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Cases of Interest to Chapter 7 Trustees and Consumer Debtors

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TRUSTEE CASES:

Law v. Siegel, 134 S.Ct. 1188 (2014)

Chapter 7 Trustee avoided fraudulent mortgage placed by debtor on his residence pre prepetition in order to deceive trustee and the Bankruptcy Court into believing that there was no equity in the property over and above his homestead exemption. Following avoidance, Trustee attempted to surcharge the debtor's homestead exemption for his costs and fees incurred. The Bankruptcy Court allowed the surcharge which was affirmed by the Bankruptcy Appellate Panel and by the 9th Circuit Court of Appeals. The Court of Appeals held that the surcharge was proper because it was "calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct and was warranted to protect the integrity of the bankruptcy process." In re Law, 435 Fed.Appx. 697, 698 (9th Cir. 2011) (per curiam). In reversing, the Supreme Court held that except for the limited circumstances specified in 11 U.S.C. §522(k)(1) and (2), exempt property is not liable for the costs of administration of the bankruptcy estate. There are other remedies available to deal with the dishonest debtor including denial of discharge; Rule 9011 sanctions; and criminal prosecution. In addition, the opinion abrogates the rulings of In re Yonikus, 966 F.2d 866 (7th Cir. 1993); In re Doan, 672 F.2d 831 (11th Cir. 1982) (per curiam); and Stewart v. Gamey, 116 F.2d 1010 (5th Cir. 1940) which gave the Bankruptcy Court discretion to deny amendments to exemptions based upon the misconduct of the debtor. It is unclear whether the alternate ground of prejudice remains as a basis for objection to an amendment to exemptions. See In re Hannigan, 409 F.3d 480, 481 (1st Cir. 2005).

In re Traverse, _____ F.3d ______; (1st Cir. 2014), 2014 WL 2142521

Bankruptcy trustee avoided unperfected mortgage on debtor's residence and preserved the lien for the benefit of the estate under 11 U.S.C. §551. Debtor claimed an exemption in the home under

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the Massachusetts homestead exemption that exceeded the value of the home. The trustee sought to sell the home and retain the proceeds from the avoided mortgage for the benefit of the estate. The debtor objected. The Bankruptcy Court and the Bankruptcy Appellate Panel agreed that the trustee could sell the property. The Court of Appeals reversed. Bankruptcy trustees are not empowered to sell fully encumbered exempt property under §363(g) when a sale fails to yield proceeds beyond the value of the secured encumbrances and the homestead exemption. In addition, the trustee cannot sell the property under the avoided mortgage for the benefit of the estate unless there is a default. Preservation of the lien gives the estate the exclusive interest in the avoided lien, but does not give the estate any ownership interest in the underlying asset. Furthermore, the trustee does not have the right to collect payment of the note secured by the avoided mortgage; only the right to the value of the lien if the property is sold voluntarily or the debtor defaults on the underlying obligation.

Howison v. Milo Enterprises, Inc. (In re Freaky Bean Coffee Co.), 494 B.R. 771 (B.A.P. 1st Cir. 2013)

Funds provided by a third party to discharge obligations assumed by the debtor in connection with the purchase of assets is not preferential when the funds bypassed the debtor and were paid directly to the principal of the debtor who in turn discharged the obligations. Although the parties intended to provide the funds to the debtor, since the debtor never actually secured possession of the funds, and there was insufficient evidence of the debtor's control over the usage of the funds, the payment could not be avoided, as it failed the first element of §547(b) which requires that there be a transfer of an interest of the debtor in property. See In re Reale, 584 F.2d 27, 31 (1st Cir. 2009) ["when determining whether certain funds are considered "an interest of the debtor in property, the ability of the debtor to exercise control over the property can be determinative."]

In re Giger, 504 B.R. 286 (Bankr. D. Me. 2014)

Chapter 7 trustee determined that lobsterman's boat was not exempt and took steps to liquidate the vessel. Before doing so, debtor converted to Chapter 12. Trustee then sought compensation as an allowed claim under the debtor's Chapter 12 plan. The request was denied. A trustee can only be paid if funds are actually disbursed by the trustee. See 11 U.S.C. §326(a). The Court rejected the trustee's arguments that compensation should be allowed on equitable grounds and for policy reasons including avoiding perverse results; discouraging the concealment of assets; encouraging a trustee's discovery of assets; fundamental fairness; encouraging trustees to undertake efforts on behalf of the estate; and not penalizing the diligence of former Chapter 7 trustees.

In re Garcia, 507 B.R. 32 (B.A.P. 1st Cir. 2014)

A bankruptcy trustee could not use §542(a) to compel turnover of funds under the jurisdiction of the Probate Court, where the debtor had at most, a right to distribution of a fractional interest in the funds. The probate exception to federal jurisdiction deprives the Bankruptcy Court of subject matter jurisdiction over a res when a state court is simultaneously exercising the same jurisdiction. See Marshall v. Marshall, 547 U.S. 293, 311, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006).

