Marcia R. Meoli

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Federal Bar Association

Bankruptcy Section Newsletter
April 2007

This newsletter is published by the Federal Bar Association, Bankruptcy Section, for the Western District of Michigan. Prepared by lawyers with busy practices, every effort is made to publish on a quarterly basis. For your records, here are the dates of newsletters for the recent past: January 2007, October 2006, July 2006, February 2006, October 2005, June 2005, February 2005, October 2004, May 2004, January 2004, October 2003, July 2003, April 2003 and January 2003.

To view this email in its best format (green and tan background, with the tree logo at the top), we suggest that you set your internet software to "HTML" view. On versions of INTERNET EXPLORER, click "tools" then "options" then "environment". Under the "views" tab, click "default read view" and set to "HTML", instead of "plain text".

In this issue

Article on the automatic stay under BAPCPA

This article is reprinted with permission from the National Association of Bankruptcy Trustees. This article originally appeared in NABTalk, Vol. 22, No. 3 (2006). While it is addressed to chapter 7 trustees, it contains a valuable review of a new provision in present bankruptcy law, which could affect

Upcoming dates:

1. 19th Annual FBA Summer Seminar: July 26-28 2007, The Park Place Hotel, Traverse City, Michigan. Look for registration materials in May, 2007.

2. Rejuvenation Party for the Honorable Jo Ann C. Stevenson will be held in the Pantlind Room, Amway Grand Hotel, Grand Rapids, Michigan on 9/28/07. Watch for brochures on this event.

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many parties involved in bankruptcy proceedings, particularly where there are security interests in personal property.

THE AUTOMATIC STAY UNDER BAPCPA AND TRUSTEE PRACTICE
By Kelly M. Hagan, Chapter 7 Bankruptcy Trustee

The enactment of the Bankruptcy Abuse Prevention & Consumer Protection Act ("BAPCPA") introduced new limitations to the application of the automatic stay under 11 U.S.C. § 362. In some cases, the stay is shortened in duration and/or lessened in scope; in others, it is never imposed. Of greatest significance to trustees are those cases in which the stay is terminated, and as a result, certain property is no longer property of the estate. The scope of this article is limited to three provisions which have the potential to impact a chapter 7 trustee's practice: sections 362(h)(1), 362(c)(3), and 362(c)(4).

Section 362(h)(1)

A chapter 7 individual debtor must file a statement of intention stating the debtor's intent to surrender, redeem or reaffirm property securing debts. Absent a court order to the contrary, the statement must be filed within 30 days after the date the petition is filed or on or before the date of the section 341(a) meeting, whichever is earlier. The debtor must perform the stated intention within 30 days of the date originally set for the section 341(a) meeting. Although it is the chapter 7 trustee's duty to ensure the debtor performs the stated intention, prior to the enactment of BAPCPA, there were few apparent consequences for the trustee if the debtor failed to meet her obligations. Under BAPCPA, however, the debtor's failure to file the statement or perform her intention timely can have significant consequences for the trustee.

If a debtor fails to file a statement of intention, files a statement that does not indicate the debtor's intention with respect to certain property, fails to perform the stated intention, or fails to do any of those acts timely, the stay provided under section 362 (a) is terminated with respect to certain property. It is important to note that the election of the "retain and pay" option, where the debtor states an intention to retain property and pay for it, without redeeming it or reaffirming the debt, has been treated by the courts post-BAPCPA as a failure to comply with the statute, which also triggers the termination of the stay. If the debtor fails to meet the section 521(a)(2) requirements, the stay is lifted as to "personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease." Under the plain language of the statute, the stay as to real property which is property of the estate is not affected.

Of greater significance for the chapter 7 trustee is the other

3. FBA Steering Committee meets typically on the 3rd Friday for lunch at the Peninsular Club in downtown Grand Rapids. Check in advance with President Dan Kubiak @ DKubiak@mmbjlaw.com

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Quick Links...

