If the Trustee believes that ... all the property cannot be exempt, [he] should object to it.").

The District Court and Court of Appeals similarly concluded that, by listing the identical amount, $10,718, as the property's market value and the value of the claimed exemptions, Reilly had signaled her intention to safeguard all of her kitchen equipment from inclusion in the bankruptcy estate. *In re Reilly,* 403 B.R. 336, 338–339 (Bkrtcy. Ct. M.D.Pa.2006); *In re Reilly,* 534 F.3d 173, 178 (C.A.3 2008). Both courts looked to § 522(*l*) and Federal Rule of Bankruptcy Procedure 4003(b), which state, respectively:

> "The debtor shall file a list of property that the debtor claims as exempt .... Unless a party in interest objects, the property claimed as exempt on such list is exempt." § 522(*l*).

> "A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded ***799** .... The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension." Rule 4003(b). [4]

Schwab having filed no objection within the allowable 30 days, each of the tribunals below ruled that the entire inventory of Reilly's business equipment qualified as exempt in full. App. 168a; 403 B.R., at 339, 534 F.3d, at 178. The leading treatise on bankruptcy, the Court of Appeals noted, *id.,* at 180, n. 4, is in accord:

> "Normally, if the debtor lists property as exempt, that listing is interpreted as a claim for exemption of the debtor's entire interest in the property, and the debtor's valuation of that interest is treated as the amount of the exemption claimed. Were it otherwise—that is, if the listing were construed to claim as exempt only that portion of the property having the value stated—the provisions ****2672** finalizing exemptions if no objections are filed would be rendered meaningless. The trustee or creditors could [anytime] claim that the debtor's interest in the property was greater than the value claimed as exempt and [then] object to the debtor exempting his or her entire interest in the property after the deadline for objections had passed." 9 Collier ¶ 4003.02[1], pp. 4003–4 to 4003–5.

Agreeing with the courts below, I would hold that Reilly, by her precise identification of the exempt property, and her specification of $10,718 as both the current market value of her kitchen equipment and the value of the claimed exemptions, had made her position plain: She claimed as exempt the listed property itself—not the dollar amount, up to $10,718, that sale of the property by Schwab might yield. ***800** Because neither Schwab nor any creditor lodged a timely objection, the listed property became exempt, reclaimed as property of the debtor, and therefore outside the bankruptcy estate the trustee is charged to administer.

II

A

Pursuant to § 522(*l*), Reilly filed a list of property she claimed as exempt from the estate-in-bankruptcy. Her filing left no doubt that her exemption claim encompassed her entire inventory of kitchen equipment. Schwab, in fact, was fully aware of the nature of the claim Reilly asserted. At the meeting of creditors, Reilly reiterated that she sought to keep the equipment in her possession; she would rather discontinue the bankruptcy proceeding, she made plain, than lose her equipment. See *supra,* at 2671, n. 3. Bankruptcy Rule 4003(b) requires the trustee, if he contests the debtor's exemption claim in whole or part, to file an objection within 30 days after the meeting of creditors. Absent a timely objection, "the property claimed as exempt ... is exempt." § 522(*l*); Rule 4003. That prescription should be dispositive of this case.

The Court holds, however, that Schwab was not obliged to file a timely objection to the exemption Reilly claimed, and indeed could auction off her cooking equipment anytime prior to the administrative closing of the bankruptcy estate. In so holding, the Court decrees that no objection need be made to a debtor's valuation of her property.

To support the conclusion that Rule 4003's timely objection requirement does not encompass the debtor's estimation of her property's market value, the Court homes in on the language of exemption prescriptions that are subject to a monetary cap. [5] Those prescriptions, the Court points out, "define ***801** the 'property' a debtor may 'clai[m] as exempt' as the debtor's 'interest'—up to a specified dollar amount—in the assets described in the category, *not* as the assets themselves." *Ante,* at 2661 – 2662. So long as a debtor values her claimed exemption

at a dollar amount below the statutory cap, the Court reasons, the claim is on-its-face permissible no matter the market value she ascribes **2673 to the asset. To evaluate the propriety of Reilly's declared "interest" in her kitchen equipment, the Court concludes, Schwab was obliged promptly to inspect "three, and only three, entries on Reilly's Schedule C: the description of the business equipment ...; the Code provisions governing the claimed exemptions; and the amounts Reilly listed in the column titled 'value of claimed exemption.' " *Ante,* at 2663. [6]

B

The Court's account, however, shuts from sight the vital part played by the fourth entry on Schedule C—current market *802 value—when a capped exemption is claimed. A debtor who estimates a market value *below* the cap, and lists an identical amount as the value of her claimed exemption, thereby signals that her aim is to keep the listed property in her possession, outside the estate-in-bankruptcy. In contrast, a debtor who estimates a market value *above* the cap, and above the value of her claimed exemption, thereby recognizes that she cannot shelter the property itself and that the trustee may seek to sell it for whatever it is worth. [7] Schedule C's final column, in other words, alerts the trustee whether the debtor is claiming a right to retain the listed property itself as her own, a right secured to her if the trustee files no timely objection. [8]

Because an asset's market value is key to determining the character of the interest the debtor is asserting in that asset, Rule 4003(b) is properly read to require objections to valuation within 30 days, just as the Rule requires timely objections *803 to the debtor's description of the property, the asserted legal basis for the exemption, and the claimed value of the exemption. See 4 Collier ¶ 522.05[1], p. 522–28 (rev. 15th ed.2005) ("[T]o evaluate the **2674 propriety of the debtor's claim of exemption," trustees need the information in all four columns of Schedule C; "[market] value" is "essential" to judging whether the claim is proper because "[e]xemption provisions often are limited according to ... [the property's] value."). [9]

C

Requiring objections to market valuation notably facilitates the debtor's fresh start, and thus best fulfills the prime purpose of the exemption prescriptions. See, *e.g., Burlingham v. Crouse,* 228 U.S. 459, 473, 33 S.Ct. 564, 57 L.Ed. 920 (1913) (Bankruptcy provisions "must be construed" in light of policy "to give the bankrupt a fresh start."). See also *Rousey v. Jacoway,* 544 U.S. 320, 325, 125 S.Ct. 1561, 161 L.Ed.2d 563 (2005); *United States v. Security Industrial Bank,* 459 U.S. 70, 72, n. 1, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982); *ante,* at 2667. The 30–day deadline for objections, this Court has recognized, "prompt[s] parties to act and ... produce[s] finality." *Taylor v. Freeland* *804 *& Kronz,* 503 U.S. 638, 644, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). As "there can be no possibility of further objection to the exemptions" after this period elapses, the principal bankruptcy treatise observes, "if the debtor is not yet in possession of the property claimed as exempt, it should be turned over to [her] at this time to effectuate fully the fresh start purpose of the exemptions." 9 Collier ¶ 4003.03[3], p. 4003–13.

With the benefit of closure, and the certainty it brings, the debtor may, at the end of the 30 days, plan for her future secure in the knowledge that the possessions she has exempted in their entirety are hers to keep. See 534 F.3d, at 180. If she has reclaimed her car from the estate, for example, she may accept a job not within walking distance. See Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 2–3 (hereinafter NACBA Brief). Or if she has exempted her kitchen equipment, she may launch a new catering venture. See App. 138a (Reilly "wishe[d] to continue in restaurant and catering as her occupation" postbankruptcy.).

By permitting trustees to challenge a debtor's valuation of exempted property anytime before the administrative closing of the bankruptcy estate, the Court casts a cloud of uncertainty over the debtor's use of assets reclaimed in full. If the trustee gains a different opinion of an item's value months, even years, after the debtor has filed her bankruptcy petition, [10] he may **2675 seek to repossess the asset, auction it off, and hand the debtor a check for the dollar amount of her claimed exemption. [11] With this threat looming until the administrative *805 closing of the bankruptcy estate, "[h]ow can debtors reasonably be expected to restructure their affairs"? NACBA Brief 25. See *In re Polis,* 217 F.3d 899, 903 (C.A.7 2000) (Posner, C.J.) ("If the assets sought to be exempted by the

debtor were not valued at a date early in the bankruptcy proceeding, neither the debtor nor the creditors would know who had the right to them.").

III

The Court and Schwab raise three concerns about reading Rule 4003 to require timely objection to the debtor's estimate of an exempt asset's market value: Would trustees face an untoward administrative burden? Would trustees lack fair notice of the need to object? And would debtors be tempted to undervalue their property in an effort to avoid the monetary cap on exemptions? In my judgment, all three questions should be answered no.

A

The Court suggests that requiring timely objections to a debtor's valuation of exempt property would saddle trustees with an unmanageable load. See *ante,* at 2666 (declining to "expand ... the universe of information an interested party must consider in evaluating the validity of a claimed exemption"). See also Brief for Petitioner 32–33; Brief for United States as *Amicus Curiae* 24. [12] But trustees, sooner or later, must attempt to ascertain the market value of exempted ***806** assets. They must do so to determine whether sale of the items would likely produce surplus proceeds for the estate above the value of the claimed exemption, see § 704(a)(1); the only question, then, is *when* this market valuation must occur—(1) within 30 days or (2) at any time before the administrative closing of the bankruptcy estate? Removing valuation from Rule 4003's governance thus does little to reduce the labors trustees must undertake.

The 30–day objection period, I note, does not impose on trustees any *additional* duty, but rather guides the exercise of *existing* responsibilities; under Rule 4003(b), a trustee must rank evaluation of the debtor's exemptions as a priority item in his superintendence of the estate. [13] And if the trustee entertains any doubt about the accuracy of a debtor's estimation of market value, the procedure for interposing objections is hardly arduous. The trustee need only file with the court a ****2676** simple declaration stating that an item's value exceeds the amount listed by the debtor. [14]

***807** If the trustee needs more than 30 days to assess market value, moreover, the time period is eminently extendable. Rule 4003(b) prescribes that a trustee may, for cause, ask the court for an extension of the objection period. Alternatively, the trustee can postpone the conclusion of the meeting of creditors, from which the 30–day clock runs, simply by adjourning the meeting to a future date. Rule 2003(e). A trustee also may examine the debtor under oath at the creditors' meeting, Rule 2003(b)(1); if he gathers information impugning her exemption claims, he may ask the bankruptcy court to hold a hearing to determine valuation issues, Rule 4003(c). See *Taylor,* 503 U.S., at 644, 112 S.Ct. 1644 ("If [the trustee] did not know the value of [a claimed exemption], he could have sought a hearing on the issue ... or ... asked the Bankruptcy Court for an extension of time to object."). See also NACBA Brief 19, 21–23 (listing ways trustees may enlarge the limitations period for objections). Trustees, in sum, have ample mechanisms at their disposal to gain the time and information they need to lodge objections to valuation.