Daniels v. Agin, 736 F.3d 70 (1st Cir. 2013)

Debtor's interest in a profit sharing plan in which the debtor was the plan administrator and trustee was not exempt due to the debtor engaging in at least eight substantial transactions prohibited by 26 U.S.C. §4975, even though a closed Internal Revenue Service did not find that the plan had lost its tax exempt status. The transactions included payment of expenses of a related entity, a real estate conveyance and loan to the daughter of an individual that had provided services, and withdrawing funds of a deceased uncle from joint accounts and placing the funds into the plan. Debtor also lost his exemption in two IRAs that were funded by transfers from the profit sharing plan and not specifically disclosed in his schedules but rather included in the total description of the profit sharing plan.

Clark v. Rameker, _____ U.S. _____ (2014) 2014 WL 2608860

An inherited IRA does not qualify for exemption under either §522(b)(3)(C) [State exemptions] or §522(d)(12) [Federal exemptions]. The characteristics of an inherited IRA are different from that of a traditional IRA in that: (1) the holder can never invest additional funds into the account; (2) the holder is required to withdraw the funds over a specified term regardless of how many years away from retirement the holder is; and (3) the holder may withdraw the entire balance at any time without penalty regardless of age. Therefore, inherited IRA's lack the characteristics of funds established for retirement purposes. Allowing the debtor to protect assets in a traditional or Roth IRA comports with the Congressional purpose of ensuring that debtors will be able to meet their basic needs in retirement years, while limiting cash windfalls if they have not obtained age 59 ½, the minimum age for penalty free distributions.

CONSUMER CASES:

T.D. Bank, N.A. v. Lapointe (In re Lapointe), 505 B.R. 589 (B.A.P. 1st Cir. 2014)

Bank conducted prepetition foreclosure sale and a memorandum of sale was executed. One day after the sale was conducted but before the foreclosure deed was executed and recorded, the debtor filed a Chapter 13 bankruptcy petition. The debtor's chapter 13 plan proposed to cure the default with periodic payments over the life of the plan. Creditor moved for relief from the automatic stay to complete foreclosure and to evict the debtor. The Bankruptcy Court relying on In re Beeman, 235 B.R. 519 (Bankr. D. N.H. 1999) and §1322(c)(1) denied the requested relief holding that the sale while conducted was not completed, and the debtor could therefore cure and reinstate. The Appellate Panel reversed holding that the "sold at a foreclosure sale" language of §1322(c)(1) means a sale that occurs at a foreclosure auction, and not the actual completion of the sale. Under New Hampshire law, the mortgagor retains neither a legal nor an equitable interest in the property once the auctioneer's hammer falls and a memorandum of sale is signed. Barrows v. Boles, 141 N.H. 382, 393 (1996).

In re Rivera, 494 B.R. 101 (B.A.P. 1st Cir. 2013)

Following the granting of relief from the automatic stay requested by a secured creditor, debtor requested dismissal of his pending Chapter 13 case so that he could file a new case, and obtain a stay of foreclosure. The Court granted the dismissal request and the debtor immediately re-filed. The secured creditor moved for and was granted dismissal under §109(g)(2), which precludes a debtor from filing a new bankruptcy case for 180 days if "the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362". The Appellate Panel noted that while the 1st Circuit has not provided guidance, there appear to be three approaches to §109(g) dismissal motions. The first is that dismissal is mandatory; the second views dismissal as discretionary to the extent the creditor is not unfairly prejudiced, a dismissal would be absurd or illogical, or where the creditor has acted in bad faith; and the third view is there must be a causal connection between the debtor's request for dismissal and the creditor's request for relief from the automatic stay. The court indicated that all three were applicable, and the debtor's conduct was exactly the type that Congress sought to curtail in enacting §109(g).

Ramos v. Negron (In re Ramos), 498 B.R. 401 (B.A.P. 1st Cir. 2013)

Trustee abandoned debtor's residence subject to a judicial lien. The Bankruptcy Court denied the debtor's request to avoid the lien pursuant to§522(f) holding that abandonment deprived the Court of jurisdiction to grant the relief requested. The Appellate Panel reversed holding that the language of §522(f) relates solely to property of the debtor, not property of the estate. Furthermore, jurisdiction over property of the debtor emanates form 28 U.S.C. §1334(e)(1) which provides: "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction - (1) of all property wherever located of the debtor as of the commencement of such case, and of property of the estate;" Since property of the estate is not implicated under §522(f), the Court retains jurisdiction to enter the relief requested, notwithstanding the prior abandonment.