United States Bankruptcy Court, Western District of Michigan

Local filing statistics

United States Trustee Program, including means test tables and other BACPA data

consequence of the debtor's failure to comply with section 521(a)(2): the personal property "shall no longer be property of the estate. . . ." Depending on the district, this statute could spell the end of some of the trustee's claims. Assume for the sake of discussion that the debtor has a piece of personal property subject to an avoidable lien. If section 362(h)(1) is triggered, and the property is no longer property of the estate, are the trustee's lien avoidance claims regarding to that property still viable? What if the trustee has taken possession of the collateral, making it impossible for debtor to surrender the collateral to the creditor and impractical for the debtor to reaffirm the debt or redeem the collateral? Clearly, the trustee's actions make it impossible for debtor to comply with the statute, although to remove the property from the estate would conflict with the purpose of other parts of the Code which set forth the trustee's rights and obligations.

Although one can expect creditor's attorneys will argue that the trustee's claims were extinguished upon the removal of the property from the estate, the trustee should argue that the chapter 5 claims are still property of the estate. In addition, any complaint should include a request for the value of the avoided lien pursuant to 11 U.S.C. § 550(a), if the property itself cannot be recovered. Even if the trustee is successful in pursuing her lien avoidance claims, there is probably little hope that the trustee could recover any non-exempt equity that is lost when the property is removed from the estate. Fortunately, the trustee does have a means of avoiding the loss of non- exempt equity, provided action is taken promptly.

To preserve the personal property, the trustee can file a motion alleging that the property is of consequential value or of benefit to the estate. If, after notice and a hearing, the court finds in favor of the trustee, then section 362(h)(1) does not apply, and the stay remains in effect and the property remains property of the estate. Entry of an order in favor of the trustee is contingent on the court ordering appropriate adequate protection and turn over of the collateral to the trustee, although at least one court did not view turnover as mandatory, instead retaining jurisdiction in the event the trustee filed a motion for turnover.

The trustee's motion must be filed before the expiration of the times set forth in subsection 521(a) (2), and the applicable deadline depends on the debtor's actions. If the debtor has failed to file a statement of intention containing the requisite information, then the trustee must file her motion within thirty days after the statement was due, but by the date of the first meeting. In those cases where the debtor has filed the statement of intention, but is fails to perform, the trustee's motion must be filed within 30 days after the first date set for the section 341(a) meeting. If the court does not grant the trustee's motion, the stay terminates upon conclusion of the hearing on the trustee's

Unites States Bankruptcy Courts

Chapter 13 Trustee Brett N. Rodgers

Chapter 13 Trustee Mary K. Viegelahn Hamlin

Federal post judgment rate of interest

State Bar of Michigan

American Bankruptcy Institute

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National Association of Consumer Bankruptcy Attorneys

National Association of Chapter 13 Trustees

Federal Bar Association of Western Michigan

Pro bono procedures and client retainer agreement

US District Court civility plan

New dollar amounts in bankrutpcy

Information on reporting bankrutpcy fraud

motion.

Section 362(c)(3)

With the enactment of BAPCPA, section 362 was revised to curtail multiple bad faith filings. Subsection (c)(3), which is not easily summarized, applies:

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

In such cases, the stay under section 362(a) may have limited duration. The circumstances triggering this provision will usually involve a chapter 7 debtor filing a second petition within one year of the debtor's prior case, which case was dismissed, although there is even some question as to whether this is the statute's meaning. Perhaps even more complicated than defining those cases affected is determining exactly how the stay in those cases is affected.

If a debtor's current filing meets the section 362(c)(3) definition, the stay under section 362(a) "with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case." Most courts agree that this language is less than clear, and some question whether it accurately reflects Congressional intent. What is interesting is if Congress meant that the stay under section 362(a) was terminated in these cases 30 days after the filing, why it didn't simply say that. That nagging question has lead several courts to delve into the principles of statutory construction to find what Congress actually intended.

One question discussed in the cases considering the statute is what acts or actions are affected by the statutory termination of the stay. At least one court has found that it is something less than all actions encompassed by section 362(a). In In re Paschal, the court compared the use of the phrase "action taken" in section 362(c)(3) to the term "act" used in other parts of section 362(a). In that case, the court found that "action taken" was a narrower term, leading to the conclusion that the stay was terminated only as to formal legal actions that are commenced pre-petition.

Other courts have focused on the two stays in a case: the one against property of the estate and the stay of any other act under subsection (a), in other words, of acts against the debtor. After considering phrases such as "with respect to the debtor" and

"debt," several courts have held that the stay of actions against property of the estate is not affected by section 362(c)(3), although two courts recently reached the opposite conclusion. In finding that the stay as to property of the estate was not terminated by this statute, one court commented on the importance of maintaining the stay to allow chapter 7 trustee to administer assets.