B

On affording trustees fair notice of the need to object, the Court emphasizes that a debtor must list her claimed exemptions "in a manner that makes the scope of the exemption clear." *Ante,* at 2668. If a debtor wishes to exempt property in its entirety, for example, the Court counsels her to write "full fair market value (FMV)" or "100% of FMV" in Schedule C's value-of-claimed-exemption column. *Ante,* at 2668 (internal quotation marks omitted). See also Tr. of Oral Arg. 6–7, 26–29; *In re Hyman,* 967 F.2d 1316, 1319–1320, n. 6 (C.A.9 1992) (Trustees must be able to assess the validity of an exemption from the face of a debtor's schedules.). Our decision in *Taylor v. Freeland & Kronz,* the Court notes, is instructive. In *Taylor,* the debtor recorded the term "$ *unknown*" as the value of a claimed exemption, which, the Court observes, raised a "warning fla[g]" because the value ***808** "was *not* plainly within the limits the Code allows." *Ante,* at 2666.

True, a debtor's schedules must give notice sufficient to cue the trustee that an objection may be in order. But a "warning flag" is in the eye of the beholder: If a debtor lists identical amounts as the market value of exempted

property and the value of her claimed exemption, she has, *on the face of her schedules,* reclaimed the entire asset just as surely as if she had recorded "100% of FMV" in Schedule C's value-of-claimed-exemption column. See Brief for Respondent 36. See also 9 Collier ¶ 4003.03[3], p. 4003–14 ("*Only* when a debtor's schedules specifically value the debtor's interest in the property at an amount *higher* than the amount claimed as exempt can it be argued that a part of the ****2677** debtor's interest in property has not been exempted." (emphasis added)).

In this case, by specifying $10,718 as both the current market value of her kitchen equipment and the value of her claimed exemptions, Reilly gave notice that she had reclaimed the listed property in full. See *supra,* at 2670 – 2672. To borrow the Court's terminology, Reilly waved a "warning flag" that should have prompted Schwab to object if he believed the equipment could not be reclaimed in its entirety because its value exceeded the statutory cap. 534 F.3d, at 179. See 4 Collier ¶ 522.05[2][b], p. 522–33 ("Normally, if a debtor lists an asset as having a particular value in the schedules and then exempts that value, the schedules should be read as a claim of exemption for the entire asset, to which the trustee should object if the trustee believes the asset has been undervalued.").

Training its attention on trustees' needs, moreover, the Court overlooks the debtor's plight. As just noted, the Court counsels debtors wishing to exempt an asset in full to write "100% of FMV" or "full FMV" in the value-of-claimed-exemption column. But a debtor following the instructions that accompany Schedule C would consider such a response nonsensical, for those instructions direct her to "state the ***809** *dollar value* of the claimed exemption in the space provided." Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule C, Instruction 5 (1991) (emphasis added). Chapter 7 debtors are often unrepresented. How are they to know they must ignore Schedule C's instructions and employ the "warning flag" described today by the Court, if they wish to trigger the trustee's obligation to object to their market valuation in a timely fashion? See *In re Anderson,* 377 B.R. 865, 875 (6th Cir. BAP 2007). [15]

C

Schwab finally urges that requiring timely objections to a debtor's market-value estimations "would give debtors a perverse incentive to game the system by undervaluing their assets." Brief for Petitioner 35; see Brief for United States as *Amicus Curiae* 27. The Court rejected an argument along these lines in *Taylor,* and should follow suit here. Multiple measures, *Taylor* explained, discourage undervaluation of property claimed as exempt. 503 U.S., at 644, 112 S.Ct. 1644. Among those measures: The debtor files her exemption claim under penalty of perjury. See Rule 1008. She risks judicial sanction for signing documents not well grounded in fact. Rule 9011. And proof of fraud subjects her to criminal prosecution, 18 U.S.C. § 152; extends the limitations period for filing objections to Schedule C, Rule 4003(b); and authorizes denial of discharge, 11 U.S.C. § 727(a)(4)(B). See also NACBA Brief 29–33 (detailing additional checks against inadequate or inaccurate filings).

***810** Furthermore, the objection procedure is itself a safeguard against debtor undervaluation. If a trustee suspects that the market value of property claimed as exempt may exceed a debtor's estimate, he should do just what Rule 4003(b) prescribes: "[F]ile an objection ... within 30 days after the meeting of creditors."

****2678** * * *

For the reasons stated, I would affirm the Third Circuit's judgment.

***811** APPENDIX

IN RE Reilly, Nadejda Case No.

Debtor(s)

SCHEDULE B - PERSONAL PROPERTY

TYPE OF PROPERTY	N O N E	DESCRIPTION AND LOCATION OF PROPERTY	H W J C	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
1. Cash on hand	X			
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, credit, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives		Account no. [redacted], business account at PNC Bank, Hazleton, PA. Name on account, [redacted] Personal checking account of debtor with PNC Bank, Hazleton, PA acct. no. [redacted]		
3. Security deposits with public utilities, telephone companies, landlords, and others	X			
4. Household goods and furnishings, including audio, video, and computer equipment	X			
5. Books, pictures and other art objects, antiques, stamp, coin, record, tape, compact disc, and other collections or collectibles		Pictures, cassette, other personal property for child.		
6. Wearing apparel		Clothing.		
7. Furs and jewelry		Jewelry		
8. Firearms and sports, photographic, and other hobby equipment	X			
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	X			
10. Annuities. Itemize and name each issuer.	X			
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.		Pension fund with International Union Industry.		
12. Stock and interests in incorporated and unincorporated businesses. Itemize.	X			
13. Interests in partnerships or joint ventures. Itemize.	X			
14. Government and corporate bonds and other negotiable and non-negotiable instruments.	X			
15. Accounts receivable.	X			
16. Alimony, maintenance, support and property settlements to which the debtor is or may be entitled. Give particulars.	X			
17. Other liquidated debts owing debtor including tax refunds. Give particulars.	X			

IN RE Reilly, Nadejda Case No.

Debtor(s)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	N O N E	DESCRIPTION AND LOCATION OF PROPERTY	H W J C	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
18. Equitable or future interest, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property.	X			
19. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X			
20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	X			
21. Patents, copyrights, and other intellectual property. Give particulars.	X			
22. Licenses, franchises, and other general intangibles. Give particulars.	X			
23. Automobiles, trucks, trailers, and other vehicles and accessories		02 Honda CRV, V.I.N. [redacted] title holder, American Honda Finance Corp., 470 Granby Rd., Ste. 2, S. Hadley, MA 01075.		12,347.00
24. Boats, motors, and accessories	X			
25. Aircraft and accessories	X			
26. Office equipment, furnishings, and supplies.	X			
27. Machinery, fixtures, equipment, and supplies used in business.		See attached list of business equipment.		10,716.00
28. Inventory		Food goods on hand at restaurant of the debtor		3,000.00
29. Animals	X			
30. Crops - growing or harvested. Give particulars.	X			
31. Farming equipment and implements.	X			
32. Farm supplies, chemicals, and feed.	X			
33. Other personal property of any kind not already listed. Itemize.	X			
			TOTAL	26,063.00

2 continuation sheets attached

(Include amounts from any continuation sheets attached. Report total also on Summary of Schedules.)

Schedule B, attachment in answer to question 27 of the preceeding. Reilly.

TWO WORLDS BY FIRE EUROPEAN CATERING
AT
[redacted]
CONYNGHAM PA 18219
[redacted]

EQUIPMENT: Tax is not included.

		Paid	Today's Market
①	Coffee Maker ① used Air Pot Brewer	$45.00	$ 250
②	Soup Warmers ③ used Adcraft Black & Stainless steel	$270.00	$ 100
③	3 Bay Sink ① Used	$ 350.00	$ 100
④	Hand Washing sink ① used	Free	Free
⑤	Microwave oven ① Used Duke	$ 120.00	$ 25.00
⑥	Sandwich Grill ① used Star Panini Bella Ground	$ 1,897.40	$ 5
⑦	Hot Plate ① used	$ 378.00	$ 1
⑧	Convection Oven ① used Single Deck - US Range	$ 925.00	$ 200

TWO WORLDS' EQUIPMENT

			Paid.	Today's Market
⑩	Refrigerator 32" ① used Turbo Air 2 sliding door		$ 1,775.00	$ 600.00
⑪	56" Refrigerator ① used Turbo Air 2 sliding door		$ 1,975.00	$ 800.00
⑫	Coffee table	used	$ 55.00	$ 30.00
⑫a	Grill table	used	$ 150.00	$ 50.00
⑬	Refrigerated Pastry Case ① Used Federal		$ 950.00	$ 400.00 or C.
⑭	Round Table	③ Used	$ 100.00	$ 50.00
⑮	Chairs BISTRO CHAIRS FRANCE	⑨ used	$ 458.00	$ 150.00
⑯	Barstools SWIVEL BACKRESTS	⑥ used	$ 476.92	$ 160.00
⑰	Holding Shelves	③ used	$ 160.00	$ 80.00
⑱	High Chair Wooden Mahogany	① used	~~$ 360.00~~ 38.16	$ 18.00
⑲	Cash Register	① used	$ 148.00	$ 70.00
⑳	Slicer	① Used	$ 150.00	$ 75.00
㉒	Holding Rack Strips		$ 185.00	$ 100.00
㉓	Dishes, Flatware Pots		$ 300.00	$ 100.00

FINE EUROPEAN CATERING
AT [redacted] Paid
EQUIPMENT
① 3-Bay Sink ① Used $700.00
② Hand Dishwasher ① Used $36.00
③ Dough Roller-Sheeter ① Used $2,665.00
④ Gas stove ① Used $1,000.00
US Range ① Used
⑤ Hood ① Used $2,000.00
⑥ Ref-Freezer ① Used $2200.00
⑦ Dough Mixer ① Used $2300
⑧ Fire suppression System $1,500.00

IN RE Reilly, Nadejda Case No.
Debtor(s)

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

SCHEDULE B - PERSONAL PROPERTY			
Account no. [redacted], business account at PNC Bank, Hazleton, PA. Name on account [redacted]	11 USC § 522(d)(5)	21.00	21.00
Personal checking account of debtor with PNC Bank, Hazleton, PA acct. no. [redacted]	11 USC § 522(d)(5)	5.00	5.00
Pictures, posters, other personal property for child.	11 USC § 522(d)(3)	1,000.00	1,000.00
Clothing.	11 USC § 522(d)(3)	1,000.00	1,000.00
Jewelry	11 USC § 522(d)(4)	100.00	100.00
Pension fund with International Union Industry.	11 USC § 522(d)(10)(E)	57.92	57.92
02 Honda CRV, V.I.N. [redacted] title holder, American Honda Finance Corp., 470 Granby Rd., Ste. 2, S. Hadley, MA 01075.	11 USC § 522(d)(2)	2,960.00	13,387.00
See attached list of business equipment.	11 USC § 522(d)(5) 11 USC § 522(d)(6)	1,850.00 8,864.00	10,714.00
Food goods on hand at restaurant of the debtor	11 USC § 522(d)(5) 11 USC § 522(d)(5)	1,331.00 975.00	2,306.00

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The 1994 version of 11 U.S.C. § 522(d)(5) allowed debtors to exempt an "aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the [homestead or burial plot] exemption provided under [§ 522(d)(1)]." In 2004, pursuant to § 104(b)(2), the Judicial Conference of the United States published notice that § 522(d)(5) would impose the $975 and $9,250 ($10,225 total) limits that governed Reilly's April 2005 petition. See 69 Fed.Reg. 8482 (Table). In 2007 and 2010 the limits were again increased. See 72 *id.*, at 7082 (Table); 75 *id.*, at 8748 (Table).

