CONSUMER BANKRUPTCY NEWS

CRITICAL ISSUES AND WINNING STRATEGIES
FOR BANKRUPTCY PROFESSIONALS

MARCH 7, 2019 | VOLUME 29 | ISSUE 9

CLOUD ON TITLE MAY BE AVOIDED BY SECTION 522(f)(1)

A notice of foreign judgment created a cloud on the title to the debtor's home, which he owned with his wife as tenants by the entirety, sufficient to constitute a charge against or interest in the property avoidable under Section 522(f)(1), the 8th U.S. Circuit Court of Appeals ruled in *CRP Holdings A-1, LLC Appellant v. O'Sullivan (In re O'Sullivan)*, 2019 WL 406685 (8th Cir. 2/1/19).

In affirming the lower courts, the appellate panel found that while there was no lien as defined by state law the recording of the foreign judgment created a lien under federal law.

Foreign judgment

Casey D. O'Sullivan and his wife lived in Barton County, Mo. They acquired their home in November 1995.

On Jan. 5, 2015, CRP Holdings, A-1, LLC obtained a $765,151 default judgment against O'Sullivan in Platte County, Mo. The judgment did not include O'Sullivan's wife.

On Jan. 26, 2015, CRP filed a notice of foreign judgment in Barton County in an attempt to obtain a judicial lien on the O'Sullivans' property.

On April 3, 2015, O'Sullivan filed a Chapter 7 petition. He claimed a $15,000 homestead exemption under Mo. Rev. Stat. § 513.475 and 11 U.S.C. § 522(b)(3)(B).

There were no objections to O'Sullivan's claimed exemptions.

O'Sullivan also moved to avoid CRP's purported judicial lien pursuant to Section 522(f)(1), asserting that it impaired his homestead exemption.

42501887

IN THIS ISSUE:

NEWS

January Total Bankruptcy Filings Increase 11% From December 3

Equifax Must Face Lawsuits Over Massive Data Breach-Ruling 3

CONSUMER PROTECTION

Debt Collection Suit Doesn't Need To Be Filed In Bankruptcy Court.............. 4

FORECLOSURE

Florida Law Presumes Debtors Who Intend To Surrender Waive Foreclosure Defense........................... 4

SANCTIONS

Court Upholds Sanctions Against Bankruptcy Lawyer For 'Egregious Conduct' 5

Credit Union Sanctioned For Filing Deficient Proof Of Claim 6

UNDISCLOSED ASSET

Omission Of Employment Suit Does Not Merit Dismissal............................. 7

Plaintiff Can't Pursue Employment Claim She Didn't Disclose 8

U.S. SUPREME COURT

Trustee Seeks Review Of Creditor 'Acts'.. 9

Law Professor Supports High Court Review Of *Dewsnup* 10

AGENCY NEWS

FTC Seeks To Add Defendants In Student Debt Relief Case 11

FTC Stops Phantom Debt Collection Scheme 11

CASE NOTES 11

THOMSON REUTERS®

CRP responded that its judgment lien did not impair the debtor's homestead exemption because the lien did not attach to entireties property and could not be enforced against the debtor's home.

The bankruptcy court granted O'Sullivan's motion. The court found that although CRP's lien did not affix to the property, its existence impaired the homestead exemption.

The 8th Circuit Bankruptcy Appellate Panel affirmed, finding that "an unenforceable judgment lien arose" on the property.

The 8th Circuit vacated that ruling, and remanded finding that the issue of "whether CRP had a judicial lien properly subject to avoidance under Section 522(f)(1)(A)" had never been addressed. *CRP Holdings, A–1, LLC v. O'Sullivan (In re O'Sullivan)*, 841 F.3d 786 (8th Cir. 2016).

Following remand, the bankruptcy court again granted O'Sullivan's motion. The court found that, under Missouri law, CRP's action of recording a foreign judgment against entireties property was a "'cloud' against title" giving rise to an "interest in property" avoidable under Section 522(f)(1). *In re O'Sullivan*, 569 B.R. 163 (Bankr. W.D. Mo. 2017).

The BAP affirmed. *CRP Holdings, A–1, LLC v. O'Sullivan (In re O'Sullivan)*, No. 17-6012, 2017 WL 4844244 (Bankr. 8th Cir. 9/22/17).

CONSUMER BANKRUPTCY NEWS

David J. Light, Esq.
Principal Attorney Editor

©2019 Thomson Reuters. All rights reserved.

CONSUMER BANKRUPTCY NEWS (ISSN 1058-3963) (USPS 012-103) is BI-WEEKLY EXCEPT ON ISSUE OMITTED IN JAN, MAY, JUL, NOV & DEC by Thomson Reuters, 610 Opperman Drive, Eagan, MN 55123-1340. Periodicals postage paid at St. Paul, MN. **POSTMASTER:** Send address changes to *CONSUMER BANKRUPTCY NEWS*, 610 Opperman Drive, Eagan, MN 55123.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400, fax (978) 646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

Avoidable interest

On appeal to the 8th Circuit, CRP asserted that the recording of its notice of foreign judgment did not create an enforceable lien, unenforceable lien, or cloud upon title under state law. Instead, the creditor argued, it held a contingent future interest.

Section 522(f)(1) says, in relevant part, "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 [Section 522(b)], if such lien is ... a judicial lien."

Section 101(37) defines "lien" as "a charge against or interest in property to secure payment of a debt or performance of an obligation."

The 8th Circuit panel said this definition suggests that a lien does not need to be enforceable to be avoidable. All that is needed is a charge against or interest in the debtor's property.

"As we recognized in the prior appeal, our sister circuits have distinguished between 'existent but presently unenforceable liens and nonexistent liens.' [841 F.3d] at 789-90. Persuaded by our sister circuits' distinctions, we 'conclude[d] that where a judgment gives rise to an unenforceable lien, a debtor may move to avoid that lien under Section 522(f). When a judgment fails to give rise to any judicial lien (including an unenforceable lien), however, Section 522(f)(1) is superfluous and without application.' *Id.* at 790," the panel said.

The court looked to Missouri law to determine if CRP's notice of foreign judgment gave rise to a lien on O'Sullivan's exempt homestead.

Under Missouri law, a judgment against one spouse does not constitute a lien on entireties property because neither spouse has an individual interest in the property that is subject to execution. However, Missouri law recognizes that there are times when courts "must act in equity to clear a cloud upon a title to real estate that is not apparent on the face of the document," the 8th Circuit said, citing *Mahen v. Ruhr*, 293 Mo. 500, 240 S.W. 164 (1922).

"In the present case, as in *Mahen*, there is no 'lien' as Missouri law defines it because CRP's notice of foreign judgment was against O'Sullivan, not O'Sullivan and his wife, who hold the property as tenants by the entirety. Nevertheless, there is a 'lien' as federal law defines it because a 'cloud upon the title' to the property exists under Missouri law, just as it did in *Mahen*, by virtue of CRP's filing of the notice of foreign judgment. That cloud on title constitutes a 'charge against or interest in the property.'"

Consistent with *Mahen*, the 8th Circuit panel agreed with the BAP that the existence of the notice of foreign judgment could make it difficult for even the most experienced title searcher to determine whether the property was liable for execution.

"The result is that the property's value and marketability of title would be affected. We agree with the BAP that CRP's recording of the foreign judgment created a cloud on title under Missouri law sufficient to constitute a 'charge against or interest in' O'Sullivan's property under the Bankruptcy Code. ... As a result, we hold that application of Section 522(f) will clear the cloud on title to O'Sullivan's property and, as a result, the bankruptcy court properly granted O'Sullivan's motion to avoid the lien."

NEWS

JANUARY TOTAL BANKRUPTCY FILINGS INCREASE 11% FROM DECEMBER

Total bankruptcy filings increased 11 percent in January 2019 from December 2018, according to the American Bankruptcy Institute and data provided by Epiq Systems, Inc. Bankruptcy filings totaled 57,618 in January 2019, up from the 52,037 total filings in December 2018.

Consumer filings also increased 11 percent in January 2019 to 54,711 from the December 2018 consumer filing total of 49,105. Conversely, the January 2019 business filing total of 2,907 represented a 1 percent decrease from the December 2018 business filing total of 2,932, and January 2019's 365 business Chapter 11 filings fell 20 percent from the 455 business Chapter 11s recorded in December.

Total bankruptcy filings in January 2019 increased 5 percent from January 2018's total of 54,650 filings. Consumer filings increased 6 percent in January 2019 to 54,711 from the January 2018 consumer filing total of 51,758. Total business filings increased slightly in January 2019 to 2,907, representing a 1 percent increase from the 2,892 business filings recorded in January 2018. The 365 business Chapter 11 filings in January 2019 represented a slight decrease from January 2018's total of 366.

EQUIFAX MUST FACE LAWSUITS OVER MASSIVE DATA BREACH-RULING

Reuters (January 29) – Two consolidated class actions filed against credit bureau Equifax over a 2017 security breach that exposed the data of nearly 150 million consumers can go forward, a federal judge in Atlanta has ruled.

The decision by District Judge Thomas Thrash allows consumers and financial institutions to proceed with their separate lawsuits over the breach, one of the largest in U.S. history, although parts of each lawsuit were dismissed.

In the consumers' case, Judge Thrash said Equifax must face negligence claims, while dismissing some federal and state law claims. Judge Thrash allowed most claims by financial institutions who said they had to reissue credit or debit cards because of the breach to proceed, while tossing the claims of other financial institutions. He also dismissed a smaller, separate case on behalf of owners of small businesses, saying they could seek damages in the consumer litigation.

Atlanta-based Equifax spokeswoman Meredith Griffanti declined to comment.

"We're pleased with the court's decision as it pertains to the card issuers' claims and believe we have a path forward to seek amendment as to the claims the court dismissed," Joseph Guglielmo, co-lead counsel for the financial institutions, said.

A lawyer for the consumers could not immediately be reached.

The lawsuits stem from Equifax's disclosure in September 2017 that hackers had breached its systems months earlier, stealing the personal information of millions of consumers such as birth dates, addresses and Social Security numbers.

Hundreds of lawsuits filed over the breach were consolidated in December 2017 in Atlanta under Judge Thrash and later split into separate cases for consumers, financial institutions and small businesses.

The consumers' lawsuit alleges that Equifax was negligent and violated numerous state and federal laws by failing to protect information that could be used for identity theft.

The financial institutions made similar claims, saying they had been forced to spend time and money to mitigate the risk of fraudulent activity because the entire credit reporting system had been compromised. Financial institutions that issued payment cards affected by the breach were seeking damages for the costs of issuing new cards and reimbursing consumers for fraudulent charges.

In a motion last June to dismiss the consumers' case, Equifax said they had not adequately alleged that they were injured or that any injuries were caused by Equifax and not some other data breach. The consumers had claimed they were at risk of fraudulent transactions, but fear of future damages is speculative and not an actual injury, Equifax said.

Financial institutions also had not adequately alleged that they were injured, Equifax said in a

© 2019 Thomson Reuters

separate motion to dismiss their case last July. They alleged that they were forced to step up monitoring activities, but they cannot hold Equifax liable for costs they voluntarily incurred, Equifax said.

In the court's order, Judge Thrash said consumers adequately alleged that they were harmed. Some had already been victims of identity theft and the others had to take measures to combat the risk of identity theft, he said.

The financial institutions that issued cards had also adequately alleged injuries because they had to incur costs for reissuing cards, he said.

Injuries claimed by the other financial institutions, however, such as costs of increased fraud monitoring, are "no more than due diligence and business as usual in the digital age," he said, dismissing their claims.

(Reporting by Dena Aubin.)

CONSUMER PROTECTION

DEBT COLLECTION SUIT DOESN'T NEED TO BE FILED IN BANKRUPTCY COURT

A woman who says a hospital violated federal law by dunning her while she was in bankruptcy is not required to bring the suit in the bankruptcy court where her Chapter 7 case was filed, a Missouri federal magistrate judge has ruled. (*Plank v. St. Anthony's Medical Center,* 2019 WL 354871 (E.D. Mo. 1/29/19).)

Nothing in the Bankruptcy Code prevents Patty Plank from bringing her Fair Debt Collection Practices Act claims in federal court, U.S. Magistrate Judge Nannette A. Baker of the Eastern District of Missouri said, rejecting a motion to dismiss the suit.

Plank filed her bankruptcy case in September 2017 in the U.S. Bankruptcy Court for the Eastern District of Missouri, and she received a discharge Jan. 3, 2018.

In her federal court suit, she claims HLO Collection Services Inc. violated the FDCPA, 15 U.S.C.A. § 1692, by sending her a letter in October 2017 that sought to collect a debt she owed to St. Anthony's Medical Center. Bankruptcy's automatic stay protected her from creditors' collection efforts during that time, her suit said.

The suit named HLO and St. Anthony's as defendants.

They moved to dismiss the case, saying Plank needed to file it in the bankruptcy court because it involved an alleged violation of bankruptcy's automatic stay.

The 8th U.S. Circuit Court of Appeals has never ruled on the question but other courts, including lower courts within the 8th Circuit, are split, Judge Baker said.

She sided with courts that have found no conflict between the Bankruptcy Code and the FDCPA.

The Bankruptcy Code and the FDCPA do not irreconcilably conflict with each other so as to repeal the FDCPA by implication," she said. "Debt collectors can comply with each statute simultaneously."

(Reporting by Donna Higgins.)

FORECLOSURE

FLORIDA LAW PRESUMES DEBTORS WHO INTEND TO SURRENDER WAIVE FORECLOSURE DEFENSE

A new Florida law creates a rebuttable presumption in mortgage foreclosure actions that debtors who state an intent to surrender their property in their bankruptcy cases have waived any defense to foreclosure. This presumption is contingent on the debtor receiving a discharge without withdrawing the stated intention.

Fla. Stat. § 702.12, which applies to any foreclosure action filed on or after Oct. 1, 2018, also allows a lienholder in a mortgage foreclosure action to submit any document the debtor filed under penalty of perjury in the bankruptcy case for use as an admission by the debtor/defendant.

"Bankruptcy courts have consistently held that borrowers who have received bankruptcy protection by announcing their intention to surrender their mortgage property have forfeited their right to contest the foreclosure," observed William L. Anderson, a litigator with Jimerson & Birr in Jacksonville, Fla.

"Bankruptcy courts are willing to sanction borrowers who attempt to 'have their cake and it too' when they contest the state court foreclosure proceedings. *See In re Elowitz*, 550 B.R. 603 (Bankr. S.D. Fla. 2016)."

While lenders could seek relief in the bankruptcy court, doing so added more time to the foreclosure process.

Lenders could also seek relief directly from the state court by asking the court to apply judicial estoppel to preclude the assertion of affirmative defenses or counterclaims.

"Several District Courts of Appeal have held that when a borrower declares their intention to surrender

 © 2019 Thomson Reuters

their interest in mortgaged real property, the borrower is precluded from taking overt action to defend against the foreclosure," Anderson said. For examples, he referenced *Clay County Land Trust v. HSBC Bank USA, N.A. for FBT Securitization Trust 2005-3*, 219 So. 3d 1015 (Fla. 1st DCA 2017); and, *Rivera v. Bank of America, N.A. ex rel. BAC Home Loans Servicing, L.P.*, 190 So. 3d 267 (Mem.) (Fla. 5th DCA 2016).

However, this approach does not present consistent results because courts have a great deal of discretion when it comes to applying judicial estoppel.

Now, Section 702.12 presents a clear roadmap for courts to follow when debtors file bankruptcy, state an intention to surrender their homes, and receive a discharge without changing their stated intention.

"Once the lender moves the trial court to judicially notice the bankruptcy proceedings, the trial court must take note of the same. Then, the ball is the borrower's court and the borrower must present some argument or proof as to why they should be able to defend against the foreclosure," Anderson said.

"This removal of discretion and clear mandate on how the trial court is to proceed should expedite foreclosure proceedings and provide a predictable set results for lenders."

Anderson cautions that while Section 702.12 enables the foreclosure process to move more quickly, the lender must still go through the necessary steps to obtain a foreclosure judgment. Lenders should know which bankruptcy documents they need to introduce, and outline for the trial court how the bankruptcy documents clearly demonstrate that the debtor is prevented from raising a defense.

"A borrower could still object to a lender's evidence at trial or make legal arguments that the lender failed to prove the requisite elements of foreclosure, without running afoul of judicial estoppel. Even if the trial court utilizes Section 702.12, a lender should be prepared for objections to evidence at trial," Anderson said.

SANCTIONS

COURT UPHOLDS SANCTIONS AGAINST BANKRUPTCY LAWYER FOR 'EGREGIOUS CONDUCT'

A Texas lawyer must pay a former client nearly $28,000, plus undetermined attorney fees, for "particularly egregious and disturbing" conduct that led to the client's wrongful jailing, a federal judge has ruled, affirming sanctions issued by a bankruptcy court. (*In re Decloutte v. Austin*, 2019 WL 337967 (S.D. Tex. 1/28/19).)

The bankruptcy judge also properly issued writs of garnishment ordering a trustee and a bank, which held funds owed to lawyer Kelley L. Austin of Sugarland, Texas, to pay the former client, District Judge Nancy F. Atlas of the Southern District of Texas said.

