Commercial Law & Bankruptcy Section
Case Summaries - Summer 2011

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In Re Penrod, 611 F.3d 1158 (9th Cir. 2010)

In September 2005, Melanie Penrod traded in her 1999 Ford Explorer to purchase a 2005 Ford Taurus. She owed over $13,000 on the Explorer but received $6,000 in credit giving her $7,000 in negative equity - Penrod financed approximately $31,700 to purchase a vehicle that cost approximately $25,600. The dealership subsequently assigned the financing contract to AmeriCredit Financial Services.

Penrod filed for Chapter 13 bankruptcy protection. At the time of filing, she still owed $25,675 to AmeriCredit. Her Chapter 13 Plan bifurcated AmeriCredit's claim into secured and unsecured portions. AmeriCredit objected claiming it had a purchase money security interest ("PMSI") in the entire amount, including the negative equity.

The bankruptcy court held that AmeriCredit did not have a purchase PMSI in the portion of the loan related to the negative equity charges, but did have a security interest in the remaining balance. This decision was affirmed by the BAP. AmeriCredit challenged the BAP's ruling in the subject appeal.

On appeal, the *Penrod* Court looked to the "hanging paragraph" under 11 U.S.C. § 1325 (a), which prevents the bifurcation of claims, and defined the issue as whether a PMSI is created in the negative equity. The *Penrod* Court noted that the bankruptcy code does not define PMSI and looked to state law.

Under the California Uniform Commercial Code, a PMSI arises when a good is purchased and the seller (if a dealer financed transaction) or lender (if a sale is financed by a loan) retains a security interest in that good for all or part of the price. The key issue on appeal was the meaning of "price." To that end, the *Penrod* Court looked to the official comment for the Uniform Commercial Code (U.C.C. § 9-103, cmt. 3):

> As used in subsection (a)(2), the definition of "purchase money obligation," the "price" of collateral or the "value given to enable" includes obligations for expenses incurred in connection with acquiring rights

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> in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations.

With this background, AmeriCredit argued that the negative equity related to the Taurus is an "expense [ ] incurred in connection with acquiring rights in the collateral." The *Penrod* Court disagreed holding that the negative equity was not sufficiently connected to the Taurus to establish a purchase money security interest. A trade-in and new purchase may be performed at the same time, but it cannot change the fact that a seller or lender can only obtain a purchase money security interest for new value. Negative equity is an antecedent debt and simply does not fit within that rubric.

AmeriCredit argued that the California Automobile Sales Finance Act should be used to determine the "price of the collateral." The *Penrod* Court again disagreed holding that the purpose of the "cash price" definition in the ASFA is to disclose to consumers that they are responsible for negative equity charges and not that those charges would result in a purchase money security interest.

AmeriCredit also argued that Section 547(c)(3) of the Bankruptcy Code gives special protection from preference avoidance to "enabling loans," which are defined like PMSIs. The *Penrod* Court disagreed. Under the Bankruptcy Code, security interests are given preferential treatment to the extent that the obligation relates to the receipt of truly new value, not just old obligations that have been repackaged.

Lastly, the *Penrod* Court cautioned against using the phrase "value given to enable the debtor to acquire rights in or the use of collateral" to find in favor of AmeriCredit. While acknowledging that many courts faced with this issue have honed in on "value given to enable" to describe negative equity, such an interpretation is erroneous. There is a difference between "price" and "value given to enable." The "value given" part of the definition is intended to make clear that the obligation is not limited to the seller, but, rather, can be made to a finance company. In short, that broad language is employed to encompass third party financing, not to expand the scope of purchase money security interests.

With this decision, the *Penrod* Court created a circuit split by declining to adopt the reasoning of eight other circuit courts and, instead, holding that a creditor does not have a PMSI in the "negative interest" of a vehicle traded in during a new vehicle purchase.

In Re O'Brien, 10-00161-TLM

Boise City/Ada County Housing Authority ("Boise City") initiated suit against Laraye L. O'Brien ("O'Brien") to recover what it alleged were fraudulently obtained housing benefits. Boise City contended that O'Brien fraudulently certified that she had no familial relationship with renters seeking Section 8 housing assistance. O'Brien filed for bankruptcy protection, which stayed the state litigation. Boise City then initiated an adversary proceeding seeking a judgment that a debt is owed and that the debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A). This decision addresses Boise City's motion for summary judgment and motion to strike along with O'Brien's untimely motion to amend her answer.