2 Schwab concedes that the appraisal occurred before Rule 4003(b)'s 30–day window for objecting to the claimed exemptions had passed. See Brief for Petitioner 15.

3 Reilly's desire to avoid the equipment's auction is understandable because the equipment, which Reilly's parents purchased for her despite their own financial difficulties, has " 'extraordinary sentimental value.' " Brief for Respondent 5 (quoting App. 152a–153a). But the sentimental value of the property cannot drive our decision in this case, because sentimental value is not a basis for construing the Bankruptcy Code. Because the Code imposes limits on exemptions,

many debtors who seek to take advantage of the Code are, no doubt, put to the similarly difficult choice of parting with property of "extraordinary sentimental value." *Id.*, at 152a–153a; see *infra,* at 2667 – 2669.

4 Compare *In re Williams,* 104 F.3d 688, 690 (C.A.4 1997) (holding that interested parties have no duty to object to a claimed exemption where the dollar amount the debtor assigns the exemption is facially within the range the Code allows for the type of property in issue); *In re Wick,* 276 F.3d 412 (C.A.8 2002) (employing reasoning similar to *Williams,* but stopping short of articulating a clear rule), with *In re Green,* 31 F.3d 1098, 1100 (C.A.11 1994) ("[A] debtor who exempts the entire reported value of an asset is claiming the [asset's] 'full amount,' whatever it turns out to be"); *In re Anderson,* 377 B.R. 865 (6th Cir. BAP 2007) (similar); *In re Barroso–Herrans,* 524 F.3d 341, 344 (C.A.1 2008) (focusing on "how a reasonable trustee would have understood the filings under the circumstances"); and *In re Hyman,* 967 F.2d 1316 (C.A.9 1992) (applying an analogous totality-of-the-circumstances approach).

5 The forms, rules, treatise excerpts, and policy considerations on which the dissent relies, see *post,* at 2671 – 2678 (opinion of GINSBURG, J.), must be read in light of the Bankruptcy Code provisions that govern this case, and must yield to those provisions in the event of conflict.

6 Bankruptcy Rule 4003 specifies the time within which the debtor must file Schedule C, as well as the time within which interested parties must object to the exemptions claimed thereon.

Schedule C—Property Claimed as Exempt

Description of Property	Specify Law Providing Each Exemption	Value of Claimed Exemption	Current Market Value of Property Without Deducting Exemptions
Schedule B Personal Property			
.....	.....	.....	.....
See attached list of business equipment.	11 U.S.C. § 522(d)(6)	1,850	10,718
	11 U.S.C. § 522(d)(5)	8,868	

7 Schwab's statutory duty to object to the exemptions in this case turns solely on whether the value of the property claimed as exempt exceeds statutory limits because the parties agree that Schwab had no cause to object to Reilly's attempt to claim exemptions in the equipment at issue, or to the applicability of the Code provisions Reilly cited in support of her exemptions.

8 The dissent's approach suffers from a similar flaw, and misstates our holding in critiquing it. See *post,* at 2669 – 2670 (asserting that by refusing to subject "challenges to the debtor's valuation of exemptible assets" to the "30–day" objection period in Federal Rule of Bankruptcy Procedure 4003(b), we "drastically reduc[e] Rule 4003's governance"). Challenges to the valuation of what the dissent terms "exemptible assets" are not covered by Rule 4003(b) in the first place. *Post,* at 2669. Challenges to "property claimed as exempt" as defined by the Code are covered by Rule 4003(b), but in this case that property is not objectionable, so the lack of an objection did not violate the Rule. Our holding is confined to this point. Accordingly, our holding does not "reduc[e] Rule 4003's governance," nor does it express any judgment on what constrains objections to the type of "market value" estimates, *post,* at 2669, the dissent equates with the dollar value a debtor assigns the "property claimed as exempt" as defined by the Code, see, *e.g., post,* at 2670, 2672.

9 Treating such claims as unobjectionable is consistent with our precedents. See, *e.g.*, *Rousey,* 544 U.S., at 325, 125 S.Ct. 1561. It also accords with bankruptcy court decisions holding that where, as here, a debtor claims an exemption pursuant to provisions that (like § 522(d)(6)) permit the debtor to exclude from the estate only an "interest" in certain property, the "property" that becomes exempt absent objection, § 522(*l*), is only the "partial interest" claimed as exempt and not "the asset as a whole," *e.g.*, *In re Soost,* 262 B.R. 68, 72 (8th Cir. BAP 2001).

10 The dissent's approach does not avoid these concerns. The dissent insists that "a debtor's market valuation [of the equipment in which she claims an exempt interest] is an essential factor in determining the nature of the 'interest' [the] debtor lists as exempt" (and thus in determining whether the claimed exemption is objectionable), because "without comparing [the debtor's] market valuation of the equipment to the value of her claimed exemption" the trustee "could

not comprehend whether [the debtor] claimed a monetary or an in-kind 'interest' in [the] equipment." *Post,* at 2674, n. 9. This argument overlooks the fact that there is another way the trustee could discern from the "face of the debtor's filings," *post,* at 2673, n. 6, whether the debtor claimed as exempt a "monetary or an in-kind 'interest' in" her equipment, *post,* at 2674, n. 9: The trustee could simply consult the Code provisions the debtor listed as governing the exemption in question. Here, those provisions, §§ 522(d)(5) and (6), expressly describe the exempt interest as an "interest" "not to exceed" a specified dollar amount. Accordingly, it was entirely appropriate for Schwab to view Reilly's schedule entries as exempting an interest in her business equipment in the (declared and unobjectionable) amounts of $1,850 and $8,868. Viewing the entries otherwise, *i.e.,* as exempting the equipment in kind or in full no matter what its dollar value, would unnecessarily treat the exemption as violating the limits imposed by the Code provisions that govern it, as well as ignore the distinction between those provisions and the provisions that "authoriz [e] reclamation of the property in full without any cap on value," *post,* at 2672, n. 5. And it would do all of this based on information (identical dollar amounts in columns 3 and 4 of Schedule C) that Schwab and one of his *amici* say often result from a default setting in commercial bankruptcy software. See Reply Brief for Petitioner 15; Brief for National Association of Bankruptcy Trustees 13, n. 15.

11 The dissent's argument that the estimate plays a greater role, and is "vital," *post,* at 2673, to determining whether the value a debtor assigns the "property claimed as exempt" (here, an interest in certain business equipment) is objectionable, see *post,* at 2673 – 2674, lacks statutory support because the governing Code provisions phrase the exemption limit as a simple dollar amount. The dissent's view, see *post,* at 2672 – 2674, might be plausible if the Code stated that the debtor could exempt an interest in her equipment "not to exceed" a certain *percentage* of the equipment's market value, because then it might be necessary to "compar [e] [the debtor's] market valuation of the equipment to the value of her claimed exemption" to determine the exemption's propriety. *Post,* at 2674, n. 9. But the Code does not phrase the exemption cap in such terms. Moreover, even accepting that the equivalent Schedule C entries the dissent relies upon represent a claim to exempt an asset's full value, the dissent does not explain why this equivalence precludes a trustee from relying on the dollar amount the debtor expressly assigns both entries. According to the dissent, a trustee faced with such entries should assume not only that the debtor reclaims from the estate what she believes to be the full value of an asset in which the Code allows her to exempt an interest "not to exceed" a certain dollar amount, *e.g.,* § 522(d)(6), but *also* that the debtor would continue to claim the asset's full value as exempt even if that value exceeds her estimate to a point that would cause her claim to violate the Code. The schedule entries themselves do not compel this assumption, and the Code provisions they invoke undercut it. The evidence that the debtor in this case would have chosen that course is external to her exemption schedule. See, *e.g., supra,* at 2658 (citing statements in Reilly's motion to dismiss); *post,* at 2671, n. 3, 2672 (same). And in the ordinary case, particularly if the equivalent entries the dissent relies upon result from a software default, see n. 10, *supra,* there is no reason to assume that a debtor would want to violate the Code or jeopardize other exemptions if her market value estimate turns out to be wrong.

12 See also Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 442; Act of Mar. 2, 1867, ch. 176, § 11, 14 Stat. 521, amended by Act of June 22, 1874, 18 Stat., pt. 3, p. 182; Bankruptcy Act of July 1, 1898, ch. 541, § 6, 30 Stat. 548, 11 U.S.C. § 24 (1926 ed.); Chandler Act, ch. 575, § 1, 52 Stat. 847, 11 U.S.C. § 24 (1934 ed., Supp. IV); § 522 (1976 ed., Supp. II); § 522 (2000 ed. and Supp. V).

13 See also General Orders and Forms in Bankruptcy, Official Form 1, Schedule B (5) (1898); Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule B–4 (1971).

14 The precise reason for the amendment is unclear. See Communication from THE CHIEF JUSTICE of the United States Transmitting Amendments to the Federal Rules of Bankruptcy Procedure Prescribed by the Court, Pursuant to 28 U.S.C.2075, H.R. Doc. No. 102–80, p. 558, reprinted in 11 Bankruptcy Rules Documentary History (1990–1991) (referencing only the fact of the amendment). It may have been to consolidate and reconcile the separate forms debtors were previously required to file in Chapter 7 and Chapter 13 cases, see, *e.g., In re Beshirs,* 236 B.R. 42, 46–47 (Bkrtcy.D.Kan.1999), or simply to make it easier for trustees to evaluate whether certain assets were viable candidates for liquidation. Whatever the case, it did not result from statutory changes to the Code provisions that govern this dispute.

15 Because the Code provisions we rely upon to resolve this case do not obligate trustees to object under Rule 4003(b) to a debtor's estimate of the market value of an asset in which the debtor claims an exempt interest, our analysis does not depend on whether the schedule of "property claimed as exempt" (currently Schedule C) calls for such an estimate or not. We engage the point only because Reilly suggests that the 1991 schedule revisions requiring debtors to provide such an estimate on the schedule of "property claimed as exempt" means that the estimate must be viewed as part of the exemption and is therefore subject to the Rule. See Brief for Respondent 40–41. The dissent ranges far beyond even this unavailing argument in suggesting that the market value estimate served as "an essential factor in determining the nature of the 'interest' a debtor lists as exempt," *post,* at 2674, n. 9, even before 1991 when that estimate did *not* appear

on the schedule of "property claimed as exempt" (former Schedule B–4), but rather appeared on former "Schedule B–2," *post,* at 2673, n. 6, which merely listed the debtor's "personal property" as of the date of the petition filing. Interim Fed. Rule Bkrtcy. Proc. Official Form 6, Schedules B–2, B–4 (1979).