'Egregious conduct'

Austin represented Loretta Decloutte of Fort Bend County, Texas, in a divorce proceeding that began in November 2012, and a Chapter 13 case that she filed in the U.S. Bankruptcy Court for the Southern District of Texas in October 2014, Judge Atlas' opinion said.

Austin received a $10,000 check payable to her client as a part of the divorce settlement in July 2016, while the automatic stay in Decloutte's bankruptcy case was in effect, the opinion said.

But instead of delivering the check to Decloutte, the attorney endorsed it with her client's name, kept more than $7,300 for herself and sent a separate check for the balance, according to the opinion.

Austin filed a false police report in Fort Bend County, stating that Decloutte had stolen $10,000 from her, the opinion said. The attorney testified that she did so in response to questions arising about the check's endorsement and to protect herself from charges of forgery and theft, the opinion said.

Authorities arrested Decloutte in May 2017 and formally charged her in state court with felony theft based on the false police report, according to the opinion. She was eventually released.

Sanctions

Decloutte obtained new counsel and filed an adversary complaint against Austin in the bankruptcy court, seeking to recover payments made to the attorney and damages resulting from Austin's violation of the automatic stay that was still in effect when Austin endorsed Decloutte's check, Judge Atlas said.

Bankruptcy Judge David R. Jones ruled in June 2018 that Austin violated the stay and awarded $12,500 in punitive damages under Section 362(k).

Judge Jones also determined that the attorney had violated sections of Texas Disciplinary Rules of Professional Conduct and granted Decloutte attorney fees for her bankruptcy and criminal proceedings. The judge also ordered Austin to pay Decloutte $15,420 in sanctions for the client's wrongful imprisonment and other expenses she incurred.

He further declared that the $27,920 was nondischargeable in Austin's own bankruptcy proceeding, commenced in 2012, which Judge Jones is also overseeing. In so ruling, he cited Section 523(a)(4),

which excludes from discharge debts for fraud while acting in a fiduciary capacity.

Judge Jones also referred Austin to the district court's chief judge and to the Texas State Bar, recommending she be disbarred, and sent the matter to a U.S. attorney for further investigation.

In a separate order, the bankruptcy judge issued writs of garnishment in September, which led to Decloutte's Chapter 13 Trustee placing a hold on funds owed Austin and Wells Fargo seizing a checking account, according to Judge Atlas.

Austin appealed the judge's orders issuing the sanctions and the garnishment writs.

Appeal denied

The appeal raised many arguments, each of which Judge Atlas rejected, for concluding that the bankruptcy judge abused his discretion in ordering the sanctions.

Austin argued, for example, that the judge could not award punitive damages, but Judge Atlas said Section 362(k) expressly permits them in appropriate circumstances, including those involving "egregious conduct."

She also rejected the attorney's argument that because Judge Jones imposed the sanctions for state court matters, the sanctions were unlawful, responding that Decloutte's criminal prosecution was "closely related to Austin's conduct in the Chapter 13 bankruptcy proceeding."

Judge Atlas also ruled that Judge Jones did not abuse his discretion when he issued the garnishment writs, rejecting the attorney's allegations that they violated Texas law and that the bankruptcy judge did not give her adequate notice.

(Reporting by Conor O'Brien)

CREDIT UNION SANCTIONED FOR FILING DEFICIENT PROOF OF CLAIM

A creditor that asserted a claim in a couple's bankruptcy case but initially omitted required information establishing the claim's validity must pay $200 in sanctions to the Chapter 13 Trustee, a Michigan bankruptcy judge has ruled in an unpublished decision. (*In re Ball*, 2019 WL 303071 (Bankr. E.D. Mich. 1/22/19) (unpublished).)

Financial Edge Credit Union's initial, deficient claim prompted the trustee to incur unnecessary costs by objecting on statute-of-limitations grounds, Bankruptcy Judge Daniel S. Opperman of the Eastern District of Michigan said, though he noted that the trustee could have taken steps to avoid the need to object.

Initial, amended claims

According to Judge Opperman's opinion, Jason and Jill Ball owed Financial Edge a $250 debt stemming from an overdrawn bank account when they filed a Chapter 13 petition in December 2017.

Financial Edge asserted a $250 claim in the debtors' case and submitted a copy of the parties' account contract and a statement of account, but none of the documents indicated the date of the Balls' last payment on the debt, the opinion said.

Because Financial Edge's proof of claim indicated only the amount of the debt and that the account was opened in August 2009, Chapter 13 Trustee Thomas McDonald objected to the claim, believing it barred by Michigan's six-year statute of limitations, the opinion said.

Financial Edge filed an amended proof of claim the next day, this time indicating that the Balls made their last payment on the account in June 2017, the opinion said. The trustee consequently withdrew his objection.

On the same day he withdrew the objection, McDonald also filed a motion for sanctions under Federal Rule of Bankruptcy Procedure 3001, seeking $400 in damages for Financial Edge's inadequate initial proof of claim.

Seeking sanctions

Rule 3001 lists supporting information a creditor must provide when asserting various types of claims in a bankruptcy case. It also defines sanctions, including awarding expenses and attorney fees, for failure to comply.

Under Rule 3001(3)(A), when a claim is based on an open-end or revolving consumer credit agreement, the creditor must file with the proof of claim a statement indicating the date of the account holder's last transaction and the date of the last payment on the account, among other information.

Here, Financial Edge's claim stems from an open-end consumer credit account, so the requirements set forth in Rule 3001(c)(3) apply, Judge Opperman explained. However, the creditor did not initially include the dates of the last transaction or the last payment on the account, the judge said.

This caused the trustee to file an objection, on statute-of-limitations grounds, that Financial Edge's amended claim ultimately rendered moot, the judge

 © 2019 Thomson Reuters

said. The judge noted that the trustee was carrying out his duty to review the claim as imposed in *Midland Funding LLC v. Johnson*, 137 S. Ct. 1407 (2017).

In opposing the sanctions motion, Financial Edge cited the fact that it filed its amended proof of claim immediately and argued that the deficiency could have easily been cured without the need for an objection.

Some sanctions warranted

Noting that "both parties are right and wrong," Judge Opperman said Financial Edge's initial proof of claim violated Rule 3001 but that the trustee could have called or written to Financial Edge's counsel before resorting to filing an objection.

"Financial Edge failed to file a proof of claim as required by Rule 3001, so some award may be appropriate, but the amount requested by the trustee, $400, while nominal, could have been drastically reduced if not eliminated by a simple phone call, email or letter," the judge said.

"So, while Financial Edge started this problem by filing a deficient proof of claim, the trustee continued it by taking a more drastic course of action," he added.

While McDonald had argued that he "is charged with reviewing thousands of claims a year and does not have the time to do so informally," Judge Opperman said a "more measured response" was necessary in cases like this.

He therefore awarded McDonald half of the requested sanctions, or $200, saying Financial Edge's initial proof of claim was deficient but that "other less drastic actions can and should have been taken."

(Reporting by Lisa Uhlman.)

UNDISCLOSED ASSET

OMISSION OF EMPLOYMENT SUIT DOES NOT MERIT DISMISSAL

Judicial estoppel does not bar an Alabama woman's employment discrimination lawsuit even though she failed to disclose it in her bankruptcy filings, an Alabama federal judge has ruled. (*Washington v. Shanahan et al.*, No. 17-cv-528, 2019 WL 320582 (S.D. Ala. 1/24/19).)

U.S. District Judge Terry F. Moorer of the Southern District of Alabama denied the defendants' motion to dismiss the suit, saying he found no evidence Tiffany M. Washington deliberately set out to make a mockery of the courts, a required element of the equitable doctrine of judicial estoppel.

Discrimination claims

Washington alleges claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000, and the Rehabilitation Act, 29 U.S.C.A. § 701, against her former employer, the Defense Contract Management Agency, and acting U.S. Secretary of Defense Patrick M. Shanahan. The Rehabilitation Act prohibits federal contractors from discriminating against employees on the basis of disability.

The suit says DCMA discriminated against Washington as an African-American woman by demoting her and then retaliated against her after she filed an informal Equal Employment Opportunity complaint in September 2014. The agency also failed to offer accommodation for a depressive disorder that adversely affected her work performance, the complaint says.

Washington worked for DCMA from June 2008 to May 2015, when she was fired after allegedly submitting inaccurate reimbursement claims associated with an involuntary transfer from Mobile, Alabama to Atlanta, according to Judge Moorer's opinion.

She is seeking reinstatement, $300,000 in damages, back pay with interest, and reimbursement for relocation and other costs, the opinion said.

The defendants moved to dismiss the suit, saying Washington was judicially barred from bringing claims she had not disclosed in three Chapter 13 bankruptcy cases she filed between February 2015 and July 2017.

Bankruptcy filings

The defendants say Washington failed to disclose various employment claims pending during that time, including her initial EEO complaint, several administrative appeals, and a federal lawsuit in the Northern District of Georgia.

The defendants asserted Washington is a "sophisticated litigant," pointing to her six total bankruptcy filings, her work as a procurement specialist at DCMA, her two federal lawsuits, and her previous experience dealing with the Small Business Administration and filing a claim related to the Deepwater Horizon oil spill.

Washington countered that the defendants could not meet the two-prong test for judicial estoppel that requires them to establish that she took an inconsistent position under oath in a separate proceeding and that any inconsistency was calculated to make a mockery of the judicial system.

Washington said she expected no compensation from her initial employment-related filings, so failing to list those did not prejudice creditors, the opinion said.

She also said she amended her 2017 bankruptcy filing to reflect the current lawsuit just eight days after filing it in the Alabama federal court, according to the opinion. She also argued that none of the three bankruptcy plans at issue here were approved, so there was no prejudice to creditors in any event.

No evidence

Judge Moorer first said that judicial estoppel should be raised as an affirmative defense rather than in a motion to dismiss, but he concluded that even if it had been properly raised, the defendants failed to meet their burden.

The judge found the defendants failed to provide any legal support for why Washington's disclosure of the lawsuit just days after it was initiated was insufficient or why her failure to disclose any administrative proceedings in her bankruptcy filings would justify judicial estoppel.

The judge rejected the defendants' sophistication argument, saying Washington had not succeeded in any of her job-related claims or in six bankruptcy petitions to date, and that there was little evidence that her job skills or experience dealing with British Petroleum and the SBA had any similarity to the EEO claims asserted here.

As no discovery has taken place in the case and no scheduling order has been determined, the judge found converting the motion to a summary judgment motion would also be premature and declined to do so.

(Reporting by Alex Rose.)

PLAINTIFF CAN'T PURSUE EMPLOYMENT CLAIM SHE DIDN'T DISCLOSE

Judicial estoppel prevents an Oklahoma woman from pursuing an age discrimination claim she filed against her ex-employer after failing to the claim as an asset in her bankruptcy case, a federal judge has ruled. (*Clute v. Murray Womble Inc.*, 2019 WL 238152 (N.D. Okla. 1/16/19).)

The plaintiff clearly knew of the potential claim when she filed her bankruptcy schedules, U.S. District Judge John E. Dowdell of the Northern District of Oklahoma said, rejecting her argument that she had no intention or motive to conceal the claim.

Age discrimination suit, bankruptcy

According to Judge Dowdell's opinion, Karen Clute filed an age discrimination charge against Murray Womble Inc. with the U.S. Equal Employment Opportunity Commission in October 2016, about two months after the hardware manufacturer terminated the 64-year-old's employment.

Clute filed a perfected discrimination charge with the EEOC on June 2, 2017. On the same day, she filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Northern District of Oklahoma.

In her bankruptcy schedules, Clute responded "no" when asked if she had any potential claims against third parties, the opinion said.

After the Chapter 7 Trustee reported that the estate had no non-exempt property with which to pay creditors, the bankruptcy court granted Clute a discharge, and closed the case in September 2017.

In January 2018, Clute filed an age discrimination lawsuit against Murray Womble in Oklahoma state court, the action was later removed to the district court.

The defendant moved for summary judgment, saying Clute was judicially estopped from bringing the claim based on her failure to it in her bankruptcy. Clute then moved to reopen her bankruptcy case so she could amend her schedules to include the employment claim.

Applying judicial estoppel

Judicial estoppel is meant to stop parties from deliberately changing positions to gain an advantage in litigation. It applies when a party takes clearly inconsistent positions in different legal proceedings, creating the perception that either the first or second court was misled and giving the party an unfair advantage.

Here, the first element of judicial estoppel is clearly satisfied, Judge Dowdell said, citing Clute's assertion in her bankruptcy filings that she had no claims against third parties when, in fact, she had filed her perfected EEOC charge the same day as her Chapter 7 petition.

"Given the timing of her EEOC filings, it is clear that plaintiff was actively pursuing her potential claim against Murray Womble Inc. when she filed her bankruptcy petition," the judge said, rejecting Clute's argument that she did not disclose the claim because she had not yet filed a lawsuit at the time.

Next, Judge Dowdell found Clute's "actions indisputably created the perception that she successfully misled the bankruptcy court." The Chapter 7

 © 2019 Thomson Reuters

Trustee "undoubtedly" relied on the debtor's incorrect schedules in filing the no-asset report, which in turn led to the discharge order, the judge explained.

In opposing application of judicial estoppel, Clute said she had not intentionally misled the bankruptcy court, noting that she moved to reopen her bankruptcy case so she could amend her schedules.

Rejecting that argument, Judge Dowdell said receipt of a bankruptcy discharge is enough to support application of judicial estoppel, even if the discharge is later vacated.

"Allowing a plaintiff to 'back up' and benefit from the reopening of bankruptcy only after his omission had been exposed would suggest that a debtor should consider disclosing potential assets only if he is caught concealing them," he said, quoting *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151 (10th Cir. 2007).

The final element of judicial estoppel is also satisfied, Judge Dowdell said, noting that Clute "received the benefit of a discharge without ever having disclosed her age discrimination claim," giving her an unfair advantage over her creditors.

Additional circumstances

Noting that courts may look to additional considerations in determining whether judicial estoppel applies, Judge Dowdell rejected Clute's argument that judicial estoppel was inapplicable because her failure to include the employment claim was inadvertent and not intentionally deceptive.

"Plaintiff's knowledge of her undisclosed potential claim is simply not in genuine dispute," the judge said.

Finally, he rejected Clute's "self-serving" argument that she had no motive to conceal the employment claim, saying courts may infer a motive to conceal assets in bankruptcy cases.

Judge Dowdell therefore found Clute was judicially estopped from pursuing her suit. However, noting that the bankruptcy trustee should not be estopped from bringing the claim, the judge gave the trustee 60 days to intervene as the real party-in-interest before he dismisses the case.

(Reporting by Lisa Uhlman.)

U.S. SUPREME COURT

TRUSTEE SEEKS REVIEW OF CREDITOR 'ACTS'

A Chapter 13 Trustee says the U.S. Supreme Court should review whether an employer violated the automatic stay in an employee's bankruptcy by "passively" acquiring a lien against proceeds from her slip-and-fall suit against a supplier. (*Davis v. Tyson Prepared Foods Inc.*, No. 18-941, 2019 WL 277236 (U.S. Jan. 14, 2019).)

The 10th U.S. Circuit Court of Appeals ruled against the trustee in October, saying employer Tyson Prepared Foods Inc. did not "act" for purposes of the automatic stay because the lien arose automatically under Kansas workers' compensation law.

The decision affirmed a ruling from the U.S. Bankruptcy Court for the District of Kansas.

Chapter 13 Trustee Carl Davis says the Supreme Court should hear the case because a majority of other circuit courts of appeals have held that passively holding or obtaining a property interest violates the stay.

Slip-and-fall settlement

Elizabeth Garcia slipped and fell on a wet floor mat at a Hutchinson, Kansas, food processing plant in June 2012 and ultimately received nearly $50,000 in workers' compensation benefits from Tyson, according to the bankruptcy court opinion.

Garcia and her husband entered Chapter 13 in March 2013.

She didn't disclose the workers' compensation claim in her bankruptcy papers and said her benefits had already ended, but she received more than $22,000 from Tyson after the bankruptcy filing date, the opinion said.

In June 2014, just after Garcia settled the workers' compensation claim through a final lump-sum payout, she sued Aramark Services, which had supplied the floor mat at the Tyson plant.

The Chapter 13 Trustee learned of the suit and obtained an order for turnover of any recovery Garcia obtained in the litigation.

She later settled with Aramark for $45,000, the opinion said.

No 'affirmative conduct' justifying stay violation

Tyson, saying it did not know of the suit or bankruptcy until 2016, asserted a statutory lien against $22,000 of the settlement funds reflecting its post-petition benefits payments.

Kan. Stat. Ann. § 44-504(b) grants employers that pay workers' compensation benefits a right to subrogation – substituting one party's legal rights for another's – and a lien against any recovery the employee later obtains from a third-party tortfeasor.

The bankruptcy court ordered the trustee to hold $25,000 remaining after payment of attorney fees, pending resolution of the lien issue.

The trustee then commenced an adversary proceeding, saying Tyson had violated Section 362(a)(4), which prohibits "any act to create, perfect or enforce any lien against property of the estate."