Although the consequences of section 362 (c)(3) are not as troublesome for trustees as those of section 362(h)(1), it is important for trustees to remain cognizant of the possible ramifications of section 362(c) (3) for at least two reasons. First, nothing in the plain language of the statute limits its application to personal property. Second, the trustee may never receive notice that a creditor is pursuing its state court remedies in reliance on this statute, which remedies (such as a real property foreclosure action), when brought to their natural conclusion, will remove property from the estate.

The statute does provide an avenue for avoiding the stated result, but the trustee may find great difficulty in carrying the burden of proof. On motion of any party in interest, and after notice and a hearing, the court may extend the stay as to any or all creditors, subject to any conditions or limitations imposed by the court. However, the presumption is that the filing was not in good faith and the burden is on the moving party to demonstrate that the filing is in good faith as to the creditors to be stayed. In some cases, the trustee may be unable to confirm the debtor's good faith, or find a means of proving it. In addition, the trustee may be reluctant to argue in favor of the debtor's good faith, to the extent this could be raised by the debtor in a subsequent proceeding to challenge the debtor's discharge or other actions by the debtor. Finally, note that the hearing must be completed before the expiration of the 30-day period, which may prove to be more challenging in some districts more than others.

Section § 362(c)(4)

Section 362(c)(4) is, in some ways, the most straightforward of the three statutes discussed. It provides: "[I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case. . . ." Like subsection 362(c)(3), there is bound to be some dispute as to which cases this applies to, but most practitioners seem to agree that it applies to a debtor on his third bankruptcy in a year, where the other conditions are satisfied. Unlike subsection 362(c)(3), there can be no dispute about the effect of the statute: if the debtor meets the criteria, the stay under 362(a)

is terminated. (Which again, raises the question, if this is what Congress also intended under section 362(c)(3), why it did not adopt the same language used here).

Section 362(c)(4) also offers the option of a comfort order; a party in interest may request, and the court "shall promptly enter," an order confirming that no stay is in effect. A party in interest also has the option of filing a motion to impose the stay, and the procedure mirrors that found in subsection (c)(3), except that the motion must be filed within 30 days of the bankruptcy filing. If the court orders a stay under (c)(4)(B), the stay is effective the date of the order.

Conclusion

Although BAPCPA creates some potential pitfalls for the chapter 7 trustee, there are some practical measures trustees can take to avoid the consequences of the debtor's failure to comply with section 362(h)(1) or to overcome the fact of the debtor's prior filings. Trustees may want to review the statement of intention early in the case, to ensure it is filed timely and is complete, and review the petition to determine if there are prior filings that merit further investigation. If it appears that the property may be removed from the estate pursuant to section 362(h)(1), the trustee should attempt to determine as soon as possible whether there is non-exempt equity in the property or any lien avoidance claims. If that cannot be determined promptly, the trustee may consider filing a motion under section 362(h)(2), arguing that the trustee can only assume that the property is of consequential value or of benefit to the estate until it can be proven otherwise. In all cases, if the trustee determines that the property does have value to the estate or that there are viable chapter 5 claims, the trustee should attempt to obtain possession of the property or pursue her claims prior to the conclusion of the creditor's state court remedies, and as soon as possible, to avoid complicating the trustee's pursuit of assets.

Footnotes

1. Unless otherwise indicated, all references are to the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title 11, U.S.C. §§ 101 et seq.

2. 11 U.S.C. § 521(a)(2)(A)

3. Id.

4. 11 U.S.C. § 521(a)(2)(B)

5. 11 U.S.C. § 704(3). See also In re Donald, 343 B.R. 524, 531

(Bankr.E.D.N.C.2006) (the only consequence of the debtor's failure to perform pre-BAPCPA was, in some cases, relief from the stay).

6. 11 U.S.C. § 362(h)(1)(A) & (B)

7. See In re Boring, --- B.R. ---, 2006 WL 1816241 (Bkrtcy.N.D.W.Va.2006) (debtor's statement that she planned to exercise "retain and pay" option was insufficient to satisfy her obligations under BAPCPA if she wished to retain stay protections with respect to the vehicle; court held that stay was terminated); and In re Donald, supra ("retain and pay" option is effectively no longer available under BAPCPA).