While causes of action under § 523(a)(2)(A) are generally unapt for summary judgment because of the intent element, the Court proceeded with its duty to evaluate the entirety of the record that was presented. In doing so, the Court noted that the submissions were copious including the submissions of several depositions, in their entirety. While this practice is common, it is problematic. First, it obligates the Court to commit undue time to review which wastes judicial resources. Rather, only relevant portions of the testimony should be submitted. Secondly, the submission of the entire deposition is an invitation, intended or not, for the Court to insert its own interpretation and evaluate how the witness responded. Putting these issues aside, the Court reviewed the documents submitted within the scope of its authority and construed inferences from the evidence in a light most favorable to the non-moving party. The Court found that much of what was submitted merely suggested facts, raised inferences, or invited the Court to assess credibility or weigh conflicting evidence. Accordingly, the Court concluded that there are, at a minimum, disputed issues as to O'Brien's knowledge and intent to deny the motion for summary judgment. The motion to strike was rendered moot by the Court's denial of the summary judgment motion.

The Court also addressed the untimely motion to amend. O'Brien contends that she discovered the statute of limitations defense during discovery. Boise City countered that the Pretrial Order specifically established the pleadings settled and no further amendments should be tolerated. The Court found the existence of the Pretrial Order material as the parties were given a chance to address whether amendments were desired after all discovery had concluded. No issues were raised. Despite this, Rule 16(e), Federal Rules of Civil Procedure (incorporated by Fed.R.Bankr.P. 7016), provides that the Court may modify a pretrial order to prevent manifest injustice. Here the requested amendment seeks to present a legal issue on facts the Court concluded would be placed into evidence in any event – what Boise City knew or discovered regarding the familial relationship and when. Since the evidence will be presented in any event, prejudice to Boise City will be minimal. Accordingly, the Court granted O'Brien's motion to amend her answer.

In Re Thiel, 10-00434-TLM

Issue/Holding:

The issue in *Thiel* was whether it was permissible for the Court to consider evidence of transportation expenses in determining "projected disposable income" under 11 USC § 1325(b). Judge Myers held that such consideration was impermissible.

Analysis:

The Thiels filed a petition for bankruptcy under Chapter 13. Under Chapter 13, a debtor submits a plan to repay their creditors. The Thiels submitted a plan that listed projected disposable income of $234.70 a month over the period of the plan. However, under Form 22C, the Thiels' projected monthly disposable income was $1,102.70. The source of the discrepancy was the fact that Form 22C did not take into account the transportations expenses specific to the Thiels, who had four children, all of whom could drive. The Trustee objected to the plan. The issue to resolve was whether the Thiels' deviation from Form 22C to determine projected disposable income was appropriate.

The Thiels' supported their position by relying on the Supreme Court's decision in *Hamilton v. Lanning*, __, U.S., __, 130 S.Ct. 2464 (2010). In that case, the Court recognized that there are instances in which strict application of Form 22C to determine projected disposable income leads to anomalous results. In Lanning, the debtor had received a large sum of money before filing his petition. The sum caused projected disposable income to be grossly inaccurate. Due to the unusual nature of the circumstances, the debtor adjusted the projected disposable income. The Court found that this was permissible. In so doing, it adopted the rule that to determine a debtor's projected disposable income, bankruptcy courts must begin with Form 22C, but in "unusual cases," where there is evidence of impending changes to a debtor's income or expenses that are "known or virtually certain" to occur, the bankruptcy court may adjust the results of Form 22C in fixing debtor's projected disposable income.

In *Thiel*, Judge Myers ruled that the deviation from Form 22C was impermissible. The Court reasoned that the Thiels' reading of *Lanning* was far too expansive. Accordingly, the Court sustained the Trustee's objection. However, it is unclear whether the Court's decision was in part based on the fact that the information provided relating to transportation expenses were primarily projections and thus, by definition, were not a known or virtually known fact. This seems reasonable to assume, but it is not made explicit in the decision. In any event, the law is such that while a one-time pre-petition buyout payment is sufficient to warrant adjustment to projected disposable income under Form 22C, evidence of transportation expenses, especially when they are essentially projections, is not.