In July 2017 the bankruptcy court granted Tyson's motion for summary judgment based on a recent 10th Circuit decision out of Colorado, *WD Equipment LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017).

Adopting a minority position, the *Cowen* court said the word "act" in Section 362(a)(3), which stays acts of possession or control over estate property, does not apply to passively holding onto an asset.

The U.S. District Court for the District of Kansas certified Garcia's case for direct appeal to the 10th Circuit, which said it cannot overturn the work of another panel absent en banc review or an intervening Supreme Court holding.

The 10th Circuit panel found no reason to interpret "act" as used in Section 362(a)(4) differently than in Section 362(a)(3).

"We, too, must read the statutory term 'act' to encompass only affirmative conduct on the part of the lienholder," the panel said.

Certiorari petition

In calling for Supreme Court review, Davis says five courts of appeals have held that Section 362(a)'s various prohibitions on "acts" apply to passively holding or obtaining property interests of debtors or bankruptcy estates.

The petition cites *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989), and four subsequent holdings from other circuits.

Only one other appeals court beside the 10th Circuit has held that "act" means affirmative conduct, the trustee says, citing *U.S. v. Inslaw Inc.*, 932 F.2d 1467 (D.C. Cir. 1991).

Certiorari would resolve this "entrenched and acknowledged" conflict, he says.

Moreover, the 10th Circuit holding conflicts with the Supreme Court's holding in *U.S. v. Whiting Pools Inc.*, 462 U.S. 198 (1983), which rejected the notion that creditors who retain seized property are immune from Bankruptcy Code remedies such as the automatic stay, the trustee says.

Finally, the 10th Circuit's *Cowen* holding gets a vitally important legal question wrong, Davis says.

"The minority rule adopted by the court below is contrary to ... settled principles of bankruptcy law and the sound administration of the bankruptcy system," he concludes.

(Reporting by Michael Nordskog.)

LAW PROFESSOR SUPPORTS HIGH COURT REVIEW OF *DEWSNUP*

A nearly 30-year-old U.S. Supreme Court precedent on avoidance of liens "was wrongly decided and should be overruled," a Washington and Lee University law professor has told the high court. (*Ritter v Brady,* No. 18-747, *amicus brief filed,* 2019 WL 193119 (U.S. Jan. 10, 2019).)

Margaret Howard is supporting a Chapter 7 debtor's petition seeking review of a federal appeals court ruling that said the debtor could not strip off a lien securing a second mortgage on her home, which was worth less than what she owed on the first mortgage.

The appeals court relied on *Dewsnup v. Timm*, 502 U.S. 410 (1992), in which the Supreme Court said that for purposes of Section 506(d), a claim secured by a lien is treated as fully secured regardless of the underlying value of the collateral.

Section 506(d) voids any part of a lien that is not "an allowed secured claim." Section 506(a) states that a claim is considered secured to the extent of the value of the collateral underlying the lien.

Petitioner Sonja Ritter says the justices should use her case to overturn *Dewsnup*.

Howard supported that request in a January 10 amicus brief, saying the justifications the *Dewsnup* court gave for its holding do not stand up to scrutiny.

The *Dewsnup* justices misstated or ignored Supreme Court precedents of the time, and "completely ignored" the way secured claims were handled in the 1978 Bankruptcy Code, Howard says.

"The Bankruptcy Code is consistent with a priority view of secured creditors' rights, entitling them to the value of the collateral supporting their liens, no more and no less," she says.

A response to the petition from Chapter 7 trustee Lois Brady was due January 10, but nothing was filed, according to the Supreme Court's docket for the case.

Court rejects bid to strip lien

The petition, filed Dec. 2, 2018, arises from Ritter's unsuccessful attempt to avoid a lien on a second mortgage.

According to her petition, she had a $340,000 mortgage with Bank of America and a second mortgage with PNC Bank for $42,500, but her home was worth only $185,000.

 © 2019 Thomson Reuters

She sought to strip off the PNC lien under Section 506(d), but the U.S. Bankruptcy Court for the Northern District of California granted her a discharge and closed her case without ruling on her motion.

She later sought to reopen her case and obtain a ruling on her motion after the PNC lien prevented her from refinancing her primary mortgage, her petition said.

The bankruptcy court declined to do so, saying it would be futile because the court could not grant her the relief she requested.

The 9th Circuit's Bankruptcy Appellate Panel affirmed, citing *Dewsnup*. *Ritter v. Brady (In re Ritter)*, 2017 WL 3392671 (Bankr. 9th Cir. 8/8/17).

The 9th U.S. Circuit Court of Appeals, also relying on *Dewsnup,* then affirmed the panel's decision, leading Ritter to file her certiorari petition. *Ritter v. Brady (In re Ritter)*, 730 Fed. App'x 529 (9th Cir. 2018).

Creating confusion

In addition to Howard, a group of law professors and retired bankruptcy judges filed their own amicus brief December 21, also urging the Supreme Court to accept Ritter's case and use it to overrule *Dewsnup*.

The case has created confusion ever since it was decided, they said, pointing out that courts have refused to follow it in Chapter 11 and Chapter 13 cases.

They also point to the damage they say *Dewsnup* has caused for Chapter 7 debtors who own homes.

Debtors, like Ritter in this case, are unable to obtain the "fresh start" the bankruptcy process was designed to give them if they cannot strip off underwater liens, the amici say.

(Reporting by Donna Higgins.)

AGENCY NEWS

FTC SEEKS TO ADD DEFENDANTS IN STUDENT DEBT RELIEF CASE

The Federal Trade Commission moved to add two defendants to its ongoing action against a California-based student debt relief operation. The agency alleges that the defendants bilked consumers out of millions of dollars using false promises that they could reduce their monthly payments, or eliminate or reduce their student loan debt.

"The proposed new defendants, Capital Sun Investments, LLC, a Wyoming firm based in California, and its manager, Jimmy Calderon, are alleged to have been part of the deceptive operation, which targeted tens of thousands of consumers trying to obtain lower monthly payments or forgiveness of their student loan debts," the FTC said in a statement.

FTC STOPS PHANTOM DEBT COLLECTION SCHEME

The U.S. District Court for the Western District of North Carolina entered a temporary restraining order on February 4 at the request of the Federal Trade Commission. According to a release from the agency, the order temporarily halted and froze the assets of Global Asset Financial Services Group LLC.

According to the FTC's complaint, Global Asset falsely claimed to be attorneys or affiliated with attorneys to pressure consumers into making payments on debts they did not owe, and threatened to take legal action against consumers if they did not pay.

The FTC's complaint names 10 companies and six individuals including Midwestern Alliance LLC, a debt broker that allegedly bought, sold, and placed fake debt portfolios that it obtained from a former payday loan generator after consumers said they did not recognize the debt or had already paid it.

The complaint charged that the defendants' deceptive and unfair tactics violated the FTC Act and the Fair Debt Collection Practices Act.

CASE NOTES

Consumer Bankruptcy News reports published cases concerning consumer bankruptcy. The following were obtained between Jan. 17 and Feb. 7, 2019.

FIRST CIRCUIT

REQUEST FOR *IN REM* RELIEF MADE AFTER CASE DISMISSED WAS MOOT

Case name: *In re George E. Harris Jr.,* 29 CBN 243, 2019 WL 189220 (Bankr. D. Mass. 1/14/19).

Ruling: The bankruptcy court denied a creditor's motion for reconsideration of an order denying its motion seeking *in rem* relief from the automatic stay that was filed after the debtor's case was dismissed.

© 2019 Thomson Reuters

What it means: "Wells Fargo has not met the constitutional minimum for standing as it seeks relief from stay when there is no bankruptcy case and no operable stay. It is in no danger of any imminent harm. Indeed, Wells Fargo is currently free to commence a foreclosure action with respect to the subject property without restriction. Should a bankruptcy case be filed which purports to affect the property, Wells Fargo may file a motion for *in rem* relief from the stay on an expedited basis which this court will consider."

Summary: The debtor's case was dismissed on Nov. 28, 2018. That same day, but after the dismissal order had taken effect, Wells Fargo Bank N.A. moved for relief from the automatic stay. The motion included a request for *in rem* relief regarding property located in Pembroke, Mass., that had been the subject of four bankruptcy cases in less than two years. Wells Fargo alleged that the bankruptcies were filed in a bad faith effort to prevent Wells Fargo from exercising its foreclosure rights. The bankruptcy court denied the motion as being moot. Wells Fargo asked the court to reconsider with respect to the *in rem* portion of its motion. According to the bank, the bankruptcy court retained jurisdiction to grant *in rem* stay relief because such relief transcends the existence of the bankruptcy case in which it originated and because a court retains the inherent power to act in certain matters even after case dismissal. "Wells Fargo advises that it has been unable to identify any reported decision dealing with a court's power to grant *in rem* stay relief after a bankruptcy case has been dismissed. An independent survey of the cases confirms that this does indeed appear to be a matter of first impression," the court said. The bank presented two unreported decisions from the 9th Circuit Bankruptcy Appellate Panel holding that an appeal of an order granting *in rem* stay relief does not become moot if the underlying bankruptcy case has been dismissed. *Sepehry-Fard v. U.S. Bank, N.A. (In re Sepehry-Fard)*, 2018 WL 2709718 (Bankr. 9th Cir. 6/5/18), and *Benzeen Inc. v. JP Morgan Chase Bank, N.A. (In re Benzeen Inc.)*, 2018 WL 6627275 (Bankr. 9th Cir. 12/18/18). "The BAP rulings were premised on the persuasive rationale that once an *in rem* stay relief order enters and is recorded, its efficacy for up to two years after its entry no longer depends on the pendency of the bankruptcy case from which it originated. Thus an appellate court's reversal of an *in rem* order, for example, even after dismissal of the underlying bankruptcy case, would afford an appellant meaningful relief," the court said. "The reasoning in *Sepehry-Fard* and *Benzeen* is not transferable to the circumstances here. Without a pending bankruptcy case, there is no automatic stay preventing a creditor like Wells Fargo from proceeding against a person or property in the first place. In other words, there simply is no stay to lift." Wells Fargo argued that *in rem* relief was different than the "garden variety" type of stay relief. The bank conceded that an ordinary motion for stay relief would be moot after the case was dismissed, but argued that the same was not true for *in rem* relief because *in rem* relief remains effective after a case is dismissed. However, the court said that to provide meaningful relief from the stay there must be a stay. "Our legal system does not afford parties the right to seek relief for an abstract controversy based on anticipated events which may or may not occur no matter how sincere a party's belief that the relief may eventually be needed," the court said. "Wells Fargo has not met the constitutional minimum for standing as it seeks relief from stay when there is no bankruptcy case and no operable stay. It is in no danger of any imminent harm. Indeed, Wells Fargo is currently free to commence a foreclosure action with respect to the subject property without restriction. Should a bankruptcy case be filed which purports to affect the property, Wells Fargo may file a motion for *in rem* relief from the stay on an expedited basis which this court will consider."

Opinion by Judge Melvin S. Hoffman

SECOND CIRCUIT

67-YEAR-OLD DEBTOR CAN'T DISCHARGE $337,980 STUDENT LOAN

Case name: *Lozada v. Educational Credit Management Corp. (In re Rafael Lozada),* 29 CBN 244, 2018 WL 6046413 (Bankr. S.D.N.Y. 11/16/18).

Ruling: The bankruptcy court ruled that the 67-year-old debtor could not discharge $337,980 in student loans.

What it means: "While the Court respects Mr. Lozada's commitment to charity, the reality is that when he elects to tithe rather than pay his nondischargeable debt, he is making donations using someone else's money. As such, the Court, in evaluating the first *Brunner* prong will consider Mr. Lozada's charitable donations totaling over $100,000 in the five years preceding his bankruptcy ... in the context of his overall financial condition."

Summary: The 67-year-old Chapter 7 debtor owed $337,980. $71.63 in interest was being added to the total every day. The debtor was retired. He lived with his wife, who was a retired school teacher. They had no dependents. The debtor's only source of income was Social Security payments of $1,219. The debtor and his wife had net monthly income of at least $5,942. The debtor held a law degree but never passed any bar exam. The debtor had worked in the social service and nonprofit sectors earning as much as $75,000 in one year. He earned $70,000 as recently as 2013. He was unemployed since 2014 and had not looked for a job since

 © 2019 Thomson Reuters

2015. The debtor and his wife made charitable and religious contributions in excess of $21,500 per year from 2013 through 2016. The debtor inherited approximately $30,000 in 2015. Between July 2013 and May 2017, the debtor had deferments and forbearances for all but three months. The bankruptcy court denied the debtor's request that his student loan obligation be discharged. In *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), the 2d Circuit established a three-prong test for determining whether a student loan is discharged pursuant to Section 523(a)(8). For a student loan to be discharged the debtor must satisfy all three prongs. The court found that the debtor satisfied none of them. *Brunner*'s first requirement is that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living. The court found that the debtor and his wife enjoyed a comfortable lifestyle with no indication that they made any effort to limit their discretionary spending. The court noted that the debtor and his wife traveled, dined out, and provided money to their adult children. They also contributed more than $100,000 over five years to their church and charitable organizations. "While the Court respects Mr. Lozada's commitment to charity, the reality is that when he elects to tithe rather than pay his nondischargeable debt, he is making donations using someone else's money. As such, the Court, in evaluating the first *Brunner* prong will consider Mr. Lozada's charitable donations totaling over $100,000 in the five years preceding his bankruptcy ... in the context of his overall financial condition," the court said, and found that the debtor could afford to make payments on the debt. Next, *Brunner* required the debtor to show the existence of additional circumstances indicating that his inability to repay the student loan was likely to persist for a significant portion of the loan's repayment period. Given a lack of competent medical evidence to the contrary, the court found that the debtor was healthy enough to do some work. Finally, *Brunner* required the debtor to show that he made a good faith effort to repay the student loan before seeking to discharge the debt. The court found that while the debtor made a good faith effort to pay the debt when it first became due, that was a long time ago. More recently, the debtor had failed to use available resources to make any payment on the loan and did not enroll in an income contingent repayment plan. "Although his payments and requests for alternative plans early on are indicative of good faith, they are not sufficient to support a finding of good faith effort to repay the loans when viewed against the backdrop of all the relevant circumstances. The factual record clearly demonstrates that Mr. Lozada did not make an effort to maximize his income to repay his student loan debt. Similarly, the record reflects that he did not minimize his expenses or use his excess income to repay his student loan debt. Mr. Lozada's failure to consider enrolling in an income-based repayment plan since his retirement, particularly when viewed in the context of his lack of effort to seek employment or to minimize his expenses, weighs heavily against a finding of good faith. Based on the totality of the facts before it, the Court concludes that Mr. Lozada has failed to meet the good faith requirement of *Brunner*."

Opinion by Judge Mary Kay Vyskocil

THIRD CIRCUIT

RULE 3002.1(c) DID NOT APPLY TO LATE FEES CHARGED AFTER STAY RELIEF GRANTED

Case name: *Meyer v. Wilmington Savings Fund Society FSB, et al. (In re Allen J. Meyer),* 29 CBN 245, 2019 WL 441929 (Bankr. M.D. Pa. 2/5/19).

Ruling: The bankruptcy court partially granted the defendants' motion for summary judgment.

What it means: The court found that the defendants' attempt to collect late fees charged prior to the bankruptcy filing and after stay relief was granted were not subject to Rule 3002.1(c). Therefore, the defendants' motion for summary judgment was granted as to these charges, and denied as to the balance of the complaint.

Summary: The debtor received a Chapter 13 discharge in April 2017. The case was reopened at the debtor's request in August 2017 to allow the debtor to initiate an adversary proceeding against the defendants. Count I of the debtor's complaint alleged that the defendants failed to file and serve notices of fees, expenses, and charges in violation of Rule 3002.1(c) and sought sanctions pursuant to FRBP 3002.1(i). Count II alleged that the defendants violated the discharge injunction by seeking to collect fees, expenses, and charges post-discharge for which required notices were not filed. The defendants moved for summary judgment. The bankruptcy court granted the motion only to the extent that the complaint alleged that certain late fees were assessed in violation of Rule 3002.1. Those late fees were either assessed prior to the bankruptcy filing and included in the defendant's proof of claim, or assessed after the defendants received relief from the automatic stay. "In short, FRBP 3002.1(c) requires a mortgage holder to file a notice for all fees, expenses, and charges that were incurred post-petition that are asserted to be recoverable against the debtor or the debtor's principal residence," the court said. "However, unless the court orders otherwise, the notice requirements of this rule cease to apply when the automatic stay is terminated or annulled with respect to the residence that secures the claim." The court found that the defendants' attempt to collect late fees charged prior to the bankruptcy filing and after stay relief was granted were not subject to Rule 3002.1(c). Therefore,

the defendants' motion for summary judgment was granted as to these charges, and denied as to the balance of the complaint.

Opinion by Judge Robert N. Opel II

DEBTOR DID NOT INTEND TO HARM OR HIDE PLAINTIFF'S PROPERTY

Case name: *Lepre Jr. v. Milton (In re Erica L. Milton),* 29 CBN 246, 2019 WL 441931 (Bankr. W.D. Pa. 2/4/19).

Ruling: The bankruptcy court ruled that the plaintiff's claim was dischargeable, and that the debtor was entitled to receive a Chapter 7 discharge.