8. 11 U.S.C. § 362(h)(1). The section 362(h)(1) penalties do not apply if the debtor has stated his intention to reaffirm debt on the original contract terms and the creditor refuses to agree to the reaffirmation on those terms. 11 U.S.C. § 362(h)(1)(B).

9. 11 U.S.C. § 362(h)(1)

10. 11 U.S.C. § 362(h)(2)

11. Id.

12. See In re Squires, 342 B.R. 644, 646 (Bankr.M.D. Fla.2006). (stay not terminated where the property had equity and was therefor of consequential value or benefit to the estate; court did not order turnover, although it explicitly reserved jurisdiction to make that decision upon filing of a motion for turnover).

13. In re Baldassaro, 338 B.R. 178, 182 (Bankr.D.N.H.2006).

14. 11 U.S.C. § 362(c)(3). Note that the prior dismissal does not create a presumption of bad faith for purposes of the subsequently filed case if the prior case was dismissed due to the debtor entering into a debt repayment plan,. 11 U.S.C. § 362(I).

15. Cf. In re Paschal, 337 B.R. 274, 277 (Bankr.E.D.N.C.2006) (court questioned whether statute by its plain language actually applied to a debtor on her third bankruptcy in a year: "Taken all together, the section only applies to individuals who have had three cases pending in one calendar year: one case that has been dismissed, one case that is still pending when the petition at issue is filed, and the new case that is before the court for determination."). See also In re Moore, 337 B.R. 79 (Bankr.E.D.N.C.2005) (chapter 13 debtor did not have a prior case "pending" within the year prior to his present case, for purposes of section 362(c)(3), where prior case was dismissed more than one year prior to the commencement of his present case; prior case was no longer "pending" once it was dismissed, notwithstanding that it remained open until trustee filed a final

report).

16. 11 U.S.C. § 362(c)(3)(A)

17. See Baldassaro, 338 B.R. at 182: "As a threshold issue, the Court notes that the language in new § 362(c) (3) is very poorly written. It has been noted that the provisions of this new subsection "are, at best, particularly difficult to parse and, at worst, virtually incoherent." In re Charles, 332 B.R. 538, 541 (Bankr.S.D.Tex.2005). Judge Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, has stated that "[i]n an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out." In re Paschal, 337 B.R. 274, 276-78 (Bankr.E.D.N.C.2006). This Court likewise finds the provisions of § 362(c)(3) to be neither consistent nor coherent." (footnotes omitted). See also Paschal, 337 B.R. at 278 (court notes that the legislative history is contrary to the statutory language as court is inclined to interpret it).

18. See In re Paschal, supra.

19. See 11 U.S.C. § 362(c)(1) and (2)

20. In the following cases, the courts concluded that the termination of the stay under section 362(c)(3)(A) does not terminate the stay with respect to property of the estate: In re Jones, 339 B.R. 360 (Bankr.E.D.N.C.2006); In re Moon, 339 B.R. 668 (Bankr.N.D.Ohio 2006); In re Johnson, 335 B.R. 805, 807 (Bankr.W.D.Tenn.2006); and In re Bell, 2006 WL 1132907 *2 (Bankr.D.Colo.2006). Cf. In re Jumpp, 344 B.R. 21 (Bankr.D.Mass.2006) (section 362(c)(3)(A) terminates the stay as to both property of the debtor and property of the estate); and In re Jupiter, --- B.R. ---- , 2006 WL 1817065 (Bankr.D.S.C.2006) (same).

21. In re Jones, 339 B.R. 360, 365 (Bankr.E.D.N.C.2006) ("Although supported by the plain meaning of § 362(c)(3)(A), § 101(12) and § 102(2), this interpretation also makes sense from a policy perspective. It is important in chapter 13 cases to protect property of the estate from automatic termination under § 362(c)(3)(A), because estate property may be needed to consummate the debtor's chapter 13 plan. It is even more important to protect property of the estate in chapter 7 cases, to which § 362(c)(3)(A) also applies. 11 U.S.C. § 103(c). In a chapter 7 case, the chapter 7 trustee has the duty to administer the assets of the bankruptcy estate. 11 U.S.C. § 704(a)(1). Keeping the stay in place with respect to property of the estate, even in cases where there has been a dismissal in the prior year, is an important protection for creditors.") (footnotes omitted).