In Re Scholz, 447 BR 887 (BAP 9th Cir. 2011)

Issue/Holding:

The issue in Scholz was whether current monthly income under the bankruptcy code included benefits received from the Railroad Retirement Act ("RRA"). The second issue was whether those benefits should be considered when calculating projected disposable income. The Ninth Circuit Bankruptcy Appellate Panel ruled in the affirmative regarding the first issue, and in the negative as to the latter.

Analysis:

On May 15, 2009, Mr. and Mrs. Scholz declared bankruptcy under Chapter 13. Mr. Scholz was retired and received a benefit from the railroad with which he used to be employed. Ms. Scholz worked in a real estate agency. The Scholzs filed a Form B22C. It indicated they were below median-income debtors. The form came with an addendum offered by the Scholzs. The addendum indicated that they received a monthly benefit under the RRA. If that amount were included in the form as current monthly income ("CMI"), the Scholzs' would be above-median debtors.

The Scholzs' status as above or below median debtors was significant as it bore on how they would go about determining projected disposable income. If the Scholtzs' were below-median debtors, they could deduct actual expenses reasonably necessary to maintenance and support. If the Scholtzs' were above-median debtor, they would have to go through the means test, as memorialized in Form 22C.

The Court ruled that the benefits must be counted as CMI. Its reasoning was rooted in the basic rules of statutory interpretation and construction. The Bankruptcy Code defines CMI, *inter alia*, as the average monthly income from all sources. The Code includes in its definition any amount paid for the household expenses of the debtor. While the definition is broad, it comes with a few exceptions. Those exceptions are explicit and do not include RRA benefits. Under the rule of statutory construction, e*xpressio unius est exclusio ulterius*, RRA benefits are not expressly excluded from the definition of CMI and therefore must be included in its scope.

The Court then ruled that while the RRA benefits might constitute CMI and put the debtors in the above-median income category, the benefits could not be used to determine projected disposable income. The Court reasoned that it was "settled" that projected disposable income is forward looking. Because of this, such income would fall under the RRA anti-anticipation clause.

Accordingly, the Court concluded that whether a debtor is an above-median debtor or a below-median debtor is, in part, a function of CMI. In determining CMI, the Court can look to retirement benefits other than those expressly excluded. However, if the benefits are sufficient to warrant pushing a debtor into the class of an above-median debtor, the benefits may not be taken into account in determining projected disposable income.

In Re Henderson, 10-03114-JDP

Issue/Holding:

The issue in *Henderson* was whether an above-median debtor with negative "projected disposable income" is required to submit a five year plan of repayment or a three year plan. The Court ruled that a three year plan was permissible.

Analysis:

The Hendersons were above-median Chapter 13 debtors. Their Form 22C projected negative disposable income. Accordingly, the plan they proposed paid nothing to unsecured creditors. Trustee objected on the basis that a 5 year – and not a 3 year – plan is required under the Code.

The operative provision is 11 USC § 1325(b). It states: "If the trustee … objects to the confirmation of the plan, then the court may not approve the plan unless … the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period … will be applied to make payments to unsecured creditors under the plan." The Code defines applicable commitment period as: "3 years; or not less than 5 years, if the current monthly income of the debtor and the debtor's spouse when multiplied by 12, is not less than … 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." Based on this, the Trustee argued that the plan should have been for five (5) years.

However, in *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008), the Court, in nearly identical circumstances, ruled that a five (5) year plan was not required. More specifically, the 9th Circuit stated that if a trustee objects to plan confirmation for an above-median income debtor with positive projected disposable income, the debtor must pay all of his projected disposable income to unsecured creditors for a period of no less than five years. If, however, that same debtor has no projected disposable income, the applicable commitment period has no application. Under stare decisis, the decision in Henderson should have been a fait accompli.

The complicating issue was whether *Kagenveama* was still good law in light of the *Lanning* and *Ransom* decisions. Judge Pappas ruled that it was. According to the Judge, *Lanning* stood for the proposition that to determine a debtor's projected disposable income, the Code requires bankruptcy courts to begin with Form 22C disposable income projected over the applicable commitment period. However, in "unusual cases," where there is evidence of impending changes to a debtor's income or expenses that are "known or virtually certain" to occur, the bankruptcy court may adjust the results of the mechanical approach in fixing debtor's projected disposable income. This was not the issue in *Kagenveama* and therefore the *Lanning* decision had no bearing on the ultimate holding in *Kagenveama*.