What it means: The court found that the debtor placed the plaintiff's belongings in a shed on her property to maintain the plaintiff's possessions until he retrieved them pursuant to the terms of a Protection from Abuse Order. She did not intend to hide the property from the court or to harm the plaintiff.

Summary: In November 2009, the plaintiff moved into the debtor's home, which she had owned for eight years. At some point, the parties were engaged to be married, and they lived together as a family for several years. During that time, the plaintiff decided to replace the property's gravel driveway with a concrete driveway. He also built a shed to store his motorcycles and other items. After a few years, the relationship soured and then got nasty. On Feb. 28, 2015, the debtor and her daughter went to stay with the debtor's parents to give the plaintiff an opportunity to gather his things and find another place to live. About two weeks later, the debtor filed a Petition for Protection from Abuse against the plaintiff. The resulting PFA Order required the plaintiff to leave the property. The plaintiff said the PFA Order came as a surprise, and he was forced to leave the property with only his motorcycle and a book bag full of clothing. The bankruptcy court found that while the PFA might have come as a surprise, the plaintiff had been aware that he needed to move out for at least two weeks. The debtor said that she moved the plaintiff's possessions to the shed pursuant to the PFA Order. The PFA Order allowed the plaintiff to contact the debtor to arrange to pick up his possessions, but the debtor said he never did. Instead, the plaintiff filed a replevin action against her, which the debtor answered. The plaintiff then filed an amended complaint, which the debtor did not answer. He obtained a default judgment in the amount of $71,700 against the debtor based on the amended complaint, and obtained a writ of execution. The plaintiff's collection efforts were stayed by the debtor's bankruptcy filing. Acting under the court's direction, the plaintiff retrieved his property from the shed. However, he asserted that the debtor did not allow him to take all the property that he claimed to own. He responded by filing an adversary proceeding asserting that the debtor should be denied a discharge, and that his claim was nondischargeable. The discharge challenge was based on Section 727(a)(4). According to the plaintiff, the debtor knowingly made a false oath by failing to disclose that she was holding his property when she filed for bankruptcy. Given the disputed ownership of many of the items, the court found that the plaintiff failed to prove that this representation – if indeed false – was knowingly false. As to items that the debtor put in the shed for the plaintiff to retrieve, the court found that the debtor did not believe she was holding them for the plaintiff. Instead, she placed them in the shed as directed by the PFA Order and the plaintiff failed to retrieve them. Therefore, the court found that the debtor did not intend to deceive the court when she said she was not holding property that belonged to someone else. After concluding that the debtor was entitled to receive a discharge, the court ruled that the plaintiff's claim was not excepted from discharge. The plaintiff asserted that the debtor fraudulently or otherwise improperly obtained his property, but the court found no credible evidence that the debtor did anything other than collect the plaintiff's possessions and place them in the shed for the plaintiff to retrieve. That the property may have been damaged as a result of the passage of time and the deterioration of the shed did not mean that the debtor intended to harm the plaintiff or his property.

Opinion by Judge Carlota M. Böhm

FOURTH CIRCUIT

CREDITOR'S ACTIONS SHOWED DISREGARD FOR BANKRUPTCY PROCESS

Case name: *James-Jenkins v. Sutton, et al. (In re Tonique Tonetta James-Jenkins),* 29 CBN 247, 2019 WL 354700 (Bankr. D.S.C. 1/25/19).

Ruling: The bankruptcy court ordered the defendant to pay $1,500 in attorney fees for willfully violating the automatic stay.

What it means: The defendant agreed to return the debtor's vehicle, which he repossessed in violation of the automatic stay, only if the debtor agreed that she would not seek damages. The court found that the defendant's conditional return of the vehicle indicated "a disregard for the bankruptcy process and the automatic stay."

Summary: The defendant repossessed the debtor's car nearly four months after she filed for Chapter 13 relief. The debtor immediately filed an adversary proceeding seeking damages and a motion requesting turnover of the vehicle. The defendant did not attend the hearing on

 © 2019 Thomson Reuters

the turnover motion. At the hearing, the debtor's attorney informed the court that the vehicle had been returned to the debtor the night before. The defendant failed to respond to the adversary proceeding, so a default judgment was entered. On Dec. 17, 2018 – more than 60 days after service of the complaint – the defendant filed a response stating that he learned of the debtor's bankruptcy three days after he repossessed her car, and that she agreed not to seek damages. The defendant opposed the request of the debtor's attorney for an award of $1,500 in fees. "A review of the evidence and testimony makes clear that Defendant received notice of the bankruptcy case, had actual knowledge, and chose to proceed with repossession of Plaintiff's vehicle despite this notice. The notice was received, at the latest, in the phone conversation between [the debtor's attorney] and Thomas Sutton that took place prior to the repossession. Statements made by Defendant during his communications with [the debtor's attorney,] along with his conditional return of the vehicle only after Plaintiff signed a release, indicate a disregard for the bankruptcy process and the automatic stay. Plaintiff is entitled to recover under Section 362(k). The Court finds that an award of the requested attorney's fees of $1,500 is reasonable and appropriate."

Opinion by Judge Helen E. Burris

FIFTH CIRCUIT

MONEY RETURNED BY TAXING AUTHORITY WAS EXEMPT

Case name: *In re Michael P. and Tina A. Bostick,* 29 CBN 248, 2019 WL 417808 (Bankr. E.D. La. 2/1/19).

Ruling: The bankruptcy court granted the debtors' motion to modify their plan.

What it means: Money paid by the Louisiana Department of Revenue to the Chapter 13 Trustee was a return of an overpayment of taxes by the administrator of the debtor's 401(k) plan after the debtor withdrew funds from his 401(k) account. The court found that the payment was not a refund, and that the funds retained their exempt status under state law.

Summary: Prior to filing for Chapter 13 relief, the debtor Michael P. Bostick withdrew $68,000 from his 401(k) account to pay for the care of his gravely ill mother. The plan administrator withheld federal and state taxes, and paid that money to the taxing authorities. The amount paid by the plan administrator to the Louisiana Department of Revenue far exceeded what should have been paid. As a result, the LDR refunded $24,796.87. Because the debtors filed for Chapter 13 relief prior to the issuance of the refund, the LDR sent the money to the trustee. The debtors responded with a motion asking the trustee to apply the funds to their plan such that their monthly plan payments were reduced. The trustee objected to the modification, asserting that the money should be paid into the plan in addition to the scheduled plan payments. The debtors argued that the money was exempt pursuant to Louisiana Revised Statute 13:3881(D) because the funds were proceeds of the 401(k) account. The trustee countered that the money was a tax refund that was not exempt, or the funds were not exempt because they were not rolled over or returned to the 401(k) account. The bankruptcy court found that $23,800 of the funds refunded by the LDR was a return of the money paid by the 401(k) plan administrator in error and not a tax refund. Next, the court found that the debtor's 401(k) account was a "tax-deferred arrangement" within the meaning of R.S. 13:3881, and that the money withdrawn from the account remained exempt because the statute did not require the money to be rolled over into another qualifying account. "The funds were withheld by the plan administrator and sent to LDR, which then sent the funds to the Chapter 13 Trustee. It is easy to trace them, and they have been segregated since their removal from the 401(k). The court thus finds that pursuant to R.S. 13:3881(D), the $23,800 is exempt." Because the court agreed with the debtors that the money returned by the LDR was exempt, the court granted the debtors' motion to modify their plan.

Opinion by Judge Jerry A. Brown

LIENHOLDER ENTITLED TO INSURANCE PROCEEDS

Case name: *In re Deloris J. and Nateshus Jackson,* 29 CBN 249, 2019 WL 329424 (Bankr. M.D. La. 1/16/19).

Ruling: The bankruptcy court denied the Chapter 13 debtors' motion to use collision insurance proceeds paid for pre-petition damage to their vehicle to purchase a replacement vehicle.

What it means: The court found that the proceeds from the insurance policy belonged to the lienholder.

Summary: Neighbors Federal Credit Union held a purchase money security interest in the debtors' 2017 Nissan Altima. The vehicle was involved in an accident before the debtors filed for Chapter 13 relief. The vehicle was declared a total loss after the debtors filed bankruptcy. The debtors' insurance stated that Neighbors held a lien on the vehicle. The insurance proceeds were insufficient to pay Neighbors' claim in full. The debtors sought the bankruptcy court's permission to use the insurance proceeds to buy a new car. Neighbors objected that it was entitled to the proceeds. The debtors responded that they, as beneficiaries of the insurance policy, were entitled to the proceeds subject to Neighbors' lien. The bankruptcy court found that the insurance

© 2019 Thomson Reuters

policy was property of the debtors' bankruptcy estate because the debtors owned the policy, but the proceeds from the policy were not property of the estate because Neighbors' right to the proceeds was superior to the debtors' right. In relevant part, the insurance policy stated: "If the auto is subject to a lien or a person or entity other than you had an ownership interest in the auto at the time of the accident or loss, such person or entity may be included by us as a payee on any payment." In addition, the debtors agreed to insure the credit union's interest in the vehicle when they borrowed the money to buy it. "In *American General Fire & Cas. Co. v. Reese*, the Fifth Circuit relied on Louisiana jurisprudence to equitably reform an insurance contract to name a mortgagee as loss payee where the homeowners' fire insurance policy did not name the mortgagee as loss payee," the court noted. "Thus, even if the court were to accept the debtors' argument that the general loss payee language in the GoAuto policy were insufficient to grant Neighbors an interest in the insurance proceeds, Louisiana law recognizes the right of a lienholder, such as Neighbors, to the proceeds where the parties intended that it be paid from the proceeds. *A fortiori*, the debtors' naming Neighbors as loss payee on the declarations page supports the lender's claim to the proceeds."

Opinion by Judge Douglas D. Dodd

DEBTOR DOES NOT NEED TO PAY MONEY WITHDRAWN FROM 401(k) PLAN TO TRUSTEE

Case name: *In re Susan M. Arlin,* 29 CBN 250, 2019 WL 328724 (Bankr. N.D. Texas 1/24/19).

Ruling: The bankruptcy court denied the Chapter 13 Trustee's request for post-confirmation of the debtor's confirmed plan.

What it means: Money the debtor withdrew from her 401(k) Plan to pay for unexpected post-petition medical and home repair costs did not need to be paid to the trustee even though the money had lost its exempt status. The court found that the trustee's proposed modification, which called for a lump sum payment, was not feasible. The court added that even if the trustee's proposal was feasible it would exercise its discretion to deny the modification based on the circumstances.

Summary: On Schedule B, the Chapter 13 debtor listed a 401(k) Plan with a value of $22,467. On Schedule C, the debtor claimed the entire 401(k) Plan as exempt pursuant to Texas law. No one objected to the exemption. After the debtor filed for bankruptcy, she underwent two knee surgeries and foot surgery. She also incurred expenses to repair and replace a fence and outside storage facility at her home. The bankruptcy court found that these post-petition expenses were substantial and unexpected. Without seeking her attorney's advice, the trustee's consent, or the court's approval, the debtor withdrew a total of $22,900 from her 401(k) Plan to pay for these expenses. The trustee learned of the withdrawals when he reviewed the debtor's income tax return, which showed a substantial increase in her income because of the withdraw. The trustee asked the court to modify the debtor's plan in the mistaken belief that she had an increase in income. He amended his request to seek modification of the debtor's plan to require a lump sum payment of $22,467.40 on the basis that the money lost its exempt status when it was withdrawn from the 401(k) Plan. The court denied the trustee's request because the proposed modification was not feasible. "Even if the trustee's position is correct, the uncontroverted evidence and credible testimony of the debtor confirm that the entire balance of the withdrawals has long been spent and is no longer available to the debtor to pay the requested lump sum payment to the trustee. Furthermore, the trustee offered no evidence that the debtor has sufficient other funds to make the proposed lump-sum payment. Based on the uncontroverted evidence, the Court finds and concludes that the trustee did not satisfy his burden to establish that the Oral Plan Modification (to require the debtor to make a lump-sum payment to the trustee in the amount of $22,467.40) is feasible as required by Section 1329(b)(1)," the court said. The court added that even if the proposed modification was feasible it would use its discretion to deny the trustee's request based on the totality of the circumstances. "Given the debtor's testimony, it is clear to the Court that she had a good-faith basis to use her exempt 401(k) Funds to pay the unexpected and unbudgeted medical and home-repair bills. Had the debtor not suffered her medical issues or incurred home repair bills, then she would not have had a reason to withdraw the 401(k) Funds from her 401(k) Plan and such funds would have remained the debtor's exempt asset, outside the reach of pre-petition creditors' claims," the court said. "Finally, even though the debtor made the imprudent unilateral decision to spend the non-exempt Withdrawal proceeds from her 401(k) Plan to pay the medical and home-repair expenses in violation of her confirmed plan, the Court finds and concludes that the debtor's actions were not made in bad faith or in reckless disregard of her obligations under the Bankruptcy Code, her plan, or any other orders of the Court. With that said, the debtor took a risk when she spent the non-exempt Withdrawal proceeds without first obtaining Court approval. Her decision could have resulted in severe adverse consequences, including the dismissal of her bankruptcy case. Fortunately for the debtor, based on the facts and circumstances in this case, the debtor will not suffer such adverse consequences for her actions." While it did not factor into the decision, the court said the 5th U.S. Circuit Court of Appeals interpretation of the Texas exemption statute in *In re Hawk*, 871 F.3d 287

 © 2019 Thomson Reuters

(5th Cir. 2017), required a finding that the money withdrawn from the debtor's 401(k) Plan lost its exempt status when it was not rolled over into another retirement account within 60 days.

Opinion by Judge Mark X Mullin

DEBTORS' PLAN DID NOT NEED TO INCLUDE RETIREMENT ACCOUNT WITHDRAWALS

Case name: *In re Damon C. and Katracy L. Sullivan,* 29 CBN 251, 2019 WL 328723 (Bankr. N.D. Texas 1/24/19).

Ruling: The bankruptcy court denied the Chapter 13 Trustee's motion to modify the debtors' plan.

What it means: Money the debtors withdrew from their retirement accounts to pay for unexpected post-petition medical and home repair costs did not need to be paid to the trustee even though the money had lost its exempt status. The court found that the trustee's proposed modification, which called for a lump sum payment, was not feasible. The court added that even if the trustee's proposal was feasible it would exercise its discretion to deny the modification based on the circumstances.

Summary: This case presented facts similar to those in *In re Arlin*, 29 CBN 250, 2019 WL 328724 (Bankr. N.D. Texas 1/24/19). The only difference was that the debtor in *Arlin* claimed her 401(k) Plan as exempt under state law while the debtors in this case claimed $52,629 in two retirement accounts as exempt pursuant to federal law (Section 522(d)(12)). In both cases, there were no timely objections to the exemptions so they were allowed. In both cases, the debtors withdrew money from their exempt retirement plans to pay for unexpected post-petition medical and home repair expenses. After learning of the withdrawals, the trustee asked the bankruptcy court to modify the debtors' plans to require a lump sum payment of the withdrawal into the plan. The court denied the requests finding that even if the money lost its exempt status when it was withdrawn from the retirement plans, the proposed modifications were not feasible because the debtors spent the money and had no other funds available to make the payment required by the trustee's proposed modification. The court added that even if the proposed modifications were feasible, it would exercise its discretion to deny the proposed modification based on the circumstances. The only difference between the rulings was based on the different exemption statutes. Here, the court reviewed Section 522. "Sections 522(b)(4)(C) and (D) specifically address the impact that a distribution of retirement funds may have on their exempt status. And both subsections expressly apply to Section 522(d)(12)," the court said. "Sections 522(b)(4)(C) and (D) provide that exempt retirement funds that are (i) directly transferred from one eligible fund to another eligible fund, or (ii) distributed from an eligible fund and then subsequently rolled over and deposited into another eligible fund within sixty days after the distribution do not 'cease to qualify for exemption under ... subsection (d)(12) by reason of such distribution.' Applying Section 522(b)(4)(D)(ii) in context and in its place in the overall statutory scheme, it is apparent that under federal law, Congress intended to extend the exemption protection to distributions only to the extent such distributions are deposited into another eligible fund within sixty days after such a distribution. If the funds are not deposited into another eligible fund within sixty days after distribution, the exemption protection ceases." As noted above, the fact that the money withdrawn from the accounts lost its exempt status did not affect the outcome.

Opinion by Judge Mark X Mullin

SIXTH CIRCUIT

COURT FOUND CHAPTER 13 CASE FILED IN BAD FAITH

Case name: *In re Candace L. Curtis,* 29 CBN 252, 2019 WL 325806 (Bankr. W.D. Mich. 1/23/19).

Ruling: The bankruptcy court dismissed the debtor's Chapter 13 case.

What it means: The court found that the debtor's motive, the timing of the petition, her disparate treatment of creditors, and her lack of sincerity indicated that the petition was not filed in good faith.