22. 11 U.S.C. § 362(c)(3)(B)

23. 11 U.S.C. § 362(c)(3)(C)

24. 11 U.S.C. § 362(c)(3)(B)

25. 11 U.S.C. § 362(c)(4)(A)(i)

26. 11 U.S.C. § 362(c)(4)(A)(ii)

27. 11 U.S.C. § 362(c)(4)(B)

28. 11 U.S.C. § 362(c)(4)(C)

Automatic adjustments in dollar amounts for bankruptcies

Effective for cases filed on or after April 1, 2007, automatic adjustments to the dollar amounts stated in various provisions of the Bankruptcy Code and one provision to Title 28 of the United States Code will become effective. These include bankruptcy exemption amounts, minimum amounts for some trustee claims, certain definitions. You may view a good table of the changes at the US Court website. See the link near the bottom of the list at the right side of this newsletter.

Form and rule changes for electronic media

The bankruptcy subpoena forms - B-254 (Subpoena for Rule 2004 Examination), B-255 (Subpoena in an Adversary Proceeding), and B-256 (Subpoena in a Case Under the Bankruptcy Code) - have been updated to reflect the "electronic discovery" amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2006. The revised forms are posted at our local court website.

The Federal Rules of Civil Procedure also recently changed regarding discovery and many of these changes address the existence of evidence in electronic form. These may suggest changes for your discovery forms. See particularly, FRCP 26, 34, and 37.

Bankruptcy Fraud Reports

As part of the Department of Justice's efforts to combat bankruptcy fraud and abuse, and protect the bankruptcy system's integrity, the Executive Office of the U.S. Trustees has launched an Internet hotline, which allows the public to report suspected instances of bankruptcy fraud. Reports may be made

by mail, internet or by contacting the local office of the United States Trustee. See the link near the bottom of the right hand side of this newsletter for a link regarding making such reports.

Recent events/announcements

1. We now have an address for Raymond B. Johnson, former chapter 13 trustee. You may contact him at: Whispering Woods, Bld. #7, 3962 Whispering Way, Grand Rapids, MI 49546, 616-949-9500.

2. Congratulations to Paul Bare, attorney in Traverse City, Michigan, who received a certificate of tribute from Governor Jennifer M. Granholm as the 2006 Outstanding Volunteer - Pro Bono Service Award. In the award, the Governor recognized Paul's extensive pro bono work and the meaningful services that he has provided to countless families and individuals in and around Traverse City.

3. The Sixth Circuit Judicial Council has received and considered applications from people interested in the appointment to the Bankruptcy Judge position in the Western District of Michigan at Grand Rapids, with the Honorable Jo Ann C. Stevenson retiring October 2, 2007. The Merit Selection Panel recommended five people to the Sixth Circuit Judicial Council and the United States Court of Appeals for the Sixth Circuit for consideration for appointment. The five candidates are: Scott W. Dales, Edith Anne Landman, Michael V. Maggio, Harold E. Nelson and Steven L. Rayman. Congratulations to all five. Considering the number and caliber of people who applied for this position, it is a high honor to have made it this far, no matter the ultimate result.

We want to recognize the professional achievements of the people with whom we work. If you know of a professional award, achievement or other event regarding a member of our bar or other person involved in our practice, or regarding you, please let us know. Please supply sufficient information for us to report it, or to find the information to do so. You may email it to the editor, address below. Thank you.

Summaries of recent cases

BANKRUPTCY CASES FROM DECEMBER 14, 2006, THROUGH MARCH 31, 2007

Thank you to Dan E. Bylenga for his work on these summaries.

Supreme Court Cases

Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co., 127 S.Ct. 1199 (2007) - Whether the Bankruptcy Code disallows contract-based claims for attorney's fees based solely on the fact that the fees were incurred in litigating issues of bankruptcy law. Creditor in Chapter 11 proceedings, which had issued prepetition surety bond on debtor's behalf guaranteeing payment of workers' compensation benefits, filed claim to protect itself in event of default. The bankruptcy court denied the creditor's application for attorney fees, and both the District Court and 9th Circuit affirmed, relying on In re Fobian, 951 F.2d 1149 (C.A.9 1991), in support of the conclusion that the creditor could not recover attorney fees in bankruptcy for litigating issues related to federal bankruptcy law and not to the contract between the parties. The Supreme Court granted certiorari to resolve the conflict regarding the validity of the Fobian rule. The Supreme Court first ruled that Travelers' claim for attorney fees did not implicate any of the 9 exceptions in 11 U.S.C. § 502(b), and therefore must be allowed under § 502(b) unless it was unenforceable under § 502(b)(1), which allows the trustee to assert any defense against the claim. Noting that creditors' rights arise from the state law which creates the debtor's obligation, the Supreme Court concluded that the Fobian rule had no basis in the Bankruptcy Code. In light of the broad scope of § 502(b)(1) and the Court's prior holding that a contractual provision to pay attorney's fees could be enforced in bankruptcy, the Supreme Court vacated the decision.