16 See, *e.g., Barroso–Herrans,* 524 F.3d, at 345 (explaining that Schedule C entries listing the value of a claimed exemption as "unknown," "to be determined," or "100%" are " 'red flags to trustees and creditors,' and therefore put them on notice that if they do not object, the whole value of the asset—whatever it might later turn out to be—will be exempt" (quoting 1 Collier on Bankruptcy ¶ 8.06[1][c][ii] (rev. 15th ed.2007); citation and some internal quotation marks omitted)). The dissent concedes that a debtor's exemption schedule "must give notice sufficient to cue the trustee that an objection may be in order," and rightly observes that the sufficiency of a particular cue, or " 'warning flag,' " may lie "in the eye of the beholder." *Post,* at 2676. In this case, however, the Code itself breaks the tie between what might otherwise be two equally tenable views.

17 Reilly insists that our conclusion should nonetheless be avoided because "procedures that burden the debtor's exemption entitlements, like those that impair a debtor's discharge generally, are to be construed narrowly." Brief for Respondent 33 (citing *Kawaauhau v. Geiger,* 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)). This argument misses the mark for two reasons. First, the only burdens our conclusion imposes are burdens the Code itself prescribes, specifically, the burdens the Code places on debtors to state their claimed exemptions accurately and to conform such claims to statutory limits. Second, and in any event, *Geiger* and the other cases Reilly cites emphasize in the discharge context the importance of limiting exceptions to discharge to "those plainly expressed," a principle that supports our approach here. *Ibid*. (internal quotation marks omitted).

18 We disagree that Reilly's approach to exemptions would more efficiently dispose of competing claims to the asset. On Reilly's view, a trustee would be encouraged (if not obliged) to object to claims to exempt a specific dollar amount of interest in an asset whenever the value of the exempt interest equaled the debtor's estimate of the asset's market value. Where the debtor genuinely intended to claim nothing more than the face value of the exempt interest (which is rational if a debtor wishes to ensure that his aggregate exemptions remain within statutory limits), such an approach would engender needless objections and litigation, particularly if the equation that would precipitate the objection often results from a default software entry. See Reply Brief for Petitioner 15; Brief for National Association of Bankruptcy Trustees as *Amicus Curiae* 13, n. 15.

19 The dissent's observations about the poor fit between our admonition and a form entry calling for a dollar amount, see *post,* at 2677, simply reflect the tension between the Code's definition of "property claimed as exempt" (*i.e*., an interest, not to exceed a certain dollar amount, *in* Reilly's business equipment) and Reilly's attempt to convert into a dollar value an improper claim to exempt the equipment itself, " 'whatever [its value] turns out to be,' " *In re Reilly,* 534 F.3d 173, 178–179 (C.A.3 2008). As the dissent concedes, "[s]ection 522(d) catalogs exemptions of two types." *Post,* at 2672, n. 5. "Most exemptions—and all of those Reilly invoked—place a monetary limit on the value of the property the debtor may reclaim," and such exemptions are distinct from those made pursuant to Code provisions that "authoriz[e] reclamation of the property in full without any cap on value." *Ibid*. Nothing about Reilly's schedule entries establishes that Schwab should have treated Reilly's claim for $10,718, an unobjectionable amount under the Code provisions she expressly invoked, as an objectionable claim for thousands of dollars more than those provisions allow, or as a claim for an uncapped exemption under Code provisions she did not invoke and the dissent admits are "not at issue here." *Ibid*.

20 A trustee will not always file an objection. As the United States observes, Schwab did not do so in this case with respect to certain assets (perishable foodstuffs from Reilly's commercial kitchen) that could not be readily sold. See Brief for United States as *Amicus Curiae* 28, n. 7 (explaining that Schwab could have objected to Reilly's claim of a wildcard exemption for an interest in the food totaling $2,306 because this claim, combined with her wildcard claims for an interest of $8,868 in her business equipment and interests totaling $26 in her bank accounts, placed the total value of the interests she claimed exempt under the wildcard provision $975 above then-applicable limits).

21 Reilly's clouded-title argument arises only if one accepts her flawed conception of the exemptions in this case. According to Reilly, "once the thirty-day deadline passed without objection" to her claim, she was "entitled to know that she would emerge from bankruptcy with her cooking equipment intact." Brief for Respondent 57. There are two problems with this argument. First, it assumes that the property she claimed as exempt was the full value of the equipment. That assumption is incorrect for the reasons we explain. Second, her argument assumes that a claim to exempt the full value of the equipment would, if unopposed, entitle her to the equipment itself as opposed to a payment equal to the equipment's full value. That assumption is at least questionable. Section 541 is clear that title to the equipment passed to Reilly's estate at the commencement of her case, and §§ 522(d)(5) and (6) are equally clear that her reclamation right is limited to exempting an interest in the equipment, not the equipment itself. Accordingly, it is far from obvious that the Code would

"entitle" Reilly to clear title in the equipment even if she claimed as exempt a "full" or "100%" interest in it (which she did not). Of course, it is likely that a trustee who fails to object to such a claim would have little incentive to do anything but pass title in the asset to the debtor. But that does not establish the statutory entitlement Reilly claims.

1 Reilly's Schedules B and C, and the inventory she attached to the forms, are reproduced in an Appendix to this opinion.

2 Unlike exemptions that describe the specific property debtors may preserve, *e.g.,* 11 U.S.C. § 522(d)(6) (debtor may exempt her "aggregate interest, not to exceed [$1,850] in value, in any implements, professional books, or tool[s] of [her] trade"), the "wildcard" exemption permits a debtor to shield her "aggregate interest in any property" she chooses, up to a stated dollar limit, § 522(d)(5); *In re Smith,* 640 F.2d 888, 891 (C.A.7 1981).

3 Schwab informed Reilly at the meeting of creditors that he planned to sell all of her business equipment. App. 137a. She promptly moved to dismiss her bankruptcy petition, stating that her "business equipment ... is necessary to her livelihood and art, and was a gift to her from her parents." *Id.,* at 138a. She "d[id] not desire to continue with the bankruptcy," she added, because "she wishe[d] to continue in restaurant and catering as her occupation." *Ibid.* The Bankruptcy Court denied Reilly's dismissal motion simultaneously with Schwab's motion to sell Reilly's equipment. *Id.,* at 149a–170a.

4 In 2008, this prescription was recodified without material change and designated Rule 4003(b)(1).

5 Section 522(d) catalogs exemptions of two types. Most exemptions—and all of those Reilly invoked—place a monetary limit on the value of the property the debtor may reclaim. See, *e.g.,* § 522(d)(2) ("motor vehicle"); § 522(d)(3) ("household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments"); § 522(d)(4) ("jewelry"). For certain exemptions not at issue here, the Bankruptcy Code authorizes reclamation of the property in full without any cap on value. See, *e.g.,* § 522(d)(7) ("unmatured life insurance contract"); § 522(d)(9) ("[p]rofessionally prescribed health aids"); § 522(d)(11)(A) ("award under a crime victim's reparation law").

6 In support of its view that market value is not relevant to determining the "property claimed as exempt" for purposes of Rule 4003(b)'s timely objection mandate, the Court observes that Schedule C did not require the debtor to list this information until 1991. *Ante,* at 2664 – 2665. Prior to 1991, however, debtors recorded market value on a different schedule. See Interim Fed. Rule Bkrtcy. Proc. Official Form 6, Schedule B–2 (1979) (requiring debtor to list the "[m]arket value of [her] interest [in personal property] without deduction for ... exemptions claimed"). Trustees assessing the "property claimed as exempt," therefore, have always been able, from the face of the debtor's filings, to compare the value of the claimed exemption to the property's declared market value. See Brief for National Association of Consumer Bankruptcy Attorneys et al. as *Amici Curiae* 34.

7 By authorizing exemption of assets that a debtor would want to keep in kind, such as her jewelry and car, but limiting the exemptible value of this property, Congress struck a balance between debtors' and creditors' interests: Debtors can reclaim items helpful to their fresh start after bankruptcy, but only if those items are of modest value. Assets of larger worth, however, are subject to liquidation so that creditors may obtain a portion of the item's value. Cf. *In re Price,* 370 F.3d 362, 378 (C.A.3 2004) ("[B]ankruptcy law is bilateral, replete with protections and policy considerations favoring both debtors and creditors.").

8 The significance of market value is what differentiates capped exemptions from uncapped ones that permit debtors to exempt certain property in kind regardless of its worth. See *supra,* at 2672, n. 5. For uncapped exemptions, the nature of the property the debtor has reclaimed is clear: If the exemption is valid, the debtor gets the asset in full every time. For capped exemptions, however, market value is a crucial component in determining whether the debtor gets the item itself or a sum of money representing a share of the item's liquidation value. Reading Bankruptcy Rule 4003(b) to require objections to valuation thus does not, as the Court contends, "*elid[e]* the distinction" between capped and uncapped exemptions, *ante,* at 2663 (emphasis added), but instead *accounts for* that distinction.

9 Suggesting that this interpretation of Rule 4003(b) "lacks statutory support," *ante,* at 2664, n. 11, the Court repeatedly emphasizes that the Bankruptcy Code defines the "property claimed as exempt," to which a trustee must object, as "the debtor's 'interest'—up to a specified dollar amount—in the assets described in [capped exemption] categor[ies]," *ante,* at 2661 – 2662; see, *e.g., ante,* at 2662 – 2663; *ibid.,* n. 9; *ante,* at 2668, n. 19. But the commonly understood definition of a property "interest" is "[a] legal share in something; all or part of a legal or equitable claim to or right in property .... Collectively, the word includes any aggregation of [such] rights." Black's Law Dictionary 828 (8th ed.2004). Schwab, therefore, could not comprehend whether Reilly claimed a monetary or an in-kind "interest" in her kitchen equipment without comparing her market valuation of the equipment to the value of her claimed exemption. See *supra,* at 2673 – 2674. In line with the statutory text, a debtor's market valuation is an essential factor in determining the nature of the "interest" a debtor lists as exempt. Bankruptcy "forms, rules, treatise excerpts, and policy considerations," *ante,* at 2660, n. 5, corroborate, rather than conflict with, this reading of the Code.