Summary: In 2012, the debtor's former husband, Chad Curtis, was investigated and eventually prosecuted for criminal sexual misconduct against minors. He was convicted in August 2013. Four of the victims, including Madison King, sued Curtis and allegedly complicit third parties. After granting King's motion for summary judgment with respect to her claim for battery against Curtis, the district court awarded damages to King in the amount of $1.8 million. In January 2018, the debtor's divorce was entered, and a state court apportioned the couple's assets. King subsequently began post-judgment collection proceedings in the district court. At the time, Curtis was in jail. As part of her collection efforts, King obtained jailhouse recordings of conversations between the debtor and Curtis revealing that they discussed shielding their marital assets and respective revocable trusts from King. On May 16, 2018, the district court ordered the debtor to show cause why she should not be joined as a party to King's post-judgment collection proceedings. On May 24, 2018, the district court entered an order requiring the debtor and Curtis to appear for examinations on June 26, 2018, pursuant to Mich.

© 2019 Thomson Reuters

Comp. Laws § 600.6110(1). On June 25, 2018, a magistrate judge recommended that the debtor be added as a party to the post-judgment collection proceedings. Later that evening, the debtor filed for Chapter 13 relief. She scheduled assets of nearly $1 million including a horse farm worth at least $875,000 that she owned through her revocable trust. The farm was not subject to any mortgage liens. The debtor scheduled five creditors. All of the scheduled creditors held general unsecured claims. The total amount of the scheduled debt was $13,000. King was scheduled as holding a disputed and unliquidated claim in an unknown amount. The debtor proposed a plan that paid unsecured claims in full. The plan assumed that King did not have an allowable claim. King asked the bankruptcy court to dismiss the debtor's case pursuant to Section 1307(c). She alleged that the debtor filed the case as a litigation tactic. The debtor responded that she filed the petition in a legitimate attempt to obtain relief from her creditors. The bankruptcy court granted King's motion, finding that the debtor's motive, the timing of the petition, her disparate treatment of creditors, and her lack of sincerity indicated that the petition was not filed in good faith. The court noted that the debtor made several troubling statements during the hearing on King's motion. "Although the debtor acknowledged that she intended to satisfy the claims of her other creditors, she was not necessarily prepared to address any allowed claim of King," the court said. "When asked whether she would be willing to use proceeds of any sale of her horse farm to satisfy any allowed claim of King, the debtor was non-committal. The debtor further explained that she planned to sell the horse farm to her daughter. By doing so, she could not only purchase a new home for herself, but also continue to enjoy the farm. These intentions are not representative of an honest but unfortunate debtor seeking to reorganize in good faith."

Opinion by Judge John T. Gregg

CREDITOR GETS STAY RELIEF BUT NOT VEHICLE

Case name: *In re Ethan M. Angus,* 29 CBN 253, 2019 WL 325807 (Bankr. W.D. Mich. 1/23/19).

Ruling: The bankruptcy court granted a creditor's request for relief from the automatic stay, and denied the creditor's request to compel turnover.

What it means: "When a creditor is granted relief from the automatic stay, it is generally authorized to pursue its rights under applicable non-bankruptcy law, and nothing more."

Summary: The Chapter 7 debtor disclosed an agreement with GM Financial to lease a 2017 GMC Acadia. The debtor's schedules identified the agreement as an unexpired lease for personal property. The debtor stated that he did not intend to assume the lease. GM Financial moved for stay relief a few weeks after the bankruptcy petition was filed. In addition to seeking relief from the automatic stay the motion also sought an order compelling the debtor to surrender possession of the vehicle. Although neither the trustee nor the debtor objected to the motion, the bankruptcy court scheduled it for a hearing because GM Financial did not cite any authority in support of its request for possession of the vehicle. At the hearing, GM Financial cited *Zick Indus. Inc. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991). The creditor also asserted that Section 105 allowed the court to grant the request. The court found *Zick* to be inapposite because the Sixth Circuit did not address whether a bankruptcy court can compel a debtor to relinquish possession of property in conjunction with relief from the automatic stay. "Section 105(a) is similarly unavailing, as it provides no support for the creditor's request under the circumstances. That section only authorizes the court to issue orders that are necessary to 'carry out the provisions' of the Bankruptcy Code. Nowhere in Section 362 is there a requirement for a Chapter 7 debtor to deliver possession of property to a lessor after the automatic stay is terminated. When a creditor is granted relief from the automatic stay, it is generally authorized to pursue its rights under applicable non-bankruptcy law, and nothing more," the court said. "The court shall therefore deny the creditor's request to compel the debtor to surrender possession of the vehicle. Of course, nothing prevents the creditor from exercising its rights under applicable non-bankruptcy law in a court of competent jurisdiction now that the automatic stay has been terminated."

Opinion by Judge John T. Gregg

BUILDER DID NOT KNOW HE COULDN'T DO WHAT HE AGREED TO DO

Case name: *Johnston v. Cheney (In re Jeffrey L. Cheney and Rosette Smith-Cheney),* 29 CBN 254, 2019 WL 267858 (Bankr. N.D. Ohio 1/18/19).

Ruling: The bankruptcy court ruled that the plaintiffs' claim was not excepted from discharge.

What it means: The court found that the debtor deceived the plaintiffs when he represented that he could build an addition to their home. However, he did not commit fraud because he believed he could do the job.

Summary: The debtor Jeffrey Cheney owned and operated JLC Home Improvement LLC. The debtor Rosette Cheney and the plaintiff Diane Johnston were friends. The plaintiff Raymond P. Johnston and his wife, Diane, had Christmas dinner with the Cheneys in 2014. During dinner, they discussed the Johnstons' tentative plans

 © 2019 Thomson Reuters

to either move to a new home or renovate their existing home. In April 2016, the Johnstons opted to renovate their home. Their plan called for demolishing the original farmhouse portion of their home and building an addition to replace it. They invited the Cheneys to Easter dinner to discuss the project. Diane Johnston had a plan for the addition that she showed to Cheney. Cheney told the Johnstons that he was able to do the work for them and had recently completed a similar job. He also told the Johnstons that they would not have to incur the cost of an architect because he could prepare the required blueprint. In June 2016, the parties signed a contract for the project. Cheney's work was to begin after another contractor demolished the original portion of the Johnstons' home. Prior to signing the contract, Cheney delivered to Diane Johnston blueprints for her to submit for approval to Gary Swope, the county plans examiner and building inspector. The plans were approved after Cheney made one revision required by Swope. Cheney, with a crew of workers, began work on the project in June. After the footer and the foundation were completed and passed inspection, Ray Johnston testified that he noticed that the floor joists of the addition did not meet the joists of the existing house. He said this was his first indication that there was a problem with the work Cheney was doing. He added that Cheney's construction of the basement stairs in the addition was "a big red flag" because the risers and treads were not uniform. There also were issues involving water leakage around windows and doors installed in the addition. Cheney eventually left the job, and the Johnstons hired a new contractor to correct what Cheney had done and to finish the job at a cost of $56,000. In December 2016, the Johnstons sued Cheney alleging that he fraudulently induced them to enter into the renovation contract. In May 2017, the Cheneys filed for Chapter 7 relief. The Johnstons initiated an adversary proceeding asserting that their claim against the Cheneys was excepted from discharge by Section 523(a)(2)(A). The bankruptcy court agreed with the Johnstons that Cheney misrepresented his ability to do the job. "While numerous issues arose regarding Cheney's work, some of which were more in the nature of a disagreement regarding the scope of the contract, there are critical issues in Swope's inspection report about which he testified that convince the court that Cheney did not have the ability to properly construct the addition to Plaintiffs' home. Specifically problematic are the trusses used in the structure of the addition that were not in compliance with the applicable building code and/or manufacturer's specifications and the improperly built stairs. Both the trusses and the stairs were a critical and basic part of the construction job. The court finds the problems identified by Swope regarding the trusses and the stairs to be emblematic of a person who does not have the ability to do the job required by Cheney's contract with Plaintiffs," the court said. However, the Johnstons did not prevail because they failed to show that Cheney did not know he could not do the job, or that he made the misrepresentation with reckless disregard for the truth. "As Diane Johnston testified, in April 2016, Cheney was very confident that he could do the job. He had previously built a set of stairs, and there is no evidence that the stairs were defective. And there is no evidence that Cheney encountered similar problems with other similar projects completed by him such that he should have known that he lacked the ability to complete the project contemplated by Plaintiffs. There is also no evidence that Cheney intended to deceive Plaintiffs. Work went well during the first month, except for the dispute regarding what needed to be done to seal in the exposed wall after the house was separated. Cheney showed up to work five days a week with his crew, presumably whom he had to pay. He ordered lumber, drywall, insulation, and windows, among other things. The court does not believe his mindset was to defraud Plaintiffs."

Opinion by Judge Mary Ann Whipple

30-DAY STAY DOES NOT APPLY TO PROPERTY OF BANKRUPTCY ESTATE

Case name: *In re Letitia E. Smith,* 29 CBN 255, 2019 WL 417827 (Bankr. E.D. Tenn. 2/1/19).

Ruling: The bankruptcy court denied confirmation of the debtor's plan, and denied a secured creditor's motion for relief from the automatic stay.

What it means: "Here, this Court finds that the property of the estate of a debtor, who had a case pending within the prior year but did not seek an extension of the stay under Section 362(c)(3), is still protected by the stay imposed by subsection (a). In this case, that property includes the debtor's home."

Summary: The debtor filed for Chapter 13 relief on April 4, 2017. She scheduled Habitat for Humanity as a creditor holding a claim secured by her home. Habitat filed an amended proof of claim stating that the debtor owed $82,673.12, of which $9,533.08 was necessary to cure any default. The debtor's confirmed plan provided for payment of the arrearage in the amount stated in Habitat's plan. The debtor developed health problems, which caused her to stop making plan payments in January 2018. Her case was dismissed on June 28, 2018. She refiled for Chapter 13 relief on Aug. 17, 2018. She did not seek an extension of the 30-day stay. Habitat objected to confirmation of the debtor's plan, and moved for relief from the automatic stay. As an initial matter, the bankruptcy court found that the stay terminated under Section 362(c)(3) only as to the debtor and the debtor's property. While acknowledging that a growing number of courts are finding that Section 362(c)(3) terminates the stay in its entirety, the court found "the

language used in the statute supports the reasoning that 'with reference to the debtor' limits the extent of the stay termination. The *Goodrich* case makes an appealing argument that the language does not carry out the legislative intention of deterring serial filers, but the Court finds that the reasoning of the majority relying on the actual language enacted is more persuasive. The Court finds that the language in subsection (c)(4) of Section 362 regarding imposition of the stay demonstrates that Congress could clearly describe the complete stay imposed under subsection (a) without limitation. Its use of different language in subsection (c)(3) supports a conclusion that less than the stay imposed in subsection (a) covering the debtor, his property, and the estate's property is terminated by the provision in subsection (c)(3). Here, this Court finds that the property of the estate of a debtor, who had a case pending within the prior year but did not seek an extension of the stay under Section 362(c)(3), is still protected by the stay imposed by subsection (a). In this case, that property includes the debtor's home." Having found that the stay was still in effect, the court denied Habitat's motion preliminarily on the basis that its interest in the property was adequately protected. The court sustained Habitat's objection to confirmation of the debtor's plan because it did not provide for payment of the arrearage claim within a reasonable amount of time. "The debtor has proposed to make monthly payments of $200 toward the arrearage. Because the claimed arrearage is $14,089.95, the time needed to cure the arrearage would be more than 70 months, which exceeds the maximum plan length," the court said. The court gave the debtor an opportunity to amend her plan to increase the payments to Habitat, and to produce evidence of her ability to make those increased payments.

Opinion by Judge Shelley D. Rucker

SEVENTH CIRCUIT

DIVIDED 7TH CIRCUIT PANEL AFFIRMS DISCHARGE OF DEBT FOR BACK PAY

Case name: *Appeal of National Labor Relations Board (In re Edward L. Calvert),* 29 CBN 256, 2019 WL 275922 (7th Cir. 1/22/19).

Ruling: A divided 7th U.S. Circuit Court of Appeals panel affirmed the bankruptcy court's ruling that the National Labor Relations Board's claim was not excepted from discharge by Section 523(a)(6).

What it means: The majority agreed with the lower courts that the NLRB failed to establish that the adjudication that the debtor was personally liable for violating the National Labor Relations Act involved and actually decided the issue of whether the debtor acted with malice.

Summary: Edward Calvert owned E.L.C. Electric Inc. After a failed attempt to unionize the company's rank-and-file electricians, Calvert attempted to thwart future unionization efforts by laying off most of those electricians. The union that attempted to organize the workers filed a complaint with the National Labor Relations Board. An administrative law judge ruled that Calvert's action violated Section 158(a)(3) of the National Labor Relations Act. The NLRB affirmed the ruling, and ordered E.L.C. Electric to compensate the electricians with backpay. Calvert responded by shifting E.L.C. Electric's operations to two new corporate entities. The ALJ initiated supplemental proceedings and concluded that Calvert shuttered the firm to avoid paying the electricians. The judge pierced the corporate veil and held Calvert personally liable for $437,427 in backpay and interest. The NLRB adopted the judge's findings and conclusions. After Calvert filed for Chapter 7 relief, the NLRB initiated an adversary proceeding asserting that its claim was excepted from discharge by Section 523(a)(6) because the debtor's actions were willful and malicious. Calvert conceded that his actions were willful, but argued that they were not malicious. The NLRB sought summary judgment, arguing that the agency's finding of liability under Section 158(a)(3) of the NLRA precluded Calvert from litigating whether the debt was nondischargeable under Section 523(a)(6). The bankruptcy judge denied the motion, reasoning that Section 158(a)(3) of the NLRA and Section 523(a)(6) of the Bankruptcy Code apply different legal standards and that the NLRB proceedings lacked a "sufficient level of 'specific findings' to be given preclusive effect on the question whether the debt was exempt from discharge – more particularly, whether Calvert had acted with malice." Following a bench trial, the court ruled that Calvert's actions were not malicious. The district court affirmed, as did a divided 7th Circuit panel. The only issue presented on appeal was whether Calvert was collaterally estopped from asserting that his actions were not malicious. To establish issue preclusion, the NLRB needed to identify the actual findings made in the NLRB proceeding that it believed were entitled to preclusive effect, and then map those findings onto the standard for malice under Section 523(a)(6), the majority said. "The Board has not satisfied its burden. It has not identified the specific issues that were actually decided in the labor proceeding, much less mapped the ALJ's findings onto the elements of § 523(a)(6). Instead, the Board's argument for collateral estoppel is stated at a high level of generality," the majority said. "As the Board sees it, a factual finding that Calvert acted with malice *necessarily* nests within the agency's imposition of § 158(a)(3) liability. But for preclusion to apply, the Board must establish

 © 2019 Thomson Reuters

that the issue of discriminatory intent under § 158(a)(3) of the NLRA is the same as the issue of malice under § 523(a)(6) of the Bankruptcy Code *and also* that the issue of Calvert's intent was *actually decided* in the agency proceeding. It has not done so." The dissenting judge agreed with the NLRB that a violation of Section 158(a)(3) of the NLRA was a malicious act, and disagreed with the majority that the Board's argument was not specific. "To establish issue preclusion, the NLRB needed to show that the ALJ's analysis of Calvert's intent 'substantially mirrored' the standard for malice under § 523(a)(6). *Horsfall*, 738 F.3d at 775. In fact, the Board had a tougher row to hoe to prevail in the labor proceedings than it did before the bankruptcy court, since it had not only to prove Calvert's impermissible motive, but also to withstand Calvert's affirmative defense of a legitimate business reason. Regardless of who bore the burden on which issue, the universe of evidence presented to the ALJ had to persuade him that a prohibited reason – not a legitimate one – motivated Calvert's actions. And as the text of his decision makes clear, persuade him it did," the dissent said. "When the ALJ held that Calvert discriminated against his employees in violation of § 158(a)(3) and held him liable for that violation, he resolved the question of whether Calvert had just cause for his actions. Instead of giving the ALJ's findings about Calvert's intent the preclusive effect they were due, the bankruptcy court offered Calvert another bite at the apple, affording him an opportunity to relitigate his purported justifications for violating federal law. But the ALJ's analysis left no room for finding Calvert's conduct justified."

COLLEGE DEBT WAS DISCHARGEABLE, DISTRICT COURT REMANDS FOR CONSIDERATION OF DAMAGES

Case name: *Hazelton v. UW-Stout,* 29 CBN 257, 2019 WL 413567 (W.D. Wis. 2/1/19).

Ruling: The district court reversed the bankruptcy court's ruling that the debtor's obligation owed to UW-Stout was a nondischargeable student loan, and remanded for further proceedings.

What it means: According to *In re Chambers*, 348 F.3d 650 (7th Cir. 2003), "nonpayment of tuition qualifies as a loan" under Section 523(a)(8) "in two classes of cases: where funds have changed hands, or where there is an agreement whereby the college extends credit." Because the facts of this case did not fit either class, the district court found that the debtor's obligation to pay tuition was a dischargeable debt.