Additionally, in *Ransom* the Court focused on whether a chapter 13 debtor, in calculating disposable income, may deduct Form 22C expense standards if he does not have corresponding actual expenses. Specifically, the *Ransom* debtor sought to deduct standardized "vehicle ownership costs," despite owning his vehicle free of any debt or lease obligations. The Court determined that, where a debtor will not incur an expense during the life of his chapter 13 repayment of the plan, he may not take a standardized deduction for that expense in calculating projected disposable income. Again, this case does not address the issue in *Kagenveama*. As such, it is still good law and was binding on the Henderson Court. Accordingly, Judge Pappas overruled the Trustee's objection to the plan.

In Re Bronson, 10-01259-TLM

In re Bronson deals with Chapter 13 plan confirmation and the proper calculation of income and expenses for purposes of determining whether the debtors dedicated all projected disposable income as required by Section 1325(b)(1)(B). Bronson is a straightforward application of *Hamilton v. Lanning*, ___ U.S. ___ (2010) where the Supreme Court rejected the mechanical approach for calculating projected disposable income and instead allowed for a forward looking approach that accounts for "changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."

In the six months prior to filing that are used for calculating Currrent Monthly Income (CMI) for Form 22C, Mr. Bronson worked two months at a lower paying job and four months at his current higher paying job at Micron and Mrs. Bronson worked two months at her prior job and then became unemployed. At confirmation, the debtors wanted to use CMI for their income projection but the trustee argued that Mr. Bronson's new job was a "known or virtually certain" change that necessitated using his current income rather than the CMI calculation that was artificially low because of the two months with the lower paying job. The Court noted the evidence suggested the new job was "stable and expected to continue" and then held that the debtors would have to propose a new plan that accounted for additional disposable income as calculated using the full amount of the income from Mr. Bronson's new job, pursuant to *Lanning*. Interestingly, the Court still included, without discussion, Mrs. Bronson's income from the CMI calculation even though her current status was unemployed; apparently it was not "known or virtually certain" that she would remain unemployed.

The Court also rejected the trustee's

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In Re Bronson, 10-01259-TLM

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comments, made at the confirmation hearing, that she would consider whether any of the debtors' actual current expenses could also be factored into the disposable income calculation. The Court reiterated the conclusions from *In re Thiel*, 446 B.R. 434 (Bankr. D. Idaho 2011), that the "amounts reasonably necessary to be expended" are found in the means test of Section 707(b)(2)(A) and (B) and are not to be pulled from the "actual" expenses listed on Schedule J. For example, the debtors claimed $1,005.00 in actual, current monthly transportation expenses but the means test limits them to $472.00. *Thiel* is Judge Myers' prior opinion that harmonizes the U.S. Supreme Court's two cases addressing the means test and disposable income: *Lanning* and *Ransom v. FIA Card. Servs.*, N.A., 131 S.Ct. 716 (2011).

In footnote 22, the Court counseled against the overuse of "good faith" objections to a debtor's chapter 13 plan, particularly where the "debtor's proposal conforms to other Code requirements and it is precisely those provisions that chafe the objector." The Court utilized footnotes 12 and 19 to encourage litigants to provide the Court with briefing, including applicable case law, particularly where the Court specifically requests that briefing prior to an evidentiary hearing.

In Re Beach v. Bank of America, 10-8114-JDP

In *Beach*, it was alleged that the bank had violated the Idaho Consumer Protection Act (ICPA) by threatening legal action against the debtors without a proper basis and by giving them a misleading disclosure statement at closing. Further, the debtors and estate pursued claims under the Truth In Lending Act.

In response to the motion to dismiss, the Court held the debtors' complaint would be dismissed as to claim against the bank for allegedly improperly threatening a legal action, as the debtors had failed to provide sufficient facts to demonstrate that their claim was plausible on its face, as set forth in the Supreme Court decision *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-58 (2007). In the complaint the debtors had merely alleged that the bank engaged in threatening legal action without a proper basis and did not provide any more information including when the alleged threat occurred. Thus, the Court could not determine, among other things, whether the debtors' claim would be barred by the applicable statute of limitations or whether the debtors had a plausible claim.

Second, the Court found that the statute of limitations period had expired as to the debtors' claim under the ICPA in regard to an alleged misleading disclosure statement. The Court determined that the statute of limitations ran from when the debtors had suffered an ascertainable injury which occurred at the closing. Due to the passing of two years from that date prior to the lawsuit being filed, the complaint was not timely.