10 Schwab states that "[c]ases in which there are assets to administer ... can take 'one to four years' to complete." Brief for Petitioner 32 (quoting Dept. of Justice, U.S. Trustee Program, Preliminary Report on Chapter 7 Asset Cases 1994 to 2000, p. 7 (June 2001)).

11 Money generated by liquidation of an asset will often be of less utility to a debtor, who will have to pay more to replace the item. See H.R.Rep. No. 95–595, p. 127 (1977) (noting that "household goods have little resale value" but "replacement costs of the goods are generally high").

12 This concern is questionable in light of the prevailing practice, for, as earlier noted, valuation objections are the most common Rule 4003(b) challenge. See *supra,* at 2670. By lopping off valuation disagreements from the timely objection requirement, see, *e.g., ante,* at 2662, n. 8, the Court so severely shrinks the Rule's realm that this question arises: Why are trustees granted a full 30 days to lodge objections? Under the Court's reading of the Rule, trustees need only compare a debtor's Schedule C to the text of the exemption prescriptions to assess an exemption claim's facial validity, with no further investigation necessary. That comparison should take no more than minutes, surely not a month.

13 Trustees, it bears noting, historically had valuation duties far more onerous than they have today. Rule 4003's predecessor required trustees in the first instance, rather than debtors, to estimate the market value of property claimed as exempt. See Rule 403(b) (1975). Trustees had to provide this valuation to the court within 15 days of their appointment. See *ibid.*

14 The leading bankruptcy treatise supplies an illustrative valuation objection:
"*[Name of Trustee],* the duly qualified and acting trustee of the estate of the debtor, would show the court the following:
"1. The debtor is not entitled under [the automobile exemption] to an interest of more than $3,225 in an automobile. The automobile claimed by debtor as exempt ... has a value substantially greater than $3,225.
....
"WHEREFORE Trustee prays that the court determine that debtor is not entitled to ... the exemptio[n] claimed by him, that the [property claimed as exempt] which [is] disallowed be turned over to the trustee herein as property of the estate, and that he have such other and further relief as is just." 13A Collier § CS17.14, p. CS17–22 (rev. 15th ed.2009). See also Rules 9013–9014.

15 Trustees, in contrast, are repeat players in bankruptcy court; if this Court required timely objections to market valuation, trustees would, no doubt, modify their practices in response. See 1 Collier ¶ 8.06 [1][c][ii], p. 8–75 (rev. 15th ed.2009) ("Since *Taylor* [*v. Freeland & Kronz,* 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992)], trustees rarely fail to closely scrutinize vague exemption claims."). Moreover, because valuation objections are already the norm, see *supra,* at 2670, and 2675, n. 12, few trustees would have to adjust their behavior.

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Bolduc v. Riches, Conn.Super., February 6, 2003

222 Conn. 361
Supreme Court of Connecticut.

SHAWMUT BANK, N.A.
v.
VALLEY FARMS, et al.

No. 14411.
|
Argued Feb. 11, 1992.
|
Decided June 9, 1992.

Synopsis

Lender applied for writ of replevin of farm property in possession of borrowers. The Superior Court, Judicial District of Tolland, Scheinblum, J., granted the application, and borrowers appealed. The Supreme Court, Borden, J., held that: (1) attachment exemption for tools of natural person did not apply to partnership property, and (2) replevin statutes, as applied by trial court, did not violate due process.

Affirmed.

West Headnotes (4)

[1] Partnership
Attachment or Garnishment Against Partnership or Partners

Statutory exemptions from postjudgment remedies, and therefore from prejudgment attachment, applied only to property of natural persons, and not to property held by partnership. C.G.S.A. § 52–352b.

7 Cases that cite this headnote

[2] Creditors' Remedies
Persons entitled to attachment

For purpose of statute protecting certain property from postjudgment remedies, and therefore from prejudgment attachment, "natural person" means human being, and not artificial or juristic person. C.G.S.A. § 52–352b.

9 Cases that cite this headnote

[3] Constitutional Law
Invalidity as applied

Supreme Court views question of constitutionality of statutes at issue as applied under facts of case, and is not required to gauge constitutionality of statutes without regard to particular facts or interpretation placed on statutory language by trial court.

4 Cases that cite this headnote

[4] Constitutional Law
Replevin

Replevin
Statutory provisions and remedies

Replevin statute did not violate due process clause of Federal Constitution, even though order of replevin was obtained in absence of exigent circumstances; property to be replevied was properly identified, defendants had opportunity to challenge amount and form of bond before seizure, replevin ordered did not issue until after defendants had full opportunity for evidentiary hearing, and plaintiff had preexisting security interest in property sought to be replevied. C.G.S.A. §§ 52–515 et seq., 52–278a to 52–278h; U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

Attorneys and Law Firms

****652 *361** Richard P. Weinstein, with whom was Jennifer Jaff, for appellants (defendants).

Robert M. Dombroff, with whom, on the brief, was Stephen W. Aronson, for appellee (plaintiff).

Before PETERS, C.J., and CALLAHAN, COVELLO, BORDEN and BERDON, JJ.

Opinion

BORDEN, Associate Justice.

The principal issue in this appeal is the constitutionality, under the due process clause of the fourteenth amendment to the United States constitution, of our statutory scheme regarding the action of ***362** replevin codified in General Statutes § 52–515 et seq. The defendant partnerships, Valley Farms, Maple Shade Farms, Starr Farms and REM Motor Rental, appeal[1] from the judgment of the trial court granting the application of the plaintiff, Shawmut Bank, N.A.,[2] for a prejudgment remedy of replevin of certain property of the defendants. The defendants claim that: (1) the statutory scheme authorizing replevin[3] violates the ***363** federal due process clause; and (2) the property sought to be replevied is exempt ****653** from execution and, therefore, from replevin by way of a prejudgment remedy. We affirm the judgment of the trial court.

For purposes of this appeal, the following facts are undisputed. The defendants operate farms in Connecticut. Pursuant to a series of documents consisting of certain letter agreements, demand promissory notes, security agreements and guaranties executed by the defendants in 1985, 1986 and 1991, the plaintiff loaned the defendants $1,200,000, and the defendants granted the plaintiff a security interest in all the defendants' assets, including equipment, inventory, livestock and feed. The second of the letter agreements provided that, upon default, the defendants would voluntarily surrender possession of the collateral to the plaintiff. Despite the defendants' default on repayment of the loan, they refused to comply with the plaintiff's request for possession of the collateral. The plaintiff thereupon brought this action.

The plaintiff filed an application for a prejudgment remedy alleging that there was probable cause to believe that a judgment would be rendered against the defendants, and sought an order of the court "directing that the following prejudgment remedy be issued to secure the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars, to wit: To replevy the goods and chattels described on Exhibit AA attached hereto." Exhibit AA listed, in general terms, all the livestock, feed and equipment owned by the four defendants, and also listed, by model year and serial number, certain equipment owned by defendants Valley Farms and REM Motor Rental. Attached to the application was an eight page affidavit of Kevin C. Murphy, a vice president of the plaintiff, describing the transactions between the plaintiff and the defendants. Attached to the affidavit were copies of the various letter ***364** agreements, promissory notes, security agreements, and guaranties of the defendants. Also attached to the application was an unsigned writ, summons and complaint alleging, inter alia, that the defendants had wrongfully refused to turn the collateral over to the plaintiff, and requesting, in the prayer for relief, immediate possession of the collateral, monetary damages if the collateral could not be replevied to the plaintiff, damages for wrongful detention of the collateral, attorneys' fees, and other equitable relief.

Pursuant to an order of the trial court, the court conducted an evidentiary hearing on July 29, 1991. After the hearing, the trial court found probable cause that judgment would be rendered in the matter in favor of the plaintiff, and also found the total indebtedness of the defendants to the plaintiff to be $1,080,000. The court did not, however, issue an order of replevin. Instead, it continued the case for two weeks in order for the parties to file briefs on the defendants' claim that the property was exempt from a prejudgment remedy. Also, in response to an argument of the ****654** defendants, the court ruled that the plaintiff's application was defective because it lacked an affidavit of the actual value of the property to be replevied and a proper bond. See General Statutes § 52–518 as set out in footnote 3, supra. The court instructed the plaintiff to amend its application in order to remedy these defects.

The parties returned to court on August 12, 1991. Prior to that date, the plaintiff had filed an affidavit evaluating the collateral at $3,150,000, and a bond in the amount of $6,300,000, twice the value of the collateral. After oral arguments, the trial court granted the plaintiff's application. It ordered that the plaintiff could replevy the collateral to the value of $3,150,000.[4] This appeal followed.

***365** I

[1] We first consider the defendants' claim, rejected by the trial court, that the property sought to be replevied was exempt from prejudgment remedy attachment because it constituted "[t]ools, books, instruments and farm animals

which are necessary to the exemptioner in the course of his or her occupation or profession." [5] General Statutes § 52–352b(b). [6] We agree with the trial *366 court and the plaintiff that the exemptions from post-judgment remedies, and therefore from prejudgment attachment, afforded by General Statutes § 52–352b, apply only to "property of any natural person" under that statute and, therefore, do not apply to property of partnerships, like the defendants. [7]

[2] Section 52–352b, which is part of chapter 906, entitled "Postjudgment Procedures," exempts from postjudgment procedures certain "property of any natural person." Although the term "natural person" is not defined in chapter 906, it clearly **655 means a human being, as opposed to an artificial or juristic entity. First, the types of property that are exempt under § 52–352b, other than the "[t]ools, books, instruments and farm animals" referred to in subsection (b), are the types normally associated with individuals, not legal entities. [8] Furthermore, the legislature has consistently used the term "natural person" in order to distinguish it from a partnership. See, e.g., General Statutes § 1–18a(c) (" 'Person' means natural person, partnership, association or society."); General Statutes § 33–374d(10) (" 'Person' means a natural person, company, partnership, foreign or domestic corporation, trust, unincorporated *367 organization, government or any other entity or political subdivision, agency or instrumentality of a government...."); General Statutes § 34–9(12) (" 'Person' means a natural person, partnership, limited partnership, foreign limited partnership, trust, estate, association or corporation."). Finally, except where a word or phrase has a technical meaning or has acquired "a peculiar and appropriate meaning in the law," a statutory word or phrase "shall be construed according to the commonly approved usage of the language." General Statutes § 1–1(a). Consistent with that rule of construction, "natural person" means "a human being as distinguished in law from an artificial or juristic person." Webster's Third New International Dictionary.

We are unpersuaded by the defendants' argument that excluding partnerships from the exemption of § 52–352b would "render the exemption meaningless as applied to the few remaining small family farms" because "every family that owns and operates a farm collectively could be deemed to be a partnership...." Unlike these defendants, who have chosen to operate their farms in the partnership form, others remain free to own their farm assets in individual or joint ownership forms and thereby retain the statutory exemption available to natural persons. See, e.g., *Gangl v. Gangl,* 281 N.W.2d 574 (N.D.1979) (family farm not a partnership). These defendants presumably saw some legal advantage to operating the farms as partnerships. Having done so, they must accept any legal disadvantage that arises from the limitation of § 52–352b to property owned by a natural person.