Marrama v. Citizens Bank of Massachusetts, 127 S.Ct. 1105 (2007) - whether Chapter 7 debtor who acted in bad faith forfeited absolute right to convert case to Chapter 13. Chapter 7 debtor who misrepresented the value of his property and that he had not transferred it in the preceding year moved to convert to Chapter 13. Trustee and creditor objected, arguing that the request to convert was made in made faith, and the bankruptcy court denied the request. The Bankruptcy Appellate Panel and the 1st Circuit rejected petitioner's argument that he had an absolute right to convert under § 706(a), noting that the Court can dismiss a Chapter 13 petition filed in bad faith. The Supreme Court ruled that the debtor forfeited his right to proceed under Chapter 13. The right to convert is conditioned on a debtor's right to qualify as a debtor under Chapter 13. Marrama did not qualify under § 1307(c), which allows the court to dismissal or convert a Chapter 13 case to a Chapter 7 case "for cause." A ruling that a Chapter 13 case should be dismissed or converted is tantamount to a ruling that a person does not qualify for relief under that Chapter. The Bankruptcy Code does not limit a Court's authority to respond appropriately to a debtor who acts in bad faith, and § 105(a) suffices to authorize an immediate denial of a motion to convert a Chapter 7 case to Chapter 13. Affirmed.

Published 6th Circuit Cases

In re Lebovitz, -- F.3d -- (6th Cir.2007) - whether the Chapter 7 debtor's jewelry is "necessary and proper wearing apparel" under Tennessee law. Bankruptcy court granted trustee's motion for turnover and sustained trustee's objection to the exemption Debtor claimed for five pieces of jewelry: a 5 carat diamond wedding ring, approximately 1 carat diamond earrings, a 1.5 carat diamond necklace, a diamond tennis bracelet, and a Cartier watch. The debtor listed "wedding ring and other jewelry" on her Schedule B and stated that the market value of the jewelry was unknown. The Panel agreed that some jewelry fell within the ambit of the "necessary and proper wearing apparel" exemption, but not the luxury items claimed by debtor. Such items are not necessary for debtor's employment or "fresh start." Additionally, the items were not "proper" insofar as the values exceeded the value of less expensive utilitarian items that would serve the same purpose. Affirmed.

Published Bankruptcy Appellate Panel Cases

In re Taranto, -- B.R. -- (6th Cir.BAP, 2007) - what interest rate a Chapter 13 debtor must pay to holder of claim secured by vehicle purchased for personal use within 910 days prior to filing bankruptcy where debtor proposes to pay the claim by making periodic installment payments. Debtors' pre-petition contract for vehicle provided for 72 monthly payments at zero percent interest. Appellant filed a proof of secured claim. The parties agreed that appellant's claim was fully secure since debtors purchased the vehicle within 910 days before filing their petition. Debtors offered to pay the claim at $1,200 per month for 23 months at 0% interest. Appellant objected, demanding "prime-plus" interest on its claim under Till v SCS Credit Corp., 541 U.S. 465 (2004) (Supreme Court determined that under 11 U.S.C. § 1325(a)(5)(B)(ii) a secured creditor's claim must be paid either (a) in full at the time of confirmation or (b) over time with interest). The debtors argued that the Till prime-plus interest rate would result in a windfall to the appellant since their plan already proposed accelerated payments. The Panel held that the proposed plan was a "cram down" of the appellant's allowed secured claim and modified the payment stream, which was sufficient to trigger § 1325(a)(5)(B) (ii)'s present value requirement (and Till interest). Till governs and requires debtors to pay appellant the present value of its secured claim, regardless of the contractual interest rate. Reversed.