Third, the Court held that the debtors' Truth In Lending Act (TILA) claim was *not* barred by the statute of limitations because there is not such bar where the TILA violations are raised as a defense to a debt collection action rather than an affirmative claim. The Court found that a non judicial foreclosure action, which results in the collection of a debt through the process of selling real property subject to a deed of trust at auction, is an action to collect a debt as that term would be understood in its ordinary and common meaning. Thus, the non judicial foreclosure sale was an action to collect a debt of which the debtors were responding to, thereby avoiding the bank's statute of limitations argument.

Fourth, the Court rejected the bank's argument that the debtors did not have standing to bring the cause of action in that it found that if the bank's non judicial foreclosure action was successful then the debtors' economic interest in the homestead would be adversely impacted. Thus, in light of the debtors' recoupment requested in their TILA claim, they established constitutional standing to bring the claim against the bank. Further, if a liquidation of the home would net more than $100,000 then the bankruptcy estate could also be potentially negatively impacted by the bank's non judicial action and therefore the bankruptcy estate, represented by the trustee, also had an interest in the debtors' recoupment defense.

Further, the Court found that the debtors also had the requisite prudential standing because while 11 U.S.C. § 541(a)(1) effectively transfers a debtors' cause of action into a bankruptcy estate, the debtor still has access to, and may assert, personal defenses. A cause of action is an asset of the estate to be used as the trustee sees fit. By contrast a defense is something that may prevent an unjust claim against the estate. Thus, the Court concluded that both the debtors and the trustee have prudential standing to advance the claimed TILA violations, as a defense by recoupment to the bank's claim.

Finally, the Court ruled in favor of the bank's motion to dismiss as to the trustee's rescission claim. The Court found that under the TILA any right of rescission is excluded where the consumer credit transaction involved a residential acquisition mortgage. Due to the fact that the transaction between the debtors and the bank involved a residential mortgage for the acquisition of the debtors' home, the trustee had no rescission rights.

In Re Bailey, 10-02884-JDP

The facts of *In re Bailey* are straightforward. A creditor had obtained a judgment against the debtors in state court for $103,847 plus interest on July 15, 2010. The creditor recorded its judgment in Canyon County on July 21, 2010. Debtors subsequently purchased property in Canyon County on September 1, 2010 and recorded a homestead declaration as to the property on September 3, 2010. Debtors filed for bankruptcy on September 8, 2010 and claimed the property as exempt pursuant to Idaho's homestead statutes. The debtors filed a motion to avoid the creditor's judgment lien under Bankruptcy Code Section 522(f) alleging that the creditor's lien impaired their homestead exemption.

In addressing the debtors' motion, the court was faced with two issues: (1) whether the creditor had a valid judgment lien against the property; and (2) if the lien was valid, whether the debtors could avoid the lien under Section 522(f).

The validity of the creditor's judgment lien against the property turned on whether the property was exempt before the lien attached. The Court initially noted that under Idaho Code Section 10-1110, the recording of a certified copy of a judgment lien creates a lien on a debtor's property, both then owned and thereafter acquired, but that no such lien arises where the property is exempt from execution. Turning to Idaho's homestead statutes, the Court noted that while a debtor may exempt up to $100,000 of the net value of his homestead, Idaho Code Section 55-1005(1) provides that the homestead is subject to execution or forced sale in satisfaction of a judgment obtained before the homestead was in effect. In determining when the debtors' homestead was established, the Court noted that while an "owner-occupied" residence constitutes a homestead and is protected automatically under Idaho Code Section 55-1004(1), where the property is not yet owner occupied as a principal residence, the owner must record a declaration of homestead before the property is considered a homestead. Because the creditor's judgment lien attached to the property on September 1, 2010, the date title passed to the debtors, and the debtors did not record their declaration of homestead in the property until September 3, 2010, the Court found that Idaho's homestead exemption did not exempt the property from execution, and as such, found the lien valid under Idaho Code Section 10-1110.