II

We turn, therefore, to the defendants' principal claim, namely, that the statutory scheme for replevin of goods *on its face* fails to satisfy due process of law. *368 The defendants identify three "procedural inadequacies in the statutory scheme" that, they argue, render the statutory scheme, and thus this replevin order, invalid: (1) an ex parte replevin is permitted upon a showing only of probable cause rather than of exigent circumstances; (2) General Statutes § 52–521 provides for a challenge to the amount and form of the bond only after the seizure has occurred; and (3) the statutes do not require that the property to be replevied be identified. Recognizing that, as the applicable statutes were interpreted and applied by the trial court in this case, each of these requirements was either met or was inapplicable, [9] the defendants argue that the statutes must be viewed facially, rather than as applied, because they "are unconstitutional in every application," and that, therefore, "the fact that the court was willing to give [the defendants] more process than the statutes authorize does not save the statutes from constitutional challenge." We disagree.

[3] First, we reject the contention that we are required to gauge the constitutionality of our replevin statutes on their face, **656 without regard to the particular facts of this case or the interpretation placed on the statutory language by the trial court. "The United States Supreme Court has noted that to mount a facial challenge to a statute, one must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an *369 'overbreadth' doctrine outside the limited context of the First Amendment. *Schall v. Martin,* [467 U.S. 253, 269 n. 18, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)]. *United States*

v. Salerno, 481 U.S. 739, 745, 753–55, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)." (Internal quotation marks omitted.) *State v. Ayala,* 222 Conn. 331, 344 n. 12, 610 A.2d 1162 (1992). This well established principle is consistent with the equally well established principles that " '[d]ue process is flexible and calls for such procedural protections as the particular situation demands' "; *Tedesco v. Stamford,* 222 Conn. 233, 242–43, 610 A.2d 574 (1992); and that we strive to read statutes so as to preserve, rather than to undermine, their constitutionality. *State v. Kane,* 218 Conn. 151, 156, 588 A.2d 179 (1991). We therefore view the question of the constitutionality of the statutes at issue as applied under the facts of this case. See *State v. Ayala,* supra. We conclude that the replevin statutes, as applied by the trial court to this case, comport with the requirements of due process of law.

[4] In support of their claim, the defendants offer no more than the bare assertion that the statutes at issue are unconstitutional under any conceivable set of circumstances. Indeed, the facts of this case belie that assertion, since the trial court, relying on its interpretation of the statutes, provided the defendants with nearly all the process that they claimed to be due, namely, the opportunity to challenge the amount and form of the bond before the seizure, and proper identification of the property to be replevied. [10]

The trial court's interpretation, moreover, was firmly rooted in the statutory language and was not, as the defendants' argument suggests, a strained attempt to ***370** salvage an obviously unsalvageable statutory scheme. General Statutes § 52–516(b) provides that "[a]n action of replevin, to the extent that it includes a prejudgment remedy as defined in section 52–278a, shall not be allowed unless the provisions of sections 52–278a to 52–278f, inclusive, are complied with." [11] General Statutes § 52–278a(a) specifically defines "[p]rejudgment remedy" to include the action of replevin. [12]

****657** General Statutes §§ 52–278a through 52–278h were "enacted in response to the constitutional instructions of ***371** *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and *Sniadach v. Family Finance Corporation,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969)." (Internal quotation marks omitted.) *Ford Motor Credit Co. v. B.W. Beardsley, Inc.,* 208 Conn. 13, 16, 542 A.2d 1159 (1988). Thus, in order to obtain an order of replevin, the plaintiff was required to satisfy not only the requirements of the replevin statutes; General Statutes § 52–515 et seq.; but the requirements of due process as expressed in §§ 52–278a through 52–278h.

With regard to the identification of the property to be replevied, implicit in §§ 52–278a through 52–278h is the requirement that property that is the subject of a prejudgment remedy be identified. The bench and bar of this state have always understood that identification to be a statutory requirement. Indeed, paragraph 2.a. of the statutory form for an application for a prejudgment remedy of attachment reflects that requirement. [13]

With regard to the opportunity of the defendants to challenge the amount and form of the bond before the seizure, General Statutes § 52–521(b) provides in pertinent part that "[i]f the defendant is not satisfied with the recognizance, he may, at any time before the return day of the writ, cite the plaintiff or his attorney, or the officer serving the writ, if the property still remains in his custody, to appear at once before a judge of the superior court where the replevin was effected, to respond to a motion for a new bond." [14] It is true, as ***372** the defendants argue, that § 52–521, as drafted, ordinarily contemplates a challenge to the bond after the seizure. That does not mean, however, that it is not subject to a construction, in order to save its constitutionality, that would require an opportunity by the defendant to challenge the amount and form of the bond prior to the seizure of the property.

Section 52–521(b) requires, as a matter of timing, only that the plaintiff challenge the bond "at any time before the return day of the writ." That language does not preclude a construction that, for constitutional reasons, advances the time for such a challenge. Since, as the defendants point out, ****658** the effect of a replevin of their cattle on their property interest therein was substantial, because it would work "a complete and physical taking of the cattle," and since "[i]n order to comply ***373** with due process, notice and an opportunity to be heard must be afforded litigants at a meaningful time and in a meaningful manner"; (internal quotation marks omitted) *Ford Motor Credit Co. v. B.W. Beardsley, Inc.,* supra, 208 Conn. 13, 17, 542 A.2d 1159; it was consistent with the purposes of §§ 52–278a through 52–278h for the trial court to interpret the time requirement of § 52–521(b) so as to afford the defendants a preseizure opportunity to challenge the amount and form of the bond.

We are unpersuaded by the defendants' claim that the recent United States Supreme Court decision in *Connecticut v. Doehr,* 500 U.S. ——, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), required the plaintiff in this case to establish more than probable cause, namely, exigent circumstances, in order to obtain an order of replevin. In *Doehr,* "an ex parte attachment pursuant to the Connecticut [prejudgment remedy] statute in a tort action was held to violate due process...." *Union Trust Co. v. Heggelund,* 219 Conn. 620, 624 n. 3, 594 A.2d 464 (1991). In that procedural context, the court held that exigent circumstances, rather than probable cause, were required in order to justify an ex parte deprivation of the defendant's property. *Connecticut v. Doehr,* supra, 111 S.Ct. at 2116.

This case is distinguishable from *Doehr.* Here, there was no ex parte deprivation. The replevin order did not issue until after the defendants had a full opportunity for an evidentiary hearing. Furthermore, unlike the situation in *Doehr,* in this case the probable cause standard was constitutionally sufficient because the facts at issue, namely, the existence of the debt and whether it was in default, were " 'ordinarily uncomplicated matters that lend themselves to documentary proof.' " *Id.,* at 2114, quoting *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 609, 94 S.Ct. 1895, 1900–01, 40 L.Ed.2d 406 (1974). Therefore, "the risk of error was minimal...." *Connecticut v. Doehr,* supra, 111 S.Ct. at 2115; see also *Union Trust Co.* ***374** *v. Heggelund,* supra. Finally, unlike the situation in *Doehr,* where the "[p]laintiff had no existing interest in [the defendant's] real estate when he sought the attachment"; *Connecticut v. Doehr,* supra; in this case the plaintiff had a preexisting security interest in the property sought to be replevied.

The judgment is affirmed.

In this opinion the other Justices concurred.

All Citations

222 Conn. 361, 610 A.2d 652

Footnotes

1 The defendants appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023.

2 Shawmut Bank, N.A., is the successor in interest to Shawmut Bank of Boston, N.A., the original party to the transactions with the defendants. We refer herein to Shawmut Bank, N.A., as the plaintiff.

3 Although the defendants purport to challenge the entire "statutory scheme" regarding replevin; General Statutes §§ 52–515 through 52–531; their claims of unconstitutionality focus on General Statutes §§ 52–516 and 52–518.
General Statutes § 52–516 provides: "COMMENCEMENT OF ACTION OF REPLEVIN. PREJUDGMENT REMEDY. . (a) An action of replevin shall be commenced by a writ of summons or attachment, describing the parties, the court to which it is returnable and the time and place of appearance. The writ shall be signed as in other civil actions and may run into any judicial district.

> "(b) An action of replevin, to the extent that it includes a prejudgment remedy as defined in section 52–278a, shall not be allowed unless the provisions of sections 52–278a to 52–278f, inclusive, are complied with."

General Statutes § 52–518 provides: "REPLEVIN WRIT; AFFIDAVIT AS TO VALUE OF GOODS AND RECOGNIZANCE REQUIRED. A writ of replevin shall not be issued: (1) Until the plaintiff, or some other credible person, subscribes an affidavit annexed to the writ stating the true and just value of the goods which it is desired to replevy, and that the affiant believes that the plaintiff is entitled to the immediate possession of the goods, and (2) until some person, known to the authority signing the writ to be of sufficient responsibility, has entered into a recognizance before him, with at least one sufficient surety, in a sum at least double the sworn value of the property, conditioned (A) that the plaintiff shall prosecute his action to effect, (B) for the payment of any judgment that may be recovered by the defendant in the action, and (C) for the return of the property to the defendant, and payment to the defendant of all damages sustained by the replevy of the property if the plaintiff fails to establish his right to its possession. The recognizance shall be signed by the obligors

in the presence of at least one witness other than the authority taking the recognizance. A record of the recognizance shall be entered at the foot of the writ before the writ is issued, and copies of the process left in service shall contain the affidavit and the recognizance."

4 The order was stayed pending this appeal, pursuant to the parties' agreement.

5 We address this claim first because of the fundamental principle of appellate jurisprudence that a case should be disposed of on nonconstitutional grounds if possible. See *State v. Daniels,* 209 Conn. 225, 229 n. 1, 550 A.2d 885 (1988), cert. denied, 489 U.S. 1069, 109 S.Ct. 1349, 103 L.Ed.2d 817 (1989).