In re Albion Health Services, -- B.R. -- (6th Cir.BAP, 2007) - Chapter 7 trustee objected to priority claim asserted by state unemployment insurance agency to recover sums owed by nonprofit debtor reimbursing employer that had elected not to contribute to state unemployment insurance fund. The Panel

ruled that the reimbursement claim was not a tax and was not entitled to priority status as a claim for "excise tax" under § 507(a)(8)(E). In order to qualify as a tax, a claim must be (1) an involuntary financial burden imposed on people or property, (2) imposed by the legislature, (3) for public purposes, (4) under its police or taxing powers, (5) universally applicable to similarly situated entities, and (6) that can be afforded priority without disadvantaging private creditors with similar claims. Reimbursement payments and contributions are distinct concepts under Michigan law, and nonprofit employer who opts to reimburse the state unemployment fund (rather than make contributions) does not support administration of unemployment system. Thus, reimbursement under Michigan law is better seen as an alternative to paying taxes than as an alternative means of paying taxes. Additionally, the agency's claim arose only by virtue of debtor's option to reimburse the agency for unemployment payments actually made to debtor's former employees. This is not a universally applicable obligation and deserves no priority treatment.

In re Perrin, -- B.R. -- (6th Cir.BAP 2007) -- Chapter 13 debtors filed motion seeking (a) turnover of debtor-husband's tools, which pro se creditor had refused to let him retrieve until he paid outstanding rent, and (b) damages and attorney fees for creditor's alleged violation of stay. The Bankruptcy Court ruled that the creditor willfully violated the stay and ordered turnover of tools, but did not award damages. The Panel held that (1) the debtor could not recover damages under § 362(h) unless there was proof of actual injury, and (2) the pro se creditor could call the debtors' attorney as a fact witness. Debtors offered no proof of actual damages resulting from the creditor's conduct, and nothing prohibited debtors' an attorney from acting as a witness for the creditor. The attorney never attempted to withdraw from representing the debtors and never objected on the basis of privilege to any questions posed by the creditor. Affirmed.

In re Condon, -- B.R. -- (6th Cir.BAP 2007) - debtor, professional photographer convicted of abuse of a corpse after taking pictures of corpses at the county coroner's office, moved to convert Chapter 7 case to Chapter 13. Class of creditors objected, and the bankruptcy court denied the motion. The Panel ruled that the bankruptcy court erred by relying exclusively on the plan confirmation standard of good faith and the burden of proof in its analysis of debtor's motion. Bankruptcy courts should apply the same good faith standard when evaluating a debtor's motion to convert to a Chapter 13 as is used when considering dismissal of a case under § 1307(c). The burden of proving a lack of good faith in the context of § 706(a) is on the party opposing the conversion, which is consistent with the policy behind § 706(a) to encourage conversion in order to allow a debtor to repay creditors. In determining whether a debtor's motion to convert has been

brought in good faith, courts should apply the factors identified in In re Alt, 305 F.3d 413 (6th Cir.2002). There was no evidence the debtor engaged in a pattern of egregious behavior or displayed any hallmarks of bad faith. The evidence suggested debtor waited several years after the incident giving rise to his criminal and potential tort liability before filing for bankruptcy relief. Vacated and remanded.

In re Williams, 357 B.R. 434 (6th Cir.BAP 2007) - Chapter 7 debtors' bankruptcy attorney filed fee application. The bankruptcy court reduced the fees to $850.00, the presumptive "no look" fee for Chapter 7 cases then in effect, plus expenses, and ordered that any amount paid in excess of that be disgorged. The attorney appealed the court's denial of his motion for reconsideration. The Panel held that the bankruptcy court abused its discretion by failing to conduct a lodestar analysis as required in Boddy v. United States Bankruptcy Court, 950 F.2d 334 (6th Cir.1991). The bankruptcy court erred by failing to calculate expressly the lodestar amount. The bankruptcy court did not determine the attorney's reasonable hourly rate, or explain which hours in the application were disallowed and why. Instead, the bankruptcy court focused on whether the tasks completed went above and beyond what it expected to be included in the presumptive fee. Reversed and remanded.