In re Arroyo, 489 B.R. 486 (B.A.P. 1st Cir. 2013)

Debtor filed four bankruptcy proceedings in nine years. During the third bankruptcy, the debtor entered into a stipulation with a secured creditor granting relief from the stay in exchange for a short time to sell or refinance the debtor's residence. The agreement provided for res judicata effect on any future bankruptcy cases filed within two years. Debtor defaulted under the agreement with the creditor, and the creditor took steps to conduct a foreclosure sale. One day before the sale, debtor filed his fourth bankruptcy case. Despite the filing, the secured creditor completed the sale and moved for retroactive relief from the automatic stay. Relief was granted. The debtor's appeal from the order granting relief was dismissed, the Appellate Panel holding that in Chapter 7, the debtor only has standing to prosecute appeals affecting property of the estate if he can demonstrate either (1) a reasonable possibility of a surplus if the requested order is defeated; or (2) that the appealed order adversely affects the discharge. Since the debtor conceded there was no equity in the property and the order did not affect his discharge, the debtor lacked standing.

In re Petrone, 498 B.R. 1 (B.A.P. 1st Cir. 2013)

The Bankruptcy Court did not err in refusing to grant a pro se debtor's 27th and 28th requests to delay entry of discharge pursuant to Bankruptcy Rule 4004(c)(2). The Rule cannot be used to delay discharge indefinitely and it does in fact have limits.

In re Taal, 504 B.R. 682 (B.A.P. 1st Cir. 2014)

Dismissal of chapter 13 case affirmed for failure of the debtor to comply with credit counseling requirement. The debtor submitted a certificate issued 259 days prior to the petition date and subsequently submitted a second counseling certificate indicating that a course was taken five days after the filing of the petition. §109(h)(1) requires a debtor to take an approved credit counseling course during the 180 day period prior to the filing and the debtor must file the certificate within 14 days of the bankruptcy filing. §521(b)(1). §109 provides three exceptions: (1) if no credit counseling course is available (§109(h)(2)(A)); (2) if the debtor is unable to complete the required course due to "incapacity, disability, or active military duty in a military combat zone" (§109(h)(4)); or (3) the debtor submits a certificate of exigent circumstances which (a) describes the exigent circumstances that merit a waiver; (b) states that the debtor requested counseling services from an approved agency but was unable to receive the services during the seven day period beginning on the date the request was made; and (c) the certificate is satisfactory to the court (§109(h)(3)(A)). The debtor met none of the exceptions and dismissal was affirmed.

In re Desouza, 493 B.R. 669 (B.A.P. 1st Cir. 2013)

After filing for chapter 13, debtor's spouse began divorce proceedings and obtained an order for the payment of alimony of $150.00 per week. The debtor amended his Schedule J to include the required payments, but failed to make payments while the case was pending. The former spouse filed in the divorce court a contempt proceeding and the debtor was ordered incarcerated for 30 days unless he paid $5,000.00. The divorce court found that the debtor did have the ability to pay the alimony from his rental income notwithstanding the filing of the chapter 13 proceeding. Debtor's counsel filed an emergency motion to determine that the contempt order was null and void and that the former spouse's actions violated the automatic stay. The Bankruptcy Court citing §362(b)(2)(B) and (C) held that the orders did not violate the automatic stay. On appeal, the Appellate Panel reversed in part and affirmed in part. While establishment of the alimony order did not violate the automatic stay as, it is allowed by §362(b)(2)(A)(ii), the finding for contempt and incarceration for failure to make the required payments from rental income, which was property of the estate, violated the automatic stay. The language of §362(b)(2)(c) only excepts from the automatic stay the withholding of income that is property of the estate or property of the debtor under a judicial or administrative order or statute. Since there was no withholding order or statute implicated, the contempt proceeding and incarceration violated the stay.

In re Murphy, 487 B.R. 86 (Bankr. D. R.I. 2013)

Debtors sought to modify chapter 13 plan three years after confirmation. Debtors originally agreed to contribute all of the proceeds from a personal injury claim lawsuit to the plan and later sought modification to exempt and retain the proceeds. Citing Barbosa v. Solomon, 235 F.3d 31 (1st Cir. 2000), the Bankruptcy Court determined that there must be a legitimate reason to modify a plan and correcting an error for failure to exempt the personal injury proceeds and not contribute them in the first instance does not qualify as a ground for modification.

In re Cobb, 485 B.R. 264 (Bankr. D. R.I. 2013)

Above median income debtor proposed to pay unsecured creditors $214.00 per month over a five year period of time. The plan would pay all unsecured creditors 100% over the length of the plan. The trustee objected that the plan was not proposed in good faith, as the debtor's monthly disposable income was $1,094.99 and the debtor could complete her plan much sooner. The court overruled the objection. Because the plan proposed payment of 100% to unsecured creditors, §1325(b)(1)(A) is satisfied even though the debtor was not committing 100% of her disposable income. Citing Judge Deasy's decision in In re Richall, 470 B.R. 245 (Bankr. D. N.H. 2012), good faith requires an analysis of the totality of the circumstances. Unless the trustee can demonstrate some misconduct, abuse, or unfair manipulation, the amount of the payment under the plan, standing alone, is not sufficient. Therefore, the plan was confirmed.