6 General Statutes § 52–352b provides: "EXEMPT PROPERTY. The following property of any natural person shall be exempt:

"(a) Necessary apparel, bedding, foodstuffs, household furniture and appliances;

"(b) Tools, books, instruments and farm animals which are necessary to the exemptioner in the course of his or her occupation or profession;

"(c) Burial plot for the exemptioner and his or her immediate family;

"(d) Public assistance payments and any wages earned by a public assistance recipient under an incentive earnings or similar program;

"(e) Health and disability insurance payments;

"(f) Health aids necessary to enable the exemptioner to work or to sustain health;

"(g) Workers' compensation, social security, veterans and unemployment benefits;

"(h) Court approved payments for child support;

"(i) Arms and military equipment, uniforms or musical instruments owned by any member of the militia or armed forces of the United States;

"(j) One motor vehicle to the value of one thousand five hundred dollars, provided value shall be determined as the fair market value of the motor vehicle less the amount of all liens and security interests which encumber it;

"(k) Wedding and engagement rings;

"(*l*) Residential utility deposits for one residence, and one residential security deposit;

"(m) Payments received by the exemptioner under a profit-sharing, pension, stock bonus, annuity or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service and which is either (1) qualified under Section 401, 403, 404 or 408 of the Internal Revenue Code, or any successor thereto, or (2) established by federal or state statute, but only to the extent that wages are exempt from execution under section 52–361a;

"(n) Alimony and support, other than child support, but only to the extent that wages are exempt from execution under section 52–361a;

"(*o*) An award under a crime reparations act;

"(p) All benefits allowed by any association of persons in this state towards the support of any of its members incapacitated by sickness or infirmity from attending to his usual business; and

"(q) All moneys due the exemptioner from any insurance company on any insurance policy issued on exempt property, to the same extent that the property was exempt."

7 This conclusion renders it unnecessary to consider the plaintiff's alternate argument that the defendants were estopped from claiming the statutory exemption by granting the plaintiff a consensual lien on the collateral.

8 Examples of types of property that are exempt under the statute are workers' compensation and social security benefits, health and disability insurance payments, burial plots and wedding rings. See footnote 7, supra.

9 This was not an ex parte replevin proceeding. The trial court did not issue an order of replevin until after notice and a full evidentiary hearing. Furthermore, the defendants had an adequate opportunity to challenge the amount of the bond at the August 12, 1991 hearing, before the order of replevin was issued, but failed to do so. Finally, the property to be replevied was fully identified in the documents presented to the court in the plaintiff's application.

10 We discuss, infra, the only other statutory deficiency identified by the defendants, namely, a provision that replevin may be ordered upon a finding of exigency rather than of probable cause.

11 We recognize that, under some circumstances, it may be something of a misnomer to call a replevin action a "prejudgment remedy," since the principal purpose of such an action is often, as in this case, to obtain a judgment authorizing possession of and the right to dispose of the property sought to be replevied in order to satisfy a preexisting debt; cf. *General Motors Acceptance Corporation v. Powers,* 137 Conn. 145, 75 A.2d 391 (1950); and any other aspects of the judgment would be merely incidental to that purpose. It is clear, nonetheless, that the legislature has included replevin in the panoply of

prejudgment remedies; General Statutes § 52–278a(a); and that the strictures of the due process clause apply to such an action. See *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

12 General Statutes § 52–278a provides: "DEFINITIONS. The following terms, as used in sections 52–278a to 52–278g, inclusive, shall have the following meanings, unless a different meaning is clearly indicated from the context:
"(a) 'Commercial transaction' means a transaction which is not a consumer transaction.
"(b) 'Consumer transaction' means a transaction in which a natural person obligates himself to pay for goods sold or leased, services rendered or moneys loaned for personal, family or household purposes.
"(c) 'Person' means and includes individuals, partnerships, associations and corporations.
"(d) 'Prejudgment remedy' means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order.
"(e) 'Property' means any present or future interest in real or personal property, goods, chattels or choses in action, whether such is vested or contingent."

13 General Statutes § 52–278c sets out, inter alia, the form for an application for a prejudgment remedy. Paragraph 2.a. of that form provides:
"2. That there is probable cause that a judgment will be rendered in the matter in favor of the applicant and to secure the judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $....:
"a. To attach sufficient property of the defendant to secure such sum."

14 General Statutes § 52–521 provides: "REPLEVIN; SERVICE; NEW BOND; VOIDING OF PROCESS. (a) The officer who replevies property shall leave a true and attested copy of the process with the defendant, or at his usual place of abode, within three days after the replevy, and shall retain the property replevied in his custody for twenty-four hours after leaving the copy, unless the defendant endorses on the writ that he is satisfied with the amount and sufficiency of the recognizance taken on issuing the writ.
"(b) If the defendant is not satisfied with the recognizance, he may, at any time before the return day of the writ, cite the plaintiff or his attorney, or the officer serving the writ, if the property still remains in his custody, to appear at once before a judge of the superior court where the replevin was effected, to respond to a motion for a new bond. The judge may hear the motion and, at his discretion, order a new or further bond, conditioned like the recognizance taken on issuing the writ, signed by the obligors, and delivered to the defendant, by whom it shall be transmitted to the court to which the writ was made returnable. If the order is made while the property replevied remains in the custody of the officer, he shall not deliver the property to the plaintiff until the bond is given.
"(c) If an order for a new bond is not complied with, or if the officer fails to leave with, or at the usual place of abode of, the defendant a true and attested copy of the writ, or to retain the property in his custody, as hereinbefore provided, the writ of replevin shall be null and void.
"(d) If it appears to the court before which an action of replevin is pending that the replevin bond attached to the writ is insufficient, the court may, at its discretion, order a new or further replevin bond to be given by the plaintiff, conditioned like the recognizance taken on issuing the writ. If the plaintiff fails to comply with the order, he shall be nonsuited."

2013 WL 1798898
United States District Court, D. Connecticut.

In re Myrian WEIL.
Joseph Chekroun, Appellant,
v.
Myrian Weil, Appellee.

Civil Action No. 3:12cv462 (SRU).
|
April 29, 2013.

Attorneys and Law Firms

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Peter L. Ressler, Groob, Ressler & Mulqueen, New Haven, CT, for Appellee.

MEMORANDUM OF DECISION

STEFAN R. UNDERHILL, District Judge.

***1** Appellant Joseph Chekroun appeals from the order of the United States Bankruptcy Court for the District of Connecticut, dated February 22, 2012, granting debtor Myrian Weil's Motion to Impose, Continue, and Extend the Automatic Stay (Bankr.No. 11–51930(AHS), doc. # 75). For the reasons that follow, the order is **AFFIRMED IN SUBSTANTIAL PART on other grounds.**

I. Background

This appeal arises out of a Chapter 11 bankruptcy case filed by the debtor, Myrian Weil ("Weil" or "the debtor"), on September 27, 2011. Appellant Joseph Chekroun ("Chekroun") is a creditor who held a mortgage on certain real property owned by Weil. Chekroun previously obtained a judgment of strict foreclosure on that mortgage in Connecticut Superior Court.

Weil filed the current Chapter 11 case less than one year after her previous Chapter 13 case was dismissed. As a result, the automatic stay normally triggered by the filing of a bankruptcy petition was subject to the repeat-filer provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109–8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.). Section 362(c)(3)(A) provides that, under these circumstances, the automatic stay "with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case." 11 U.S.C. § 362(c)(3)(A). Upon motion by a party in interest, however, the Bankruptcy Court may extend the stay "after notice and a hearing completed before the expiration of the 30–day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed." 11 U.S.C. § 362(c)(3)(B).

On September 28, 2011, the debtor filed a Motion to Impose, Continue, and Extend the Automatic Stay (the "Motion"). Thereafter, on October 18, 2011, the Bankruptcy Court held an initial hearing on the Motion. At that hearing, Bankruptcy Judge Alan H.W. Shiff indicated that a subsequent hearing needed to be scheduled to determine whether Weil's bankruptcy case was filed in good faith. Both parties expressed concerns that any such hearing must be held within the thirty-day time limit imposed by section 362(c)(3)(B). Judge Shiff, however, stated that, because the motion to extend the stay was filed within thirty days of Weil's petition, there was no need to decide the Motion within that time frame. *See* Tr. of Proceedings (Oct. 18, 2011), at 4–5. The matter was then adjourned for scheduling.

On February 8, 2012, the Bankruptcy Court held a hearing on the good faith issue. Crediting testimony from the debtor's husband regarding a new business venture, the Bankruptcy Court determined that the petition was, in fact, filed in good faith and granted the debtor's Motion to extend the stay in a written order dated February 22, 2012. (Bankr.No. 11–51930(AHS), doc. # 75). Chekroun's appeal timely followed.

II. Standard of Review

***2** Federal district courts have jurisdiction to hear appeals of final judgments, orders, and decrees of the Bankruptcy Court under 28 U.S.C. § 158(a)(1). *In re Flanagan,* 415 B.R. 29, 38 (D.Conn.2009). On appeal, the district court will "review Bankruptcy Courts' conclusions of law *de novo,* and their findings of fact for clear error." *Mercury Capital Corp. v. Milford Connecticut Associates,*

L.P., 354 B.R. 1, 6–7 (D.Conn.2006) (citing Fed. R. Bankr.P. 8013). The district court may "affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings ." Fed. R. Bankr.P. 8013.

III. Discussion

Section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of" most actions against the debtor, the debtor's property, and property of the bankruptcy estate. 11 U.S.C. § 362(a); *see also Eastern Refractories Co. Inc. v. Forty–Eight Insulations Inc.,* 157 F.3d 169, 172 (2d Cir.1998). The automatic stay "operates to protect debtors by giving them temporary relief from creditors and protects creditors as a whole by avoiding a first-come first-served race to the debtor's assets." *Kommanditselskab Supertrans v. O.C.C. Shipping, Inc.,* 79 B.R. 534, 540 (S.D.N.Y.1987).

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") as a "comprehensive reform measure to curb abuses and improve fairness in the federal bankruptcy system." *Connecticut Bar Ass'n v. United States,* 620 F.3d 81, 85 (2d Cir.2010). One such reform—aimed at deterring abuses by serial filers—was the addition of sections 362(c)(3) and (4), which prescribe conditions under which the stay under section 362(a) either terminates early or does not arise automatically. Section 362(c)(3) applies where one previous bankruptcy case was dismissed in the preceding year and provides that the automatic stay in the subsequent case will terminate "with respect to the debtor" thirty days after the petition is filed. 11 U.S.C. § 362(c)(3)(A). Section 362(c)(4), in contrast, applies where two or more cases were dismissed in the preceding year and provides that "the stay under [section 362(a)] shall not go into effect upon the filing of the later case." *Id.* § 362(c)(4)(A)(i).

BAPCPA's penalties on repeat-filers are tempered to some degree by provisions permitting the Court to extend the automatic stay—or impose one for the first time—if a party in interest "demonstrates [by clear and convincing evidence] that the filing of the later case is in good faith as to the creditors to be stayed." *Id.* §§ 362(c)(3)(B), 362(c)(4)(B). Notably, motions to *extend* the automatic stay under section 362(c)(3) must be filed and the "hearing *completed* before the expiration of the 30–day period," while motions to *impose* an automatic stay under section 362(c)(4) need only be filed—not heard or decided—within thirty days. *Compare id.* § 362(c)(3)(B) (emphasis added), *with id.* § 362(c)(4)(B). In other words, section 362(c)(3) imposes a thirty-day deadline on both the movant and the Court, while section 362(c)(4) imposes a thirty-day deadline on the movant alone. In the latter scenario, so long as the motion is timely filed, the Court may hear the matter at its leisure, while in the former scenario, the Court must act with atypical swiftness.