Summary: In 2008, the debtor Kelly Hazelton enrolled at UW-Stout. She signed the "Payment Plan Agreement," which all students were required to sign. Her husband also signed the agreement, which established when tuition payments were due. If a student failed to make a required payment, UW-Stout would assess a finance charge and refuse requests for transcripts until payment was made. The debtor withdrew from school in 2011, but returned for 2015 summer term. She did not sign a new Payment Plan Agreement. She completed her courses for the summer term without paying tuition. UW-Stout refused to issue the debtor's degree, which she had earned with the completion of the summer term classes, because she failed to pay the tuition. The debtor and her husband subsequently filed for Chapter 7 relief and received a discharge in October 2016. Although UW-Stout received notice of the discharge, it still seized the debtor's 2016 tax refund to satisfy her debt. The debtors filed an adversary proceeding asserting that the school's action violated their discharge injunction. The bankruptcy court ruled for the school, finding that UW-Stout's claim was "a type of student loan" and excepted from discharge pursuant to Section 523(a)(8). The district court reversed, finding that the debt was not a loan so it could not have been an "education loan." "*In re Chambers*, 348 F.3d 650 (7th Cir. 2003), is controlling. The court held that 'nonpayment of tuition qualifies as a loan' under Section 523(a)(8) 'in two classes of cases: where funds have changed hands, or where there is an agreement whereby the college extends credit. ... This existence of a separate agreement acknowledging the transfer and delaying the obligation for repayment distinguishes a loan from a mere unpaid debt.' *Id.* at 657 (internal quotations, citations, alterations omitted). The *Chambers* court concluded that the student's debt in that case did not satisfy this definition because '[n]o funds changed hands' and there was no evidence of 'a prior or contemporaneous agreement to pay tuition at a later date in exchange for an extension of credit.' *Id.* Rather, the student 'incurred a debt on an open student account, attended classes in spite of the debt and failed to pay her bill.' *Id.* The material facts of this case are indistinguishable from those in *Chambers*, a case the bankruptcy court did not discuss," the district court said. UW-Stout argued that *Chambers* was not controlling because Section 523(a)(8) was subsequently amended to add Section 523(a)(8)(B). However, the court pointed out that the relevant language in the statute remained the same. "So UW-Stout violated the discharge injunction when it continued making efforts to collect the debt after the discharge, and the bankruptcy's contrary conclusion will be reversed. The Hazeltons also ask this court to find UW-Stout in contempt and award damages, fees, and costs. But the court declines to consider those arguments because the Hazeltons don't develop them. They are free to raise those issues with the bankruptcy court in the first instance."

Opinion by Judge James D. Peterson

EIGHTH CIRCUIT

SECTION 522(f) MAY BE USED TO CHASE CLOUD AWAY

Case name: *CRP Holdings A-1 LLC v. O'Sullivan (In re Casey D. O'Sullivan),* 29 CBN 258, 2019 WL 406685 (8th Cir. 2/1/19).

Ruling: The 8th U.S. Circuit Court of Appeals affirmed the 8th Circuit Bankruptcy Appellate Panel, which affirmed the bankruptcy court's ruling that Section 522(f) could be used to avoid a cloud on a title created by an unenforceable judicial lien.

What it means: "We agree with the BAP that CRP's recording of the foreign judgment created a cloud on title under Missouri law sufficient to constitute a 'charge against or interest in' O'Sullivan's property under the Bankruptcy Code. 11 U.S.C. § 101(37). Therefore, we conclude that the cloud on title created by 'CRP's recording of its judgment '*fastened an existing, but presently unenforceable lien*' on the property.'"

Summary: The debtor and his wife owned their home as tenants by the entirety. CRP Holdings A-1 LLC obtained a $765,151 default judgment in Platte County, Mo., against the debtor. CRP filed a notice of foreign judgment in Barton County, Mo., where the debtor's home was located. The debtor subsequently filed for Chapter 7 relief. He listed his home as an asset, claimed a $15,000 homestead exemption, and moved to avoid CRP's purported judicial lien pursuant to Section 522(f). CRP did not object to the claimed homestead exemption, but argued that its judicial lien did not impair the debtor's homestead exemption because it did not attach to the property. The bankruptcy court granted the debtor's motion, finding that CRP's judicial lien, while perhaps not enforceable, affixed upon the debtor's home. Therefore, it impaired his homestead exemption. The 8th Circuit BAP affirmed. The 8th Circuit vacated the BAP's decision and remanded to the bankruptcy court with instructions to determine whether CRP held a cognizable lien. *CRP Holdings A–1 LLC v. O'Sullivan (In re O'Sullivan)*, 841 F.3d 786 (8th Cir. 2016). On remand, the bankruptcy court held that CRP possessed an unenforceable judicial lien against the debtor's home, and again granted the debtor's motion to avoid the lien. The BAP affirmed, as did the 8th Circuit. On appeal, CRP argued that it held a contingent future interest and not a lien. "As we recognized in the prior appeal, our sister circuits have distinguished between 'existent but presently unenforceable liens and nonexistent liens,'" the 8th Circuit said. "Persuaded by our sister circuits' distinctions, we 'conclude[d] that where a judgment gives rise to an unenforceable lien, a debtor may move to avoid that lien under Section 522(f). When a judgment fails to give rise to any judicial lien (including an unenforceable lien), however, Section 522(f)(1) is superfluous and without application.'" Whether the notice of foreign judgment gave rise to a lien was determined by state law. Missouri law recognizes that a judgment against one spouse does not constitute a lien on entireties property. However, in *Mahen v. Ruhr*, 293 Mo. 500, 240 S.W. 164 (1922), the court recognized that courts must act in equity to clear a cloud upon a title to real estate that is not apparent on the face of the document. "In *Mahen*, a complex set of transactions occurred resulting in conveyance instruments that the court declared void because the property was held as tenants by the entirety. These conveyance documents included a sheriff's deed reciting a judgment and execution, where the execution was against only the husband's interest that was not subject to levy and was based on a nonexistent judgment against him," the 8th Circuit said. "Consistent with *Mahen*, the BAP cited the 'practical difficulties [that] may exist for an ordinary searcher of the records or even a title company trying to determine whether the judgment [against O'Sullivan] created a lien and the property is liable for execution.' ... The result is that the property's value and marketability of title would be affected. We agree with the BAP that CRP's recording of the foreign judgment created a cloud on title under Missouri law sufficient to constitute a 'charge against or interest in' O'Sullivan's property under the Bankruptcy Code. 11 U.S.C. § 101(37). Therefore, we conclude that the cloud on title created by 'CRP's recording of its judgment '*fastened an existing, but presently unenforceable lien*' on the property.' *In re O'Sullivan*, 2017 WL 4844244, at *4 (quoting *In re O'Sullivan*, 569 B.R. at 168). As a result, we hold that application of Section 522(f) will clear the cloud on title to O'Sullivan's property and, as a result, the bankruptcy court properly granted O'Sullivan's motion to avoid the lien."

COURT DID NOT ABUSE DISCRETION BY EXTENDING DEADLINE TO PAY FILING FEE

Case name: *Curran v. Moon, Trustee (In re Jeannette E. Curran),* 29 CBN 259, 2019 WL 322697 (Bankr. 8th Cir. 1/25/19).

Ruling: The 8th Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's denial of the debtor's motion to reconsider its order indefinitely extending the deadline for her to complete payment of the Chapter 7 filing fee.

What it means: Rather than dismissing the pro se debtor's case because she failed to pay the filing fee, the court indefinitely extended the deadline for paying the fee to allow the trustee to administer her estate. The court then denied the debtor's motion to reconsider its ruling. The debtor appealed the court's denial of her motion to reconsider. Such an appeal did not subject

 © 2019 Thomson Reuters

the original ruling to appellate review. The only issue on appeal was whether the court abused its discretion in denying the motion to reconsider.

Summary: When the pro se debtor filed for Chapter 7 relief she asked the court to waive the filing fee. The bankruptcy court denied her application, and ordered her to pay the fee in four installments. After the meeting of creditors, the trustee objected to the debtor's exemptions, and initiated an adversary proceeding to recover real property the debtor transferred prepetition. The debtor responded by amending her schedules. Those amendments drew objections from the trustee. The court sustained the trustee's objections, and sanctioned the debtor. The court then denied the debtor's motion to have her case voluntarily dismissed. However, her case was up for automatic dismissal because she failed to make the final two installment payments of the filing fee. The trustee asked the court to deny the automatic dismissal of the debtor's case. The court vacated the Order to Show Cause, and entered an order indefinitely extending the final two installment payments pending the trustee's filing of a final report. The debtor asked the court to reconsider this order. The court treated this request as a motion made under Rule 60(b). The court denied the request. The 8th Circuit BAP affirmed. "An appeal from the denial of a Rule 60(b) motion does not raise the underlying judgment for our review but only the question of whether the district court abused its discretion in ruling on the Rule 60(b) motion," the panel said, adding that the debtor's request for reconsideration fell outside of the 14-day period for a timely appeal of the court's order. Rule 60(b) allows a court to relieve the debtor from its order for "mistake, inadvertence, surprise, or excusable neglect." "Curran's briefs contain extensive and repetitive factual argument expressing frustration with the bankruptcy process but she fails to identify any clearly erroneous facts or an incorrect application of the law that would entitle her to relief under any of the circumstances identified in Rule 60(b). We see no error or abuse of discretion in the Bankruptcy Court's Order denying Curran's motion for reconsideration."

CLASS ACTION WAIVER IN ARBITRATION PROVISION ENFORCED

Case name: *May v. Midland Funding LLC and Midland Credit Management Inc. (In re Freddy and Amber May),* 29 CBN 260, 2019 WL 413572 (Bankr. E.D. Ark. 1/29/19).

Ruling: The bankruptcy court granted the defendants' motion for summary judgment as to the debtors' prayer for class action certification and relief.

What it means: After denying the defendants' request to compel arbitration, the court enforced the arbitration provision's class action waiver.

Summary: In May 2013, the debtor Freddy May opened a Lowe's credit card account financed through Synchrony Bank. The debtors alleged that after they filed for Chapter 13 relief Synchrony transferred information about their account to Midland Funding LLC and Midland Credit Management Inc. ("Midland"). Midland then filed a proof of claim that the debtors said exceeded what they owed on the credit card debt. The debtors filed an adversary proceeding alleging that Midland engaged in practices that violated Rule 3001 and the Fair Debt Collection Practices Act. The debtors sought relief primarily in the context of statutory damages and fees attendant to a class action. Midland moved to compel arbitration and to strike the debtors' class allegations. Both requests were based on the credit card account agreement, which contained an arbitration provision that included a class action waiver. In a previous ruling, the bankruptcy court denied Midland's request to compel arbitration. That ruling left the class action issue. In *Torres v. Simpatico Inc.,* 781 F.3d 963 (8th Cir. 2015), the 8th Circuit said "arbitration agreements are tested through a lens of ordinary state-law principles that govern contracts, and consideration is given to whether the arbitration agreement is improper in light of generally applicable contract defenses … such as fraud, duress, or unconscionability." The debtors in this case did not assert any general contractual defenses to the class action waiver. "The entirety of the debtors' causes of action relate to an alleged improperly filed proof of claim, not any infirmity or defense related to the account agreement's formation or performance thereunder. Further, no state law or rule exists that attempts to adversely impact or impede the FAA. Here, the Utah statute does the opposite, permissively validating such waiver clauses if agreed to by the parties. The debtors simply declined their affirmative right to opt out," the court said. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court upheld a contractual class action waiver, stating that "[i]n the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings." Based on *Torres* and the line of Supreme Court cases culminating in *Epic* the bankruptcy court concluded "that the appropriate result is enforcing the class action waiver that is clearly set forth in the parties' agreement. As stated in *Epic*, '[t]he respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested.'"

Opinion by Judge Richard D. Taylor

EXEMPTION OF GARNISHED FUNDS RETURNED TO TRUSTEE WAS NOT ASSERTED TOO LATE

Case name: *In re Deyonta J. and Stacia Kaye Batiste,* 29 CBN 261, 2019 WL 417832 (Bankr. N.D. Iowa 2/1/19).

Ruling: The bankruptcy court overruled the Chapter 7 Trustee's objection to the debtors' exemption of garnished funds that the trustee recovered.

What it means: Generally, debtors may amend their schedules at any time before the case is closed. Exceptions to the general rule exist, but they were not applicable in this case.

Summary: The debtors filed for Chapter 7 relief on June 11, 2018. They amended their Schedule C to exempt $971.90 garnished from debtor Deyonta J. Batiste less than two weeks after the money was turned over to the trustee. The trustee objected to the exemption. According to the trustee, the exemption was asserted too late. The bankruptcy court overruled the objection, finding that there was no deadline for the debtors to claim the exemption. "Debtors may generally amend their bankruptcy petition and schedules at any time before the case is closed," the court said. "Trustee has not claimed that Debtors acted in bad faith or that allowing Debtors' exemption will prejudice creditors. The Court, therefore, follows the general rule finds that Debtors' amendment to their Schedule C is allowed."

Opinion by Judge Thad J. Collins

NINTH CIRCUIT

STATE COURT JUDGMENT DID NOT ESTABLISH AMOUNT OF DEBT

Case name: *McKinzie v. Kaut (In re Carl J. Kaut),* 29 CBN 262, 2019 WL 189221 (Bankr. E.D. Cal. 1/14/19).

Ruling: The bankruptcy court ruled that the plaintiff held a nondischargeable claim in an amount less than the amount of her state court judgment against the debtor.

What it means: "While this court agrees that the state court determined that the defendant was indebted to the plaintiff, the application of issue preclusion as to the amount of that debt is discretionary rather than automatic, otherwise manifest injustice would result."

Summary: In April 1999, the plaintiff and her husband purchased a house in Folsom, Calif. The debtor was their real estate agent. The plaintiff and her husband intended to make the house their home, but they changed their minds because the plaintiff's husband's health deteriorated rapidly. Instead of moving into the house, they decided to rent it. As it turned out, the debtor was looking for a home to rent. The plaintiff and her husband agreed to rent the house to the debtor. After the plaintiff's husband passed away in August 2001, the debtor approached the plaintiff about buying the house. He told her that he would not be able to qualify for a home loan because he had bad credit and had filed for bankruptcy. However, the debtor offered a note for $310,000 with monthly principal and interest payments of $2,062.44 beginning in May 2002, and a balloon payment in April 2006. The note would be secured by the property. The plaintiff accepted the debtor's offer, and the transaction closed in March 2002. The debtor was current with the lease payments when he purchased the house. He was current with the note payments through December 2004, when he told the plaintiff that he wanted to use the property as collateral for a new loan to pay approximately $100,000 in delinquent taxes. He offered to use a portion of the proceeds from the loan to reduce the principal owed to the plaintiff, and told her that the balance of the plaintiff's loan would continue to be secured by a senior lien on the property. The plaintiff agreed. However, contrary to the debtor's representation the new loan was secured by a first deed of trust on the property. In fact, the plaintiff's loan was no longer secured because, as part of the refinance, the title company selected by the debtor prepared a Full Reconveyance that the plaintiff signed without understanding that she was relinquishing her deed of trust. The plaintiff testified that even though the debtor was not acting as her real estate agent in this transaction, she relied upon his expertise and his promise that her note would continue to be secured by a senior lien. The debtor admitted that he told the plaintiff her note would continue to be secured by the property. He said the reconveyance was the result of a mistake made by the title company. The new loan was for $412,500. The debtor made a principal payment of $151,850 to the plaintiff plus $757.17 for interest. He used $163,850.87 to pay bills including the delinquent taxes, and kept the rest of the money. The debtor experienced financial problems in 2006 that caused him to default on his loan payments and his payments to the plaintiff. The house was sold at a trustee's sale on April 23, 2007. The plaintiff was unaware of the foreclosure because she had reconveyed her deed of trust. The plaintiff sued the debtor in state court for the original amount of the note plus interest and attorney fees. The debtor did not defend the action. A default judgment was entered on July 30, 2014, in the amount of $310,000 plus prejudgment interest of $121,815 and $6,000 in attorney fees. After the debtor filed for Chapter 7 relief, the plaintiff filed an adversary proceeding asserting that her claim based on the state

 © 2019 Thomson Reuters

court judgment was excepted from discharge. The bankruptcy court found that the state court judgment did not preclude the debtor from challenging the amount of the plaintiff's claim. "While this court agrees that the state court determined that the defendant was indebted to the plaintiff, the application of issue preclusion as to the amount of that debt is discretionary rather than automatic, otherwise manifest injustice would result," the court said. The plaintiff admitted that the defendant made substantial payments to her and reduced the principal of the debt from $310,000 to $107,441.74. Even though these payments predated the state court judgment, the state court did not credit them to the debtor. The bankruptcy court determined that interest on the adjusted debt was $50,730.16. The court then ruled that the plaintiff's claim was excepted from discharge by Section 523(a)(2)(A). The court found that the debtor represented to the plaintiff that if she allowed him to refinance the property, her note would continue to be secured by a senior lien on the property. "This was false, the defendant knew it was false, and he made the representation to induce the plaintiff to relinquish her security interest. As a result of the plaintiff's justifiable reliance on his representation, the plaintiff's note became unsecured and she was left without recourse to substantial real property collateral that would have made her whole," the court said.

Opinion by Judge Michael S. McManus

DEBTOR DISCHARGES FRIEND'S LOAN

Case name: *Shults v. Faulkiner (In re Laura L. Faulkiner),* 29 CBN 263, 2018 WL 6446496 (Bankr. D. Nev. 11/19/18).