Addressing Section 522(f), the Court noted that to avoid a lien under Section 522(f) three conditions had to be met: (1) there was a fixing of a lien on an interest of the debtor in property; (2) such lien impairs an exemption to which the debtor would have been entitled; and (3) such lien is a judicial lien. Turning to whether there was a fixing of a lien on an interest of the debtors in the property, the Court, quoting the Supreme Court case of *Farrey v. Sanderfoot*, 500 U.S. 291, 298 (1991) noted that the protection of Section 522(f) "does not extend to allow debtors with knowledge of an outstanding recorded judgment to purchase property and then avoid the lien that inevitably attaches." A lien is only avoidable where the debtor had an interest in the property before the lien fixed. The Court went on to recite to *Farrey* and post-*Farrey* 9th Circuit cases for the premise that where a judicial lien fixes simultaneously with a debtor's acquisition of an interest in property, the debtor is not considered to have an interest in the property before the lien fixed, and thus, the lien is not avoidable under Section 522(f). The Court held that because the creditor's judicial lien attached to the property simultaneously with the debtors' acquisition of the property, the debtors did not own an interest in the property prior to the fixing of creditor's lien and as such, the debtors could not avoid the creditor's lien under Section 522(f).

In Re Bosworth, 10-41615-JDP

The Court in *In re Bosworth* was faced with whether an all-terrain vehicle qualifies for Idaho's motor vehicle exemption under Idaho Code Section 11-605(3). The debtors had scheduled their 2006 Honda ATV as exempt under Idaho Code Section 11-605(3). The Chapter 7 Trustee objected on the grounds that the ATV did not meet the requirements to be operated on public highways and thus did not meet the Court's requirements for the motor vehicle exemption. In response, the debtor had argued that the ATV was in fact licensed to operate on public highways.

In Idaho, in order for a vehicle to qualify as exempt under Idaho Code Section 11-605(3), "that vehicle must not only be self-propelled, but also must be capable of being lawfully operated on a public street or highway. At a minimum, that requires the vehicle to be registered and properly equipped in accordance with Idaho's motor vehicle laws." *In re Sanders*, 03.1 I.B.C.R. 57, 58 (Bankr. D. Idaho 2003). In 2008 and 2009, the Idaho Legislature amended the Idaho Code to allow ATV's to display restricted license plates. While prior jurisprudence had determined that ATV's do not qualify for the motor vehicle exemption, the debtors argued that because the restricted license plate allowed the ATV to lawfully operate on certain roads, the ATV thus fell within the Court's definition of an exempt motor vehicle.

The Court noted that while the restricted license plates did allow for ATV's to be operated on certain roads, the ATV's still could not be operated on controlled access highways, state highways, or interstate highways. Further, the new restricted licensure requirements still did not require ATV's to be equipped with essential mirrors, head and tail lamps, horns or reflectors. As a result, the Court held that ATV's, even if equipped with a restricted license, remain nonexempt under Idaho Code Section 11-605(3).

In Re Reswick, 446 B.R. 362 (9th Cir. BAP 2011)

In the case of *In re Reswick* the 9th Circuit BAP was faced with the question of whether the automatic stay of Bankruptcy Code Section 362 terminates in its entirety on the 30th day after a debtor's second bankruptcy case is commenced within a year of his first, or if the stay terminates only as to the debtor, and not property of the estate. In *In re Reswick*, the debtor had initially filed for chapter 13 bankruptcy on March 23, 2009. The case was dismissed for non-payment on June 29, 2009. The debtor filed a second chapter 13 petition on August 25, 2009. More than 30 days after the debtor filed his second petition, the debtor's ex-wife initiated wage garnishment proceedings against the debtor's post-petition earnings to collect on a previous judgment. The debtor filed a motion for damages for violation of the automatic stay under Section 362(k)(1). The bankruptcy court denied the debtor's motion on the grounds that the automatic stay had terminated in its entirety on September 24th, 2009, the 30th day after the debtor's second chapter 13 filing, and before the debtor's ex-wife had commenced the garnishment proceedings. The debtor appealed the decision to the 9th Circuit BAP.

The appeal turned on the interpretation of the language of Section 362(c)(3)(A) which states that "the stay under subsection (a) with respect to any action taken with respect to a debt or property securing 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." (emphasis added). At issue was what "with respect to the debtor" means. The debtor argued that the language meant that the automatic stay only terminated with respect to actions against him and his property, not property of the bankruptcy estate, while his ex-wife urged that the automatic stay terminated in its entirety.

In addressing the issue, which was apparently one of first impression in the 9th Circuit, the Court noted that there are two conflicting lines of interpretation of the phrase "with respect to the debtor." The majority interpretation has deemed the phrase to unambiguously mean that the automatic stay terminates only as to the debtor and his property. In contrast, the minority interpretation, analyzing the phrase in the context of Section 362(c)(3) as a whole, has deemed that the intention of Section 362(c)(3) is that the automatic stay is terminated in its entirety. The Court, looking to legislative history and statutory construction, decided to follow the minority interpretation, deeming it to be the better reasoned approach. Accordingly, the Court held that the automatic stay terminated in its entirety on the 30th day after the debtor's filing of his second chapter 13 petition, and that as such, the debtor's ex-wife had not violated the automatic stay.