***3** In the case at bar, Weil timely filed the Motion, but the Bankruptcy Court failed to complete the good faith hearing within the thirty-day period imposed by section 362(c)(3). Under the plain meaning of section 362(c)(3)(A), the automatic stay had already terminated by operation of law months before the February 2012 hearing, and therefore could not be extended under section 362(c)(3)(B). *See, e.g., In re Tubman,* 364 B.R. 574, 580 (Bankr .D.Md.2007) ("Section 362(c)(3)(A) is self-executing and serves to terminate the stay 'on the 30th day after the filing of the later case.' Under Section 362(c)(3)(B), if a party in interest desires the continuation of the stay beyond that period, then a motion to extend automatic stay must both be filed *and granted* 'after notice and hearing completed before the expiration of the 30–day period.' ") (emphasis added); *In re Moreno,* No. 07–13478–B–13, 2007 WL 4166296, at *1 (Bankr.E.D.Cal. Nov. 20, 2007) (noting that, under section 362(c)(3)(B), the "hearing must be *completed* before expiration of the 30 days," and concluding that "[e]xtending the time for a hearing under Rule 9006(b) will not postpone termination of the stay, which is mandatory by the plain meaning of § 362(c)(3)(A)"); *In re Norman,* 346 B.R. 181, 183 (Bankr.N.D.W.Va.2006) (concluding that, even where a debtor files the motion before expiration of the 30–day period, the court must still complete a hearing before the thirty-day period expires); *Capital One Auto Finance v. Cowley,* 374 B.R. 601, 609 (W.D.Tex.2006) ("Section 362(c)(3) does not provide for the possibility of an interim order extending the stay before a hearing is completed."); *In re Williams,* 346 B.R. 361, 370 (Bankr.E.D.Pa.2006) ("Therefore, if a debtor seeks to extend the stay beyond thirty days as permitted by section 362(c)(3)(B), it is incumbent upon him to insure that his motion is filed *and heard* within the thirty-day window.") (emphasis added). The Bankruptcy Court's order extending the automatic stay under section 362(c)(3)(B) was therefore

issued beyond the statutory deadline and was legally ineffective to extend the automatic stay. [1]

That determination does not end the matter, however. Although the automatic stay terminated pursuant to section 362(c)(3)(A), the *scope* of that termination remains in question.

As noted above, section 362(c)(3)(A) provides that "the stay under [section 362(a)] with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case." 11 U.S.C. § 362(c)(3)(A) (emphasis added). Most courts to examine the issue have interpreted the "with respect to the debtor" language as limiting the scope and effect of the stay's termination to actions against the debtor personally and against the debtor's non-estate property. Thus, the emerging majority view is that the termination of the automatic stay under section 362(c)(3) does not extend to actions against the property of the bankruptcy estate —rather, the stay remains in effect with respect to estate property, which, as a practical matter, encompasses the lion's share of assets in play. *See, e.g., In re Holcomb,* 380 B.R. 813, 816 (B.A.P. 10th Cir.2008) ("[T]he automatic stay terminates under § 362(c)(3)(A) only with respect to the debtor and the debtor's property but not as to property of the estate."); *In re Jumpp,* 356 B.R. 789, 791 (B.A.P. 1st Cir.2006) ("The majority of courts that have considered the issue have concluded that the automatic stay does not terminate with respect to property of the estate."); *In re Mortimore,* No. 11–cv–955 (RMB), 2011 WL 6717680, at *6 (D.N.J. Dec. 21, 2011) ("Thus, the Bankruptcy Court properly interpreted the automatic termination under § 362(c)(3)(A) to apply only to non-estate property and leases."); *Williams,* 346 B.R. at 367 ("[S]ince section 362(c)(3)(A) does not purport to terminate the stay as to estate property—a concept defined by section 541(a), and which property is distinct from the debtor or the debtor's property—the stay provisions imposed by sections 362(a)(3), (a)(4), and part of (a)(2), expressly protecting property of the estate, do not expire after thirty days."); *In re Jones,* 339 B.R. 360, 365 (Bankr.E.D.N.C.2006) ("It is abundantly clear from the plain language of § 362(c)(3)(A) that the stay that terminates under that section is not the stay that protects property of the estate."); *In re Johnson,* 335 B.R. 805, 806 (Bankr.W.D.Tenn.2006) ("[T]he plain language of § 362(c)(3)(A) dictates that the 30–day time limit only applies to 'debts' or 'property of the debtor' and not to 'property of the estate.' ").

***4** A dwindling minority of courts reach the opposite conclusion, citing ambiguities in BAPCPA's statutory language and Congress's intent to punish serial filers who abuse the Code hoping to forestall creditor action indefinitely. *See In re Reswick,* 446 B.R. 362, 371 (B.A.P. 9th Cir.2011) (holding that the automatic stay terminates in its entirety as of the thirtieth day); *In re Jupiter,* 344 B.R. 754, 762 (Bankr.D.S.C.2006) ("[T]he Court finds that § 362(c)(3)(A) terminates the automatic stay as to Debtor and property of Debtor's estate. A contrary interpretation is demonstrably at odds with Congress's intent to deter bad faith, successive filings, fails to consider the context of § 362(c)(3) as a whole, and fails to account for the ambiguities in § 362(c)(3)(A)."); *but see In re Rinard,* 451 B.R. 12, 19–20 (Bankr.C.D.Cal.2011) (rejecting the reasoning in *In re Reswick,* 446 B.R. at 371, in favor of the majority view).

Although the Second Circuit has yet to address the issue, at least two district courts within this Circuit have adopted the majority view, concluding that the stay that terminates "with respect to the debtor" under section 362(c)(3)(A) applies only against the debtor and the debtor's property, while the stay against estate property remains in full effect. *See In re McFeeley,* 362 B.R. 121, 123 (Bankr.D.Vt.2007) ("A consensus has been forming that the stay referred to in § 362(c)(3)(A) 'terminates the stay with respect to actions taken against the debtor and against property of the debtor, but does not terminate the stay with respect to the property of the estate.' ") (quoting *Jones,* 339 B.R. at 365); *In re Rice,* 392 B.R. 35, 38 (Bankr.W.D.N.Y.2006) ("Although 11 U.S.C. § 362(c)(3)(A) has effected a termination of the automatic stay 'with respect to the debtor,' all other aspects of the automatic stay remain operative, including the stay of proceedings to obtain possession of estate property.").

Finding the majority interpretation persuasive, I hold that section 362(c)(3) merely provides for a partial termination of the automatic stay. After thirty days, the stay terminates only with respect to the debtor and the debtor's property; the stay remains operative, however, with respect to estate property even after the thirty-day period expires.

In my view, the majority interpretation better comports with principles of statutory construction. "Normally, '[w]hen the words of a statute are unambiguous, ... judicial inquiry is complete.' " *Anderson v. Conboy,* 156 F.3d 167, 178 (2d Cir.1998) (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992)). Here, BAPCPA's drafting may be inartful, and the framework labyrinthine, but section 362(c)(3)(A) is nonetheless unambiguous: barring an extension, the automatic stay only terminates "*with respect to the debtor* " thirty days after filing a successive petition. 11 U .S.C. § 362(c)(3)(A) (emphasis added). Indeed, as other courts have noted, the Bankruptcy Code elsewhere "differentiates between acts against the debtor, against property of the debtor and against property of the estate." *Jones,* 339 B.R. at 363 (citing 11 U.S.C. § 362(a)). Thus, the phrase "with respect to the debtor" should be construed to mean what it says: the stay terminates only with respect to the debtor and the debtor's property, but not with respect to property of the estate.

***5** Applying these principles to the case at bar, I conclude that the automatic stay has terminated, but has not terminated in its entirety. The automatic stay remains in effect with respect to property of the bankruptcy estate, as defined by 11 U.S.C. §§ 541 and 1115. Thus, to the extent Chekroun's interests concern estate property (and there is nothing to indicate to the contrary), the automatic stay with respect to that property was never subject to termination under section 362(c)(3), and there was never any need for the debtor to move for—nor for the Bankruptcy Court to grant—an extension. [2] Under these circumstances, the Bankruptcy Court's order extending the automatic stay was ineffective as untimely, but as a practical matter, was also largely unnecessary and legally harmless. Whether the stay was "extended" or never lapsed in the first place, the result is the same: the automatic stay remains in effect with respect to estate property against which creditors like Chekroun seek to take action.

In sum, the automatic stay terminated by operation of law with respect to the debtor and the debtor's property, but remains in effect with respect to the property of the estate. Therefore, the Bankruptcy Court's order is affirmed in substantial part on other grounds. The order was ineffective to "extend" the automatic stay after the thirty-day period had expired, but remains in effect with respect to property of the estate.

IV. Conclusion

For the reasons stated above, the order of the Bankruptcy Court is **AFFIRMED IN SUBSTANTIAL PART on other grounds.** The automatic stay terminated by operation of law with respect to the debtor and the debtor's property, but remains in effect with respect to the property of the estate. The Clerk shall close this file.

It is so ordered.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1798898, Bankr. L. Rep. P 82,480

Footnotes

1 Some courts, recognizing the injustice that may result from rigid application of section 362(c)(3), have exercised their inherent equitable powers under 11 U.S.C. § 105(a) to reimpose the automatic stay even after it has lapsed due to the debtor's failure to satisfy section 362(c)(3)'s requirements. *See, e.g., In re Williams,* 346 B.R. 361, 371 (Bankr.E.D.Pa.2006) ("Therefore, when a portion of the bankruptcy stay under section 362(a) has been terminated by virtue of section 362(c)(3), the debtor may seek to enjoin creditors by virtue of section 105(a)."). In the case at bar, however, the Bankruptcy Court made no mention of section 105(a) in its order extending the stay and, in any event, the debtor presented no arguments warranting such injunctive relief. *See In re Zahn Farms,* 206 B.R. 643, 645 (B.A.P.2d Cir.1997) (noting that a motion to reinstate an automatic stay "is, in fact, a request for an injunction and should meet the standards therefor"). Therefore, I need not address the applicability, if any, of section 105(a) to this case. *See In re Vorburger,* No. 09–cv–13871 (AJG), 2010 WL 3448317, at *1 ((Bankr.S.D.N.Y. Aug. 31, 2010) ("In order to obtain reinstatement of the stay despite failing to make a proper and timely motion for continuation under § 362(c)(3)(B), the Debtor would have had to move for the Court to exercise its authority under 11 U.S.C.A. § 105(a).... The Debtor does not present any arguments that would warrant the Court exercising its § 105(a) equitable powers to reimpose the automatic stay in this case.").

2 For this reason, Chekroun's other arguments on appeal concerning the Bankruptcy Court's good-faith analysis need not be addressed.

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