Ruling: The bankruptcy court ruled that the plaintiff's claim was not excepted from discharge by Section 523(a)(2).

What it means: The plaintiff alleged that the debtor made deceptive statements regarding her intent to make payments to him after the loan was made to dissuade him from pursuing collection remedies. The plaintiff did not prevail on his forbearance theory because he failed to show the value of any collection efforts he did not take. He also failed to establish when the debtor made those promises.

Summary: The plaintiff and the debtor had been friends for many years. In October 2013, the debtor acquired a condominium unit in Las Vegas. The purchase price of $73,000 was paid by the plaintiff. Although the plaintiff paid for the condo, it was titled in the debtor's name alone. In addition to the $73,500 purchase price, the plaintiff provided the debtor with another $5,000 to furnish the condo. There was no dispute that the plaintiff loaned the $73,500 to the debtor. There was a dispute as to whether the $5,000 was a loan or a gift. There was no promissory note or loan agreement regarding the $73,500 or the $5,000. In April 2016, the plaintiff sued the debtor to collect the $78,500. After the lawsuit was filed, the debtor sold the condo and used the proceeds to buy a new home. The debtor filed for Chapter 13 relief after the plaintiff filed a motion for summary judgment in the state court action. The plaintiff filed an adversary proceeding asserting that his claim was excepted from discharge pursuant to Section 523(a)(2)(A) and/or (B). The court ruled that the plaintiff's claim was not excepted from discharge by either section. Clearly Section 523(a)(2)(B) did not apply because there was no writing let alone a writing regarding the debtor's financial condition that the plaintiff relied on in making the loan. The claim was not excepted from discharge by Section 523(a)(2)(A) because the plaintiff failed to prove that the debtor did not intend to repay him when the loans were made. The debtor said she intended to pay him, and the plaintiff admitted that it was the parties' understanding that payments would not begin before October 2014. The plaintiff also alleged that the debtor made deceptive statements regarding her intent to pay after the loan was made to dissuade the plaintiff from taking steps to collect the funds. "To prevail on a forbearance theory, the plaintiff must prove by a preponderance of the evidence that he had valuable collection remedies at the time the debtor made any additional deceptive statements, and that his collection remedies lost value during the forbearance period," the court said. Here, the forbearance period would have run from October 2014, the earliest that payments were to start, and April 2016, when the plaintiff sued the debtor. During that time, the plaintiff's name was not on the title to the condo, he did not have a lien against the property, and he did not obtain a judgment against the debtor. Thus, he had no way to execute against the condo, or otherwise sell it. Because the plaintiff did not establish the value of any collection remedy he had during the forbearance period, the court could not determine that the collection remedy lost value. "Obviously, the unpaid total amount of the original loan and additional funds establish a ceiling for the plaintiff's claim, but it does not establish the amount of the collection value that was lost. Moreover, while the plaintiff intimated that the debtor gave repeated, deceptive assurances that she would repay, neither the dates on which the assurances were given, nor the value of the available collection remedies on those dates, has been established. Thus, even on a forbearance theory, Plaintiff has failed to meet his burden of proof under both Section 523(a)(2)(A) and Section 523(a)(2)(B)."

Opinion by Judge Mike K. Nakagawa

© 2019 Thomson Reuters

NO SANCTION BECAUSE CREDITOR VIOLATED DISCHARGE IN GOOD FAITH

Case name: *In re Demetrius B. Dickerson Sr.,* 29 CBN 264, 2019 WL 298933 (Bankr. W.D. Wash. 1/18/19).

Ruling: The bankruptcy court did not sanction a creditor for violating the discharge injunction because the creditor had a good faith belief that the injunction did not apply to its claim.

What it means: The court found that the creditor had a good faith belief that it could garnish the wages of the debtor's wife to collect a pre-marital debt. Although this action violated the discharge entered in the debtor's case, the court denied the debtor's request for sanctions pursuant to *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018).

Summary: Shirley J. Dickerson did not file for Chapter 7 relief with her husband, Demetrius B. Dickerson Sr. The Dickersons were married in July 2007. Prior to their marriage, Mrs. Dickerson owed a debt for medical services. In December 2008, Mrs. Dickerson incurred additional medical debt. In April 2009, both the pre- and post-marital debts were assigned to Merchants Creditor Corp. In February 2010, Merchants started garnishing Mrs. Dickerson's wages to collect its claim. After it received notice of Mr. Dickerson's bankruptcy filing in February 2012, Merchants executed a partial release of its writ of garnishment to limit the garnishment to the pre-marital debt. The debtor's bankruptcy attorney informed Merchants that it needed to stop the garnishment of the pre-marital debt as well. During that conversation, the debtor's attorney acknowledged that the pre-marital debt was not subject to the discharge and indicated that he would have no problem with garnishment recommencing after the discharge was entered. Following that conversation, Merchants executed a full release of the writ of garnishment. Nearly six years after the debtor received his discharge, Merchants resumed its garnishment of Mrs. Dickerson's wages. Mrs. Dickerson retained an attorney, who informed Merchants that the collection of community property violated the "marital community discharge" and demanded that it cease all collection activity. After Merchants did not promptly respond, the debtor's bankruptcy was reopened and the debtor moved for sanctions. Merchants released the writ of garnishment about one month after the debtor's motion was filed. The bankruptcy court found that Merchants violated the discharge injunction by collecting a community claim from the debtor's interest in community property. "A community claim is defined as a claim 'that arose before the commencement of the case *concerning the debtor* for which property of the kind specified in Section 541(a)(2) is liable.' § 101(7) (emphasis added). The Ninth Circuit has elaborated on what it means for a claim to be 'concerning the debtor' for purposes of Section 101(7). It is a debt owed by the debtor or debtor's spouse, which under state law could have been satisfied from community property that would have passed to the debtor's bankruptcy estate, whether or not such property existed at the time of bankruptcy," the court said, referencing *In re Soderling*, 998 F.2d 730 (9th Cir. 1993). The court explained that, in Washington, property acquired by either spouse during a marriage is presumptively community property. State law allows a creditor to collect a pre-marital debt from community property if the debt was reduced to judgment within three years of the marriage. Because that happened in this case, Merchants could collect the pre-marital debt from community property, including by garnishment of Mrs. Dickerson's post-marital wages. "Upon the filing of the debtor's bankruptcy, the [pre-marital debt] became a community claim despite being incurred as separate debt by Mrs. Dickerson. Since the discharge injunction enjoins any collection of community property on account of a community claim, Merchants violated the discharge injunction when it garnished Mrs. Dickerson's post-discharge wages. Therefore, under Section 524(a)(3), Merchants was prohibited from collecting from community property on account of both the 2006 Debt and the 2008 Debt, even if the 2006 Debt was in fact separate debt incurred prior to marriage," the court said. Based on *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018), the court denied the debtor's request for sanctions because the court found that Merchants garnished Mrs. Dickerson's wages in the good faith belief that doing so did not violate the discharge injunction. The fact that the debtor's experienced bankruptcy attorney apparently misunderstood how the discharge affected Mrs. Dickerson's pre-marital debt supported Merchant's assertion that it acted in good faith. "Under *Taggart*, sanctions are improper if the creditor has a good faith belief that the discharge injunction does not apply to its claim, even if that belief is unreasonable. I sympathize with the debtor's frustration and acknowledge the high bar set under *Taggart*. I also recognize that the decision in *Taggart* has been appealed to the Supreme Court and that the applicable standard may, perhaps, be different in the future. That said, Debtor has not met his burden and sanctions are therefore improper."

Opinion by Judge Marc Barreca

TENTH CIRCUIT

DEBTORS MAY AMEND SCHEDULES IN REOPENED CASES

Case name: *Mendoza, et al., v. Montoya, Chapter 7 Trustee (In re Pedro Mendoza and Sandy M. Armijo),* 29 CBN 265, 2019 WL 442380 (Bankr. 10th Cir. 2/5/19).

 © 2019 Thomson Reuters

Ruling: The 10th Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's rulings that the debtors in two Chapter 7 cases could not amend their schedules in their re-opened cases.

What it means: "Rule 1009(a)'s plain language does not create an ascertainable and specific period during which a debtor may amend his or her schedules. With this conclusion, we join a number of courts in holding 'the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing.'"

Summary: In two separate Chapter 7 cases the debtors failed to disclose personal injury claims before they received their discharges and their cases were closed. Both cases were reopened, and the debtors amended their schedules. In both cases, the trustee objected to the amendments asserting that the debtors' schedules could not be amended after the cases were closed. In both cases, the bankruptcy court sustained the objections because the debtors failed to show that their failure to amend their schedules before their cases were closed was the result of excusable neglect. The 10th Circuit Bankruptcy Appellate Panel reversed and remanded. Rule 1009 states: "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." In both cases, the bankruptcy court read Rule 1009 in conjunction with Rule 9006(b)(1), which states, "when an act is required or allowed to be done at or within a specified period by these rules ... the court for cause shown may at any time in its discretion ... [and] on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." The BAP found that the bankruptcy courts erred by applying Rule 9006(b)(1) to Rule 1009 because Rule 1009's "any time before the case is closed" is not a specified period during which an amendment may be made. "Applying a plain meaning analysis, the phrase 'any time before the case is closed' does not create a 'specified period.' Until the case is closed, it is impossible to determine the date of the case closing, suggesting Rule 1009 references an indeterminate timeframe," the panel said. Section 350 complicates application of Rule 1009 by allowing cases to be reopened. The BAP noted that other courts have suggested that the reopening of a case is an administrative act and has no substantive effect. "Since the reopening of a case is purely administrative, we cannot read Rule 1009(a)'s language to impose a substantive limitation on the debtors' ability to amend their schedules as a matter of course. A reopening renders a case open. Rule 1009(a) contains no distinction between an original case and a case closed and then reopened. Nor does the Rule limit amending schedules to any time prior to the first closing of the case. As previously stated, Rule 1009(a)'s plain language does not create an ascertainable and specific period during which a debtor may amend his or her schedules. With this conclusion, we join a number of courts in holding 'the debtor, under Rule 1009, may amend schedules without limitation of whether the case is open or reopened after closing.'"

TRUSTEE DENIED COMPENSATION FOR RUNNING DEBTOR'S BANKRUPT BUSINESS

Case name: *Connolly v. Office of the United States Trustee, et al. (In re Samuel J.C. Morreale),* 29 CBN 266, 2019 WL 287079 (Bankr. 10th Cir. 1/22/19).

Ruling: The 10th Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's order that denied the trustee in the debtor's personal Chapter 7 case compensation based on distributions from the Chapter 11 bankruptcy of the debtor's business that the trustee ran as an asset of the Chapter 7 estate.

What it means: "Absent court approval of an individual's employment as a professional or Chapter 11 trustee, the individual is a volunteer and is entitled to no compensation from the estate for any services rendered. Connolly's only appointment was as case trustee in Morreale's Chapter 7 case, and his compensation is limited by the terms of Section 326(a) to 'trustee services' in an amount based upon the moneys he disbursed as trustee in the Chapter 7 case."

Summary: The debtor owned and managed a single-member limited liability company, Morreale Hotels LLC, which filed for Chapter 11 relief in December 2012. The debtor filed for Chapter 11 relief in October 2013. His case was converted to Chapter 7 about one year later. Tom Connolly was appointed as trustee in the debtor's case. Because the debtor's bankruptcy estate included his interest in the LLC, Connolly took over the debtor's business and abandoned the LLC's reorganization plan. Ultimately, Connolly proposed a new plan after receiving the bankruptcy court's permission to sell real property owned by the LLC. Connolly's sale of the property generated proceeds sufficient to pay all claims in full and return a surplus to the Chapter 7 estate. When Connolly sought compensation in the Chapter 7 case he asked for a commission based on disbursements in both cases. The bankruptcy court noted that nothing in the Chapter 11 case addressed whether Connolly would be compensated for his work, and Connolly never sought to be appointed as trustee in the Chapter 11 case. The debtor objected to Connolly's request for a commission based on disbursements made in the Chapter 11 case. Because the Chapter 7 estate also contained more money that was needed to pay all claims, the debtor had an interest in the estate and standing to challenge Connolly's compensation. Connolly argued that he was entitled to compensation based on his work in the

Chapter 11 case because that work was beneficial to the Chapter 7 case. The parties agreed that the only issue before the court was whether Section 326(a) included the Chapter 11 disbursements in the Chapter 7 commission base for purposes of calculating Connolly's compensation as Chapter 7 Trustee. The bankruptcy court concluded it did not and denied Connolly a commission on the Chapter 11 disbursements. The 10th Circuit BAP affirmed. Section 330(a)(7) states: "In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326." Section 326 establishes a maximum percentage of "all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor" that may be paid to the trustee. "Some courts that have considered the interplay between Section 326(a) and Section 330(a)(7) have concluded that a Chapter 7 trustee's commission calculated under Section 326(a) establishes a presumptively reasonable trustee fee. Section 330(a)(2) gives the bankruptcy court discretion to award less compensation than the amount sought where extraordinary circumstances exist (but not more)," the BAP said. Connolly suggested that the phrase "in the case" only related to the words "turned over," and not "moneys disbursed." Therefore, he argued, the base on which the commission was determined may include amounts disbursed in other cases. The BAP disagreed. "Not only does that interpretation insert words into the statute that simply aren't there, but it also collides with our understanding of grammar. The word 'or' is a coordinating conjunction used to 'join clauses of equal stature.' Here, 'or' conjoins two concepts — disbursement and turnover — that describe kinds of disposition and are, in that respect, two similar elements. In Section 326(a), both are related to and modified by the words 'in the case,'" the panel said. "The larger phrase 'upon all moneys disbursed or turned over in the case' is prepositional: the preposition 'upon' relates the concept of 'all moneys disbursed or turned over in the case' to the 'reasonable compensation' the court may allow a trustee, 'payable' as calculated using the sliding scale. Within that prepositional phrase is another, 'in the case.' The preposition 'in' relates the 'all moneys disbursed or turned over' concept to 'the case.' Thus, this single-sentence subsection essentially means that a Chapter 7 or 11 trustee receives as compensation a certain percentage of funds he or she receives and pays out in the Chapter 7 or 11 case. It is not ambiguous." The BAP noted that other language in Section 326(a) indicates that a Chapter 7 Trustee's compensation is confined to the case in which he was appointed. The panel did not dispute that Connolly's actions in the Chapter 11 case were valuable, but concluded that they were undertaken voluntarily. "The Tenth Circuit's case law in this regard is as unforgiving as it is crystal clear: Absent court approval of an individual's employment as a professional or Chapter 11 trustee, the individual is a volunteer and is entitled to no compensation from the estate for any services rendered. Connolly's only appointment was as case trustee in Morreale's Chapter 7 case, and his compensation is limited by the terms of Section 326(a) to 'trustee services' in an amount based upon the moneys he disbursed as trustee in the Chapter 7 case."

NOTICE OF JUDGMENT DID NOT CREATE CONSTRUCTIVE NOTICE OF FORECLOSURE

Case name: *Brakhahn v. Nash, et al. (In re Dedee D. Brakhahn),* 29 CBN 267, 2019 WL 354699 (Bankr. D.N.M. 1/25/19).

Ruling: The bankruptcy court denied the defendants' motion for summary judgment.

What it means: "Mortgages, liens, and similar foreclosable encumbrances should not be viewed as sufficient, by themselves, to give notice of a pending foreclosure action. Such a rule would place too much of a burden on buyers."

Summary: In July 2004, Marvin and Linda Nash gave the debtor and her husband three lots in Continental Divide, N.M., along with a mobile home located on the property. This property became the debtor's homestead. The Nashes subsequently sold their business to the debtor and her husband, who were to make payments over time. After the debtors defaulted, the Nashes obtained a judgment against them, foreclosed on the judgment lien, and purchased the property at a special master's sale, which the state court approved on Nov. 29, 2017. The debtor's husband died prior to the sale. The debtor filed bankruptcy six minutes before the Nashes recorded the deed they received from the special master. The debtor initiated an adversary proceeding to avoid the transfer of her home to the Nashes. "In New Mexico, title to a property in foreclosure passes when the special master's sale is approved by a court and the purchaser receives an interest in the property," the bankruptcy court said. "Thus, title to the Rockcrest Property passed to Defendants on November 30, 2017." However, the transfer was subject to avoidance until the deed was recorded. Because the debtor filed for bankruptcy relief prior to the recording of the deed, she was able to avoid the transfer pursuant to Section 544(a)(3). The court found that the Nashes' recording of the transcript of judgment they obtained against the debtor and her husband did not put a bona fide purchaser on notice of the foreclosure action. "Mortgages, liens, and similar foreclosable encumbrances should not be viewed as sufficient, by themselves, to give notice of a pending foreclosure action. Such a rule would place too much of a burden on buyers. County real estate records are filled with such liens and encumbrances. If every one of them

 © 2019 Thomson Reuters

functioned as notice of a possible foreclosure action that would have to be investigated, buyers would be substantially burdened. The Court did not find any case law, in New Mexico or elsewhere, holding that a recorded transcript of judgment or similar lien constituted such notice," the court said. "Rather than placing the burden of proving a negative on buyers, New Mexico has made it easy for lienholders to give notice of pending foreclosure actions: the notice of lis pendens." Given that the Nashes did not file a notice of lis pendens, their constructive notice defense failed and the trustee in the debtor's case could have avoided the Nashes' unrecorded deed pursuant to Section 544(a)(3). Because the trustee declined to seek such avoidance, the debtor had the right to do so under Section 522(h). The court denied the Nashes' motion for summary judgment and gave notice of its intention to grant summary judgment in the debtor's favor.