In re Alam, -- B.R. -- (6th Cir.BAP 2006) - trustee objected to Ohio exemption claimed by Chapter 7 debtors in funds in one of their investment accounts. Bankruptcy court overruled objection, and trustee appealed. Debtors invested proceeds from a settlement with a long-term disability insurance provider in mutual fund accounts. The debtors claimed the funds were exempt as benefits paid under a policy of sickness and accident pursuant to Ohio Revised Code §§ 2329.66(A) (6)(e) and 3923.19. The trustee argued that (1) the funds were received as a settlement of the husband- debtor's ERISA suit and not entitled to the exemption, (2) the funds did not retain their exempt status once received and invested, and (3) the funds are not entirely exempt. The Panel first ruled that the lump sum settlement qualified as benefits paid under a policy of sickness and accident insurance, in light of the general maxim to construe exemptions liberally. But for the disability policy, indisputably a policy of sickness and accident insurance, the husband-debtor would not have filed his ERISA claim. The Panel next concluded that, under Ohio law, the settlement proceeds retained their exempt status once received and invested as long as the source of the exempt funds is known or reasonably traceable. As a final matter, the Panel was unable to determine how the bankruptcy court concluded that the funds were entirely exempt. The Ohio exemption statute had provided an exemption of $600.00 per month. The Panel reversed and remanded with respect to a calculations as to the amount which

is exempt.

W.D. Michigan Bankruptcy Cases

In re Sanchez, -- B.R. -- (Bkrtcy.W.D.Mich. 2007) - Chapter 7 trustee objected to exemptions claimed by debtor in account proceeds traceable to lump sum settlement of debtor's workers' compensation claim. Debtor claimed exemptions under § 522(d)(10) (C) (right to receive unemployment benefits) and § 522 (d)(11)(E) (right to receive, or property that is traceable to, payment in compensation of loss of future earnings). Judge Hughes held (1) debtor could not claim exemptions under § 522(d)(11)(D), which only applies to tort-based compensation, but (2) debtor could claim exemptions under § 522(d)(10)(C) and § 522(d) (11)(E). The Court granted the trustee's motion for summary judgment to the extent that the debtor sought an exemption under § 522(d)(10(C), but denied it for the exemptions based on § 522(d)(11)(E) because the funds in the accounts represented property traceable to a settlement to compensate the debtor for lost future earnings.

In re Krempa, -- B.R. -- (Bkrtcy.W.D.Mich. 2007) - Chapter 7 debtor brought adversary proceeding for dischargeability of obligation to his ex-wife, and ex- wife moved for summary judgment based on preclusive effect of state court's judgment in prior prepetition and postpetition enforcement proceedings. Provision in the judgment of divorce, entitled "SECTION 71 PAYMENTS", required debtor to pay his ex-wife for approximately 180 months. Debtor made payments for several years before defaulting, at which time his ex- wife filed a motion to hold him in contempt. The debtor failed to cure his default and filed for bankruptcy. Shortly after filing bankruptcy, the circuit court entered another order which indicated that it had concluded that the § 71 payments were spousal support payments, and not property settlement payments. Judge Hughes held that (1) the § 71 obligation was part of the property settlement and not alimony despite ex-wife's reported payments as additional income; (2) state court's characterization of the § 71 obligation as spousal support in prepetition proceeding to enforce the obligation did not collaterally estop debtor; but (3) state court's findings in prior postpetition contempt action which excepted the matter from the automatic stay under § 71 obligation 362(b)(2)(B) (excepting actions to enforce the collection of alimony). The Bankruptcy Court could not discharge debtor's § 71 obligation since he "already had the opportunity to fully litigate this issue" in state court and lost. The Bankruptcy Court could not overrule the state court's decision in the postpetition contempt hearing that the § 71 obligation was not subject to the automatic stay because it was alimony.

W.D. Michigan District Court Cases

In re Lucre, -- F.Supp.2d -- (W.D.Mich. 2007) - telecommunications provider providing Chapter 11 debtor with access to its network under executory prepetition agreement moved for relief from stay in order to seek to terminate preliminary injunctions debtor obtained prepetition from state court which compelled provider to allow debtor access despite alleged default under agreement. Judge Hughes granted the motion, 339 B.R. 648, and the debtor appealed. After appealing, the debtor filed a motion to assume the agreement pursuant to 11 U.S.C. § 365 and an adversary proceeding seeking an injunction. The bankruptcy court issued an injunction effective until it decided the debtor's motion to assume the debt. The District Court, Judge Quist, held that the bankruptcy court's issuance of an injunction rendered the appeal moot because regardless of whether the stay was lifted so that the creditor could seek relief in state court, the creditor was enjoined by the bankruptcy court's injunction. Dismissed as moot.

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