<u>Consumer Bankruptcy Case Review</u>

with
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Consumer Bankruptcy Committee Brown Bag

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HOMESTEAD EXEMPTION ISSUES

- In re Paul Reynold St. James, 15-13341-FJB, 2016 WL 6155899 (Bankr. D. Mass. 2016)
  - Massachusetts automatic homestead exemption can apply to property located outside Massachusetts.
  - Courts should look carefully at the particular homestead statute at issue to determine whether it can applied extraterritorially.
  - "Because the Massachusetts automatic homestead exemption is silent as to whether it applies extraterritorially, I construe it in favor of the Debtor as mandated by the Massachusetts Supreme Judicial Court."
  - Debtor still required to demonstrate that, as of the petition date, he occupied or intended to occupy the property as a principal residence.

- In re Erik A. Kuceris and Linda A. Kuceris, 13-11567-FJB, 2016 WL 4595479 (Bankr. D. Mass. 2016)
  - Petition date controls debtor's entitlement to exemptions in a case converted from chapter 13 to chapter 7.
  - "…when determining a debtor's eligibility for exemptions under § 522(b)(3)(A) in a case converted from chapter 13 to chapter 7, the controlling date for both facts and law is the date of the filing of the chapter 13 petition."

- In re Louis Savino, 14-14661-JNF, 2016 WL 4927869 (Bankr. D. Mass. 2016)
  - Court rejected creditor's claim to an equitable lien or to a reduction of the Debtor's homestead exemption under 11 U.S.C. § 522(o).
  - "The imposition of an equitable lien would be antithetical to the decision of the United States Supreme Court in Law v. Siegel."
  - "Even if Massachusetts law recognizes a court's equitable power to deny homestead protection to a debtor engaged in fraudulent conduct with respect [to] the homestead property, the United States Court of Appeals for the First Circuit in Patriot Portfolio, LLC v. Weinstein (In re Weinstein), F.3d 677 (1st Cir. 1999), has instructed that such power is preempted by federal law in the event bankruptcy ensues."

AUTOMATIC STAY VIOLATIONS

- In re Sullivan, 551 B.R. 868 (Bankr. D. Mass. 2016)
  - While mortgaged property never became part of bankruptcy estate because title transferred to bank prepetition by virtue of a prepetition foreclosure sale, automatic stay continued to protect debtor's bare possessory interest in property.
  - "…a debtor's possession of a tenancy at sufferance creates a property interest as defined under Section 541 and is protected by Section 362 of the Bankruptcy Code. The language of Section 362 makes clear that mere possession of property at the time of filing is sufficient to invoke the protections of the automatic stay."

- In re Silk, 549 B.R. 297 (Bankr. D. Mass. 2016)
    - Willful violation of automatic stay occurred where student loan creditor continued to attempt to collect debt post-petition. "Technical" computer error did not render violation not willful. No punitive damages where no evidence was offered that this was a pattern.
    - Court follows cases that find that damages include attorneys fees incurred in bringing motion even in the absence of other damages. However, court notes that only fees "reasonably incurred" should be awarded and that "the Court may consider a lack of actual damages when determining the reasonableness of attorneys' fees and costs."
    - "While it is incumbent upon creditors to respect the automatic stay and cease collection activity once they are made aware of a bankruptcy filing, debtors and their attorneys cannot use a creditor's harmless error to profit."

- Petralia v. 145 Marston St., Inc. (In re Petralia), Case No. 13-42076-CJP, AP 14-4008 (Bankr. D. Mass. Sept. 30, 2016)
    - Automatic stay violated where towing company required payment of storage and towing fees before releasing vehicle seized pre-petition. Because vehicle was seized for a private, not a public service, no statutory lien arose for the towing company.
    - Decision also contains discussion of Massachusetts exemption law. Debtor argued that creditor violated FDCPA by seizing exempt vehicle but court notes that "because the vehicle's value exceeded $15,000 [the maximum exemption amount], it was not exempt from seizure under Massachusetts law." That there was no equity in the property did not matter.