Kramer v. Bankowski (In re Kramer), 505 B.R. 614 (B.A.P. 1st Cir. 2014)

Above median income debtors not permitted to deduct mortgage payment on a stripped mortgage when calculating projected disposable income. Relying on Hamilton v. Lanning, 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010), the Appellate Panel held that when calculating projected disposable income, a Bankruptcy Court may take into account changes in a debtor's income or expenses used in the means test, provided that the changes are known or virtually certain to occur. Although the debtors used Schedules I and J to calculate their payment, which exceeded the Form B22-C amount, there was no basis for an above median income debtor to use Schedule I income and Schedule J expenses as an alternative basis for calculation. Therefore, the debtors were required to use Form B22c when calculating net disposable income and to add back the monthly payment on the stripped mortgage, resulting in a higher required monthly payment.

In re Bullard, 494 B.R. 92 (B.A.P. 1st Cir. 2013)

Debtor's hybrid plan proposed to bifurcate secured creditor's claim on real estate that was not solely the debtor's residence into unsecured and secured claims. The secured portion would be paid beyond the length of the chapter 13 plan and the unsecured claim discharged upon completion of the plan payments and entry of discharge. The Court held that §§1322(b)(2) and (b)(5) may not be combined for treatment of a secured claim under a plan. While the statute does not specifically prohibit the combination, §1325(a)(5)(B)(I) requires that the creditor retain the lien either until payment in full of the underlying debt as determined by non-bankruptcy law or upon entry of discharge. Since the plan did not propose to pay the claim in full and did not propose retention of the lien until discharge, the plan was not confirmable. Furthermore, the plan could not otherwise satisfy the requirements of §1325(a)(5)(B)(ii) which requires that the value of the property to be distributed through the plan to be not less than the allowed amount of the claim.

Pendergast v. Mass Department of Revenue (In re Pendergast), 510 B.R. 1 (B.A.P. 1st Cir. 2014), 2014 WL 1800838

Tax returns filed late with the Massachusetts Department of Revenue ("MDOR") after prior assessment are not dischargeable, even though they otherwise complied with the dischargeability, requirements of §523(a)(1)(A) and (B) . BAPCPA added another hanging paragraph following §523(19) which provides: "For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or similar state or local law." Assessment of the tax prior to the filing of a late return is the equivalent of a Section 6020(b) return and the late filed return does not qualify for dischargeability purposes. The court noted that this amendment replaced the four part definition of a return established in Beard v. Commissioner, 82 T.C. 766, 774-79, 1984 WL 15573 (1984), aff'd 793 F.2 136 (6th Cir. 1986). While late filed returns for which a tax has already been assessed are not dischargeable, late filed returns filed before a tax is assessed are still dischargeable. See Gonzales v. Mass Department of Revenue (In re Gonzales), 489 B.R. 1 (Bankr. D. Mass. 2013), aff'd 506 B.R. 317 (B.A.P. 1st Cir. 2014), Appeal docketed number 14-9002 (1st Cir. Mar. 31, 2014), and Brown v. Mass Department of Revenue (In re Brown), 489 B.R. 1 (Bankr. D. Mass. 2013), aff'd B.A.P. number MW 13-027 (B.A.P. 1st Cir. April 13, 2014), appeal docketed number 14-9003 (1st Cir. April 11, 2014). Compare Perkins v. Mass Department of Revenue, 507 B.R. 45 (D. Mass. 2014) holding that a late filed return can never qualify as a return for dischargeability purposes. Further note that the Internal Revenue Service in Sharp v. United States of America (In re Sharp), AP 08-01003, (N.D. Ill. E.D. 2009) stated that it would not take the position that returns filed late and prior to assessment were not returns within the meaning of §523(a)(1). The IRS will continue, however, to take the position that tax liabilities assessed prior to the filing of a late return are not discharegeable.

Canning v. Beneficial Me., Inc. (In re Canning), 706 F.2d 64 (1st Cir. 2013).

Court distinguishes Pratt v. Gen Motors Acceptance Corp. (In re Pratt), 462 F.2d 13 (1st Cir., 2006) in finding no violation of the discharge injunction for failure of secured creditor to either foreclose or release mortgage on real property surrendered by the debtor. Unlike the creditor in Pratt, which insisted on payment in full for release of its lien on a worthless vehicle, Beneficial offered to release its lien through a settlement or a short sale. Furthermore, there was no showing