In Re KM Allied of Nampa, 10-03056-TLM

This matter came before the Court in response to a bank's stay relief motion and the debtor's Amended Disclosure Statement.

The Court first addressed the issue of whether the debtor (a single asset real estate entity) could properly attempt to restructure under Chapter 11 a bank's obligation when the debtor is not a party to the note or construction agreement, but merely the grantor under a deed of trust. The Court found that the bank did, in fact, have a "claim" against the debtor, which claim could be restructured in the debtor's chapter 11 bankruptcy case. The Court further noted that § 1111(b)(1)(A) would entitle the bank to plan treatment not only on the secured portion of its claim, but also on the unsecured portion of its claim. That section "provides a very important benefit to the undersecured creditor holding a nonrecourse claim; it provides that for purposes of the Chapter 11 process, all secured debts shall be allowed or disallowed under § 502 as if it had recourse. *See § 1111(b)(1)(A); Bloomingdale Partners*, 155 B.R. at 969. This allows an undersecured creditor holding a nonrecourse claim to receive distribution on both the secured and unsecured portion of its claim."

Next, the Court addressed the bank's stay relief motion. As this is a SARE case, the Court discussed the requirements under Section 362(d)(3). Since no payments had been commenced by the debtor to the bank, the debtor could not rely upon § 362(d)(3)(B) to overcome the bank's motion. Instead, the debtor had to show under § 362(d)(3)(A) that it had "filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable period of time[.]" In this case, the Court found that the debtor had met its burden and was moving the case forward quickly, so that the issue of whether debtor could successfully reorganize would be resolved one way or the other within a reasonable period of time, as required under the Code. The bank's motion was denied.

Finally, the Court addressed approval of the debtor's Amended Disclosure Statement. The Court found that the debtor did not meet its burden of providing "adequate information" for interested parties to make "an informed judgment about the plan and how the provisions of the plan will be put into effect." Specifically, the Court ordered the debtor to file an Amended Disclosure Statement, (1) eliminating the extensive legal argument and rhetoric, which is not properly included in a disclosure statement; (2) amending the discussion on payment to professionals, when said professionals had not yet had their employment approved by the Court and objections were outstanding; (3) updating the discussion on plan treatment of the bank's secured and unsecured portion of its claim, as well the impact that a final determination on the applicable interest rate may have on the feasibility of the plan; (4) clarifying plan treatment of other creditors; and (5) providing further disclosures on the management of the debtor post-confirmation.

In Re Barrientos, 633 F.3d 1186 (9th Circuit 2011)

In *Barrientos*, the Ninth Circuit addressed the issue regarding the procedure for bringing contempt proceedings for a violation of a discharge injunction.

The Ninth Circuit explained that the availability of contempt proceedings under 11 U.S.C. § 105 for violation of a discharge injunction under Section 524 does not create a private right of action for damages. The remedy of contempt is available in the core bankruptcy proceeding. The rationale is that implying a private remedy could put enforcement of the discharge injunction in the hands of a court that did not issue it (perhaps even in the hands of a jury), which is inconsistent with the present scheme that leaves enforcement to the bankruptcy judge whose discharge order gave rise to the injunction. Otherwise, it undermines Congress' deliberate decision to place supervision of discharge in the bankruptcy court.

Further, the Ninth Circuit held that contempt proceedings for violation of discharge injunction must be initiated by a motion in a bankruptcy case, not via an adversary proceeding. In coming to that determination, the Ninth Circuit explained that bankruptcy rule 9020 provides that bankruptcy rule 9014 governs contempt proceedings in bankruptcy. Bankruptcy rule 9014 in turn is the rule that governs contested matters. Contested matters in the bankruptcy context is a term of art of which there is a distinction between adversary proceedings and administrative matters. A matter qualifies as an adversary proceeding as opposed to a contested matter if it is included in the list given in bankruptcy rule 7001. Otherwise it is a contested matter. Contempt proceedings are not listed under bankruptcy rule 7001. Thus, contested matters do not qualify as an adversary proceeding.

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