Opinion by Judge David T. Thuma

COURT CAN'T ORDER TURNOVER OF ABANDONED PROPERTY

Case name: *In re Jeffery L. and Kathleen R. Buffington,* 29 CBN 268, 2019 WL 328721 (Bankr. E.D. Okla. 1/24/19).

Ruling: The bankruptcy court denied a secured creditor's motion for turnover of its collateral.

What it means: "Bankruptcy courts are courts of limited jurisdiction. While this Court has jurisdiction to order turnover of property, such authority is limited to property of the bankruptcy estate. 28 U.S.C. § 157(b)(2)(E). Once property is abandoned, it is no longer property of the estate and the bankruptcy court's jurisdiction lapses."

Summary: The Chapter 7 debtor Jeffery L. Buffington owned a 2014 Volvo Truck Tractor that was collateral for a loan from VFS US LLC. VFS sought an order directing the debtor to turn over the vehicle. VFS stated that it previously obtained relief from the stay regarding its collateral, but the debtor refused to surrender it. The debtor responded that he was current with his payments on the loan. At the hearing on the motion, the trustee pointed out that the order granting stay relief also directed him to abandon any interest the estate had in the truck. Thus, the truck was no longer property of the debtor's bankruptcy estate. The bankruptcy court confirmed that the amended motion for stay relief filed by VFS included the trustee's abandonment of the asset pursuant to Section 554(b). "Bankruptcy courts are courts of limited jurisdiction. While this Court has jurisdiction to order turnover of property, such authority is limited to property of the bankruptcy estate. 28 U.S.C. § 157(b)(2)(E). Once property is abandoned, it is no longer property of the estate and the bankruptcy court's jurisdiction lapses," the court said. "Property abandoned pursuant to Section 554 reverts to the debtor and debtor's rights are treated as if the bankruptcy was not filed. Normally, property is abandoned to any party with a possessory interest in the property. [Citation omitted.] Here, it was alleged that Debtors had possession of the 2014 Volvo Truck at the time of abandonment but may have allowed another truck driver to use this vehicle. The fact that this property may at one time have been part of the bankruptcy estate does not give this Court the power to exercise any control over it now nor to resolve this dispute."

Opinion by Judge Tom R. Cornish

DEBTOR'S SURRENDER OF CONDO INTEREST DOES NOT AFFECT CO-OWNER'S INTEREST

Case name: *In re John T. Main,* 29 CBN 269, 2019 WL 325805 (Bankr. N.D. Okla. 1/23/19).

Ruling: The bankruptcy court overruled the debtor's estranged wife's objection to confirmation of his proposed plan.

What it means: The debtor's plan called for him to surrender his interest in a condominium that he jointly owned with his estranged wife. She objected because she was concerned his action would affect her interest. The court assured her that it would not.

Summary: The Chapter 13 debtor's assets included an undivided interest in a condominium he jointly owned with his estranged wife, Lea M. Wolfe. The property was subject to a mortgage in favor of BOKF, N.A., d/b/a Bank of Oklahoma. As of the petition date, BOKF was owed $91,909, and the condo was worth $150,000. The debtor proposed a plan that called for him to surrender his interest in the condo to BOKF. The Chapter 13 Trustee supported confirmation of the plan. Wolfe objected to the debtor's surrender of his interest in the condo to BOKF. Wolfe asserted that the plan should call for the debtor's abandonment of his interest in the condo, and was concerned that the surrender of his interest wound have a negative effect on her interest. The bankruptcy court began its analysis of Wolfe's objection by stating that the debtor could surrender only his interest in the property. He could not surrender Wolfe's interest, so her concern that the debtor's surrender of his interest could operate as a surrender of her interest was unfounded. "Moreover, just as Debtor cannot surrender an interest in the Condo that is not his to surrender, Wolfe cannot prohibit Debtor from exercising his statutory right under Section 1325(a)(5)(C) to surrender his interest in the Condo to BOKF," the court said. "The Court finds that, under the terms of the plan, Debtor is relinquishing all of his rights including the right of possession in the condo. BOKF is therefore placed in the position to enforce its security

interest in the condo without further resistance or interference by the debtor. This surrender does not affect or impair the rights of Wolfe in the condo. The fate of the condo is now a matter to be determined between BOKF and Wolfe, either through negotiation or litigation. Debtor has removed himself from the mix."

Opinion by Judge Terrence L. Michael

ELEVENTH CIRCUIT

HEALTH CARE PROVIDER'S CLAIM SUPERIOR TO DEBTOR'S EXEMPTION

Case name: *In re Dixie Langley,* 29 CBN 270, 2019 WL 404205 (Bankr. S.D. Ala. 1/30/19).

Ruling: The bankruptcy court ruled that a health care provider had a priority statutory lien that entitled it to receive the full amount of the proceeds from the settlement of the debtor's personal injury claim.

What it means: "Other bankruptcy courts which have considered similar issues regarding the assertion and priority of hospital liens have reached the same result: that exempt property is not protected from the enforcement of valid statutory liens."

Summary: In October 2016, the debtor was injured in a motor vehicle accident. USA Health System provided care to the debtor, and asserted a claim of $43,245.96. The debtor's personal injury claim was settled for $25,000. The debtor claimed $6,832.50 of the proceeds as exempt pursuant to Ala. Code § 43-8-42. After the bankruptcy court approved the disbursal of the exemption but before the disbursement was made, the trustee learned that USA was asserting a statutory hospital lien on the settlement proceeds. Because the asserted lien exceeded the amount of the settlement proceeds, the trustee filed a motion asking the bankruptcy court to determine the relative priority of the claims against the money. Alabama law (Ala. Code § 35-11-370) gives hospitals "a lien for all reasonable charges for hospital care, treatment, and maintenance of an injured person who entered such hospital within one week after receiving such injuries, upon any and all actions, claims, counterclaims, and demands accruing to the person to whom such care, treatment, or maintenance was furnished, or accruing to the legal representatives of such person, and upon all judgments, settlements, and settlement agreements entered into by virtue thereof on account of injuries giving rise to such actions, claims, counterclaims, demands, judgments, settlements, or settlement agreements and which necessitated such hospital care, subject, however, to any attorney's lien." Accordingly, the bankruptcy court found that USA had a statutory hospital lien. The court then found that this lien did not fit within any of the categories that exposed it to avoidance pursuant to Section 545. Finally, the court found that the lien was superior to the debtor's exemption. "While the Bankruptcy Code abhors unequal distribution among creditors which disrupts the priority scheme that Congress set out in Section 507, the policy considerations behind statutory liens must be considered in determining their relative priority with other creditors," the court said. "The obvious purpose of the hospital lien law is to give medical care providers a source of compensation for their services from the proceeds of a personal injury settlement. *In re Pohrman,* 146 B.R. 570, 574 (Bankr. D. Or. 1992); *In re Innis,* 181 B.R. 548 (Bankr. N.D. Okla 1995). 'To find otherwise would render hospital lien law useless since, in many [instances], a personal injury settlement can be claimed as exempt' in whole or in part under state law, and in turn, creating very limited circumstances wherein a hospital lien would attach to settlement proceeds. *Id.* Other bankruptcy courts which have considered similar issues regarding the assertion and priority of hospital liens have reached the same result: that exempt property is not protected from the enforcement of valid statutory liens. *Id.* Therefore, having considered the arguments of the parties, the relevant state and federal law, and the record as a whole, this Court finds that USA has a valid statutory hospital lien entitling it to the full amount of settlement proceeds awarded to the debtor for the injuries she sustained as a result of the said motor vehicle accident."

Opinion by Judge Jerry C. Oldshue Jr.

DISCHARGE DENIED BECAUSE DEBTOR TRIED TO STASH CASH IN SON'S ACCOUNT

Case name: *Musselman, Trustee, v. Malave (In re Marta Malave),* 29 CBN 271, 2019 WL 259427 (Bankr. M.D. Fla. 1/17/19).

Ruling: The bankruptcy court denied the debtor's Chapter 7 discharge.

What it means: The court found that the debtor failed to credibly explain her transfer of $12,000 to her son's account within 60 days of filing for bankruptcy.

Summary: The debtor's 21-year-old son had spina bifida. This serious medical condition did not prevent him from attending college. The debtor provided financial support to pay for his education. The debtor filed for Chapter 7 relief on March 12, 2018. She disclosed an interest in two accounts at CFE Federal Credit Union. She was the sole owner of one account ("Account 63"), which she claimed as exempt under Florida Statute § 222.11(2)(b) and Article X, Section 4(a)(2) of the Florida Constitution. She said there was $339.39 in this account. The debtor swore that another account with the credit

 © 2019 Thomson Reuters

union ("Account 28") belonged solely to her son and valued it at zero in her bankruptcy schedules. The bankruptcy court found that the debtor was at least the co-owner of Account 28 and may have been its primary owner. On March 2, 2018, less than two weeks before the debtor filed for bankruptcy, Account 28 had a balance of $4,000. Between March 2 and March 12, the debtor deposited $8,000 into Account 28. Some of the money came from Account 63. Most of the money was the debtor's 2017 federal income tax refund. On March 12, the debtor deposited $100 into the account. At the meeting of creditors, the debtor's son turned over $4,000. The trustee demanded that the debtor turn over another $7,000, but she refused. After the meeting was concluded, the debtor removed her name from Account 28. The trustee asked the court to deny the debtor's discharge pursuant to Section 727(a)(2) and (a)(4)(A). While the court complimented the debtor for her efforts to help a son and understood that she faced many hardships, those considerations did not excuse her failure to credibly explain the transfer of $12,000 to Account 28 within 60 days of filing for bankruptcy. "The Court finds the transfers were made with the intent to hinder, delay, or defraud a creditor or an officer of the estate. The testimony that the funds were to be used solely for education expenses was not credible when the debtor admitted [her son] used the account for both education and recreation purposes. Debtor simply did not want the Chapter 7 Trustee to get the money to pay her creditors," the court said. "Debtor also made a false oath by failing to list her co-ownership interest of Account 28 in her Schedules and by failing to disclose the transfers from Account 63 to Account 28 in the Statement of Financial Affairs. The transfers amounting to $12,000 were troubling and were close in time to the bankruptcy filing. Debtor offered no explanation for these false statements and omissions. Debtor wanted to help her son pay for his college which she accomplished by concealing the transfers and keeping the monies from the reach of the trustee and her creditors."

Opinion by Judge Karen S. Jennemann

COURT SUSTAINS FORMER SPOUSE'S OBJECTION TO DEBTOR'S PLAN

Case name: *Davis v. Partridge (In re Elry E. Davis),* 29 CBN 272, 2019 WL 409408 (Bankr. M.D. Ga. 1/30/19).

Ruling: The bankruptcy court sustained an objection to confirmation of the Chapter 13 debtor's proposed plan.

What it means: The court found that the below-median income debtor failed to commit all his projected disposable income to his plan because he greatly understated his expenses.

Summary: The debtor and Joyce Partridge were married from 1973 to 2002. At the time of their divorce, the couple had no minor children. The divorce decree required the debtor to pay alimony of $425 per month for 12 months. The debtor was also obligated to pay Partridge 35 percent of his retirement benefits, which the state court determined to be $512 per month. According to Partridge, the debtor was about five months behind on these payments when he filed for Chapter 13 relief on July 17, 2018. The debtor's schedules identified Partridge as being owed a property settlement claim. His plan treated her claim as a general unsecured debt. Partridge objected to confirmation of the debtor's plan. The debtor responded with a motion asking the bankruptcy court to determine that Partridge's claim was dischargeable. The court found that state law prohibited awarding Partridge a vested interest in the debtor's pension, and determined that his obligation to pay a portion of each month's payment to Partridge was pursuant to the state court's division of the couple's marital property. "The evidence establishes that, as part of the divorce proceeding, Debtor and Partridge, while represented by counsel, engaged in a series of mediation sessions. The resulting agreement reached by the parties was then presented to and adopted by the court in the form of the decree. The language and structure of the negotiated decree suggests that the parties intended for the pension benefit obligation to be a property settlement. Alimony is specifically provided for in paragraph 2 of the decree. Paragraph 3 of the decree specifically states that it is 'a division of the equitable interest in ... property and said transfers are not in settlement of any alimony or marital property rights. The division of the liquid assets, personal property and real property, as outlined herein, are all in the nature of a property settlement.' Further, while the alimony obligation under paragraph 2 of the decree ends upon the death of either party or the remarriage of Partridge, the division of property, including the pension benefits, is not affected by remarriage or death. Indeed, the decree provides that, even if Debtor dies, Partridge is still entitled to receive 35% of his death benefits. The evidence also establishes that there were no minor children at the time of the divorce. Accordingly, there was no need for additional support. Finally, the decree specifically provides that the division of property is not to be a taxable event and is not to be treated by the Internal Revenue Service as alimony. All of these factors weigh heavily in favor of a finding that it was the parties' intent that the pension benefit obligation was to be a property settlement and not alimony," the court said. Turning to Partridge's objection to confirmation, the court rejected Partridge's assertion that the debtor did not file for Chapter 13 relief in good faith. Partridge argued that the filing was in bad faith because there was no evidence of a significant change to the debtor's income or expenses, but the

© 2019 Thomson Reuters

court said he wasn't required to show such a change. He said he filed because he needed relief from the strain of not being able to get his finances under control, and there was no indication that the debtor was not being honest regarding his desire to reorganize. The court sustained Partridge's objection that the debtor was not committing all his disposable income to his plan payments. Because the debtor's income was below the applicable median, the amount of his plan payments was determined based on Schedules I and J. On Schedule J, the debtor disclosed $800 for rent and $800 for utilities. However, on the petition date the debtor was house-sitting for a friend. He was not paying rent and just $300 for utilities. Consequently, the debtor needed to increase the amount of his plan payments to satisfy Section 1325(b)(1)(B).

Opinion by Judge James P. Smith

RULE 9011'S NOTICE CAN'T BE AVOIDED BY ASKING THE COURT TO INITIATE SANCTIONS

Case name: *Barnett v. Aldridge Pite LLP, et al. (In the Matter of Robert C. Barnett),* 29 CBN 273, 2019 WL 325915 (Bankr. M.D. Ga. 1/23/19).

Ruling: The bankruptcy court denied a request to impose sanctions pursuant to Rule 9011.

What it means: The debtor's counsel believed that the creditor's motion for stay relief was frivolous, and wanted the court to sanction the creditor's counsel pursuant to Rule 9011. However, the debtor's attorney did not provide the creditor's attorney with proper notice of his intent to seek sanctions. Instead, the debtor's attorney asked the court to sanction the creditor's attorney on its own motion. The court denied the request, stating "it would be improper to allow Debtor's counsel to avoid the requirements of Rule 9011(c)(1)(A) by seeking relief under Rule 9011(c)(1)(B). It is Debtor's counsel, and not the Court, that has initiated the sanctions procedure."

Summary: Wilmington Savings Fund Society FSB moved for relief from the automatic stay to foreclose on the debtor's home. WSFS appeared at the hearing through local counsel, who requested a continuance. The debtor's attorney objected, and argued that the motion was frivolous. The debtor's attorney asked the bankruptcy court to hold a hearing to consider imposing sanctions under Bankruptcy Rule 9011 against WSFS's law firm. The court denied the request, noting that the debtor's attorney had not complied with Rule 9011(c)(1)(A), which required the debtor's counsel to give the bank's counsel at least 21 days to withdraw the offending pleading before seeking sanctions. The debtor's attorney argued that this rule did not apply if the court held a hearing on its own motion pursuant to Rule 9011(c)(1)(B). The attorney added that he advised the creditor's attorney by phone the day before the hearing that he would seek sanctions. The court declined to hold a sanctions hearing based upon informal notice. Instead, the court invited the debtor's counsel to file a motion explaining why the court should issue a show cause order pursuant to Rule 9011(c)(1)(B). WSFS subsequently withdrew its motion for stay relief. The debtor's counsel filed a motion seeking a "show cause" hearing and seeking damages pursuant to Section 362(k)(1). The court denied the request for a show cause hearing, and scheduled a hearing to consider damages based on a willful violation of the automatic stay. The court noted that Rule 9011 sanctions may be sought by motion pursuant to Rule 9011(c)(1)(A) or on the court's own motion pursuant to Rule 9011(c)(1)(B). "Informal service is not sufficient to satisfy the service requirements of Bankruptcy Rule 9011," the court said. "Further, the Court concludes that it would be improper to allow Debtor's counsel to avoid the requirements of Rule 9011(c)(1)(A) by seeking relief under Rule 9011(c)(1)(B). It is Debtor's counsel, and not the Court, that has initiated the sanctions procedure."

Opinion by Judge James P. Smith

Visit https://legal.thomsonreuters.com

 © 2019 Thomson Reuters