- In re Rielly, 545 B.R. 435 (Bankr. D. Mass. 2016)
    - In a chapter 7 case, where bank accounts containing both exempt and non-exempt funds were frozen post-petition but trustee process was served by creditor on banks pre-petition, creditor did not violate automatic stay and was not required to release attachment, especially where debtor would not agree not to dissipate funds.
    - "Although [creditor] has actual notice of the Debtor's bankruptcy filing on January 4, 2016, its inaction in failing to release its trustee process attachments of the funds…in this Chapter 7 case does not amount to an exercise of control over or an action to enforce a lien on property of the estate or property of the Debtor and did not constitute a willful violation of 11 U.S.C. § 362…Unless and until [an avoidance] action is commenced and resolved in favor of the Debtor of the Trustee, [creditor's] judicial liens are valid and enforceable."

- Perez v. Deutsche Bank National Trust Company (In re Perez) 2016 WL 5462456 (1st Cir. BAP 2016)
    - A creditor's postpetition conduct in taking action to postpone to a later date a previously scheduled foreclosure sale did not violate the automatic stay in place in the debtor's Chapter 13 case. The postponement did not constitute a "continuation" of a proceeding against the debtor.

NON-DISCHARGEABILITY ISSUES

523(a)(2)

- Husky Int'l Elecs., Inc. v. Ritz, ––– U.S. ––––, 136 S.Ct. 1581, 194 L.Ed.2d 655 (2016)
  - o "The term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation."
  - o "…anything that counts as 'fraud' and is done with wrongful intent is 'actual fraud.'"
  - o "There is no need to adapt a definition for all times and all circumstances here because, from the beginning of English bankruptcy practice, courts and legislatures have used the term 'fraud' to describe a debtor's transfer of assets that like Ritz' scheme, impairs a creditor's ability to collect a debt."

- Zacharakis v. Melo (In re Melo), AP 15-1022-JNF, 2016 WL 5110675 (Bankr. D. Mass. 2016)
  - o Creditor failed to establish individual liability of the debtor on loans made by the creditor to a limited liability company at the debtor's request.
  - o "…this Court construes Husky narrowly and concludes that its finding is limited to a determination that 'actual fraud' does not require a misrepresentation."
  - o "…Zacharakis has asserted no grounds, other than § 523(a)(2)(A), to hold the Debtor personally liable for the Loans, unlike the case in Husky in which the plaintiff relied on a Texas statute which permits creditors to hold shareholders liable for corporate debt under certain circumstances."

523(a)(4)

- Richardson v. Mills (In re Mills), AP 11-1245-JNF, 555 B.R. 106 (Bankr. D. Mass 2016)
  - o Held that debt arising from debtor's agreement with creditor to construct a high end house and repay creditor's investment of $315,000 and to share profits was excepted from discharge under discharge exception for defalcation while acting in fiduciary capacity.

523(a)(6)

- Whitcomb v. Smith (In re Smith), AP 15-1079-MSH, 555 B.R. 96 (Bankr. D. Mass 2016)
  - o Held that debtor's conduct, in promising to convey homestead property to daughter and son-in-law in exchange for right to live on property rent-free and for daughter's and son-in-law's assumption of monthly mortgage obligation, with no intention of ever conveying property as promised, was sufficient to prevent discharge of judgment debt as debt for debtor's "willful and malicious injury."
  - o "I conclude that '[Bankruptcy Code §] 523(a)(6) excepts contractual debts from discharge when those debts result from an intentional or substantially certain injury.'"

523(a)(7)

- In re McCarthy, 553 B.R. 459 (Bankr. D. Mass. 2016)
  - o Where tax penalties were assessed more than three years pre-petition, they were dischargeable under 523(a)(7)(B) even though related tax was non-dischargeable.
  - o "A tax penalty is discharged if the tax to which it relates is discharged, (in the precise terms of the statute not non-dischargeable) or if the transaction or event giving rise to the penalty occurred more than three years prior to the filing of the bankruptcy petition. Since the statute uses the disjunctive, a tax penalty that does not quality for discharge under one of the two aforementioned circumstances may still qualify under the other."
  - o Court finds that "applicable 'transaction or event'" is deadline to timely file tax and deadline to timely pay tax.

PROPERTY OF THE ESTATE – CHAPTER 13

- In re Lombardi, 551 B.R. 84 (Bankr. D. Mass. 2016)
  - Inheritance debtor became entitled to receive in last month of chapter 13 plan (but before all plan payments were made) was property of the bankruptcy estate and trustee could modify plan to require it be paid into the plan.
  - Court finds that the appropriate date for determining whether creditors are receiving what they would be entitled to receive in a chapter 7 is the modification date, not that petition date, despite that fact that the inheritance would not have been property of a chapter 7 estate upon a good faith conversion.

CLAWING BACK TUITION PAYMENTS

- DeGiacomo v. Sacred Heart University, Inc. (In re Palladino), AP15-1126-MSH, 556 B.R. 10 (Bankr. D. Mass. 2016)
  - Parents received value when they paid for the college education of their adult child and the Trustee could not avoid the tuition payments as fraudulent transfers.
  - "I find that the Palladinos paid [to the university] because they believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency. I find that motivation to be concrete and quantifiable enough."
  - Ponzi Scheme Presumption: Only transfers made *in furtherance of a Ponzi scheme* are presumed to have been made with fraudulent intent.

- ROBBING PETER TO PAY FOR COLLEGE? A Good-Faith Defense in Tuition Clawback Fraudulent Transfer, James M. Wilton & William A. McGee, Am. Bankr. Insti. J., November 2016
  - Arguing that colleges receiving tuition payments are instead "immediate or mediate transferees," entitled to assert a good-faith defense.

MORTGAGE AVOIDANCE ISSUES

- Bank of America, N.A. v. Casey, 474 Mass. 556 (2016)
  - Supreme Judicial Court answered two questions certified to it by the First Circuit:
    - 1. "May an affidavit executed and recorded pursuant to G.L. c. 183, §5B, attesting to the proper acknowledgment of a recorded mortgage containing a Certificate of Acknowledgment at omits the name of the mortgagor, correct what the parties say is a material defect in the Certificate of Acknowledgment of that mortgage?"
      - Yes, SJC finds that attorney affidavit can cure a defective acknowledgement where facts contained in affidavit are based on personal knowledge and includes "certification by an attorney that the facts stated are both relevant to the title of specifically identified property and 'will be of benefit and assistance in clarifying the chain of title.'" Affidavit must "be limited to facts that explain what actually occurred, and are not inconsistent with the substantive facts contained in the original document."

        - 2. “May an affidavit executed and recorded pursuant to G.L. c. 183, §5B, attesting to the proper acknowledgement of a recorded mortgage containing a Certificate of Acknowledgement that omits the name of the mortgagor, provide construct notice of the existence of the mortgage to a bona fide purchaser, either independently or in combination with the mortgage?”
            - Yes, if (and only if) the attorney affidavit effectively cures defect, then the affidavit, in conjunction with the mortgage, provide constructive notice.

- Grossman v. Wells Fargo Bank, N.A. (In re Thompson), Case No. 14-15822-FJB, AP 15-1093 (Bankr. D. Mass. May 12, 2016)
    - Where mortgage acknowledgement was affixed to mortgage rider and not mortgage itself but all documents were recorded simultaneously and consecutively, court found that it is apparent that “the Mortgage and Rider constitute a single integrated document.”

- DeGiacomo v. First Call Mortg. Co. (In re Reznikov), 548 B.R. 606 (Bankr. D. Mass. 2016)
    - Where mortgage acknowledgement does not indicate that the granting of the mortgage was a voluntary act, the court found that “the acknowledgment is materially defective…[and a]ccordingly the Mortgage is not capable of providing constructive notice to a subsequent purchaser for value and may be avoided by the Trustee under 11 U.S.C. § 544(a)(3).

FAIR DEBT COLLECTION PRACTICES ACT

- Midland Funding LLC v. Johnson, 2016 WL 4944674, Oct 11, 2016
    - U.S. Supreme Court has granted cert: (1) Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act; and (2) whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

- Jackson v. ING Bank et al (In re Kimmy R. Jackson, AP 13-1064-MSH (Bankr. D. Mass 2016)
    - Where mortgagee sends letter requiring payment of mortgage in full after chapter 7 discharge, mortgagee has violated the discharge injunction and the FDCPA.
    - “A letter that requires a discharged debtor to pay immediate the entire mortgage indebtedness, request that the debtor take action to obtain current payoff figures prior to forwarding any payment and closed by indicated that the sender is a debt collector and as such is attempting to collect a debt must, under these circumstances, be objectively viewed as an act to collect a debt in violation of the discharge injunction.”
    - Because letter also misidentified the holder of the mortgage and misrepresented the legal status of the debt, violated FDCPA.

- Murray v. Revenue Mgmt. Corp. (In re Murray), 552 B.R. 1 (Bankr. D. Mass. 2016)
    - Collection letter with caption that includes “versus” language is violation of the FDCPA when no lawsuit has been filed and subsequent language of letter is insufficient to “counteract false impression created by the versus language.”

DENIAL OF DISCHARGE – FALSE OATHS

- Premier Capital, LLC v. Crawford (In re Crawford), 2016 U.S. App. LEXIS 19289 (1st Cir. Oct. 25, 2016)
  - First Circuit affirms denial of discharge under 11 U.S.C. § 727(a)(4)(A) for making a false oath where debtor had two retirement accounts at same institution and did not separately list them but disclosed full value of accounts.
  - That the asset is exempt is irrelevant ("The materiality of the false other will not depend upon whether in fact the falsehood has been detrimental to the creditors.") as is the fact that its value was disclosed ("Critically for our purposes, when it comes to materiality, we distinguish an asset from an asset's value. Knowledge of an asset's value alone does little to forewarn creditors and the court of unscrupulous dealings."
  - "The bankruptcy court found Crawford 'less than credible' based on numerous misrepresentations and evasive answers."

- Agin v. Cusson, 557 B.R. 15 (Bankr. D. Mass. 2016)
  - Where debtor testified truthfully that he "did not understand the financial arrangement" involving his business entity but offered to get answers from his accountant, his testimony did not involve a false oath. Trustee was overly zealous.

SUBROGATION

- In re Daniel M. Morrison and Julie Morrison, 15-14094-MSH, 555 B.R. 92 (Bankr. D. Mass 2016)
  - Held that as a matter of apparent first impression for the court, after creditor paid the debt on which both he and debtors were guarantors, creditor was subrogated to lender's position against debtors, including lender's third mortgage position on debtors' home, under either federal or Massachusetts law.

- Dwyer v. The Insurance Company of the State of Pennsylvania et. al. (In re Pihl, Inc.) AP 13-1384-MSH 2016 WL 5376178
  - Equitable subrogation under state law is available in bankruptcy cases despite the Bankruptcy Code's broad definition of property of the estate and its own detailed subrogation provisions under 11 U.S.C. § 509.

NON-COMPETE AGREEMENTS IN BANKRUPTCY

- In re Hurvitz, 554 B.R. 35 (Bankr. D. Mass. 2016)
  - Franchisor's rights to enforce the noncompetition and nonsolicitation provisions in its franchise agreement were not "claims" under Section 101(5)(B). The franchisor was entitled to stay relief for cause because its right to enforce the noncompetition and nonsolicitation provisions would survive the debtor's Chapter 7 discharge. The debtor would face the threat of the franchisor's state court litigation regardless of whether stay relief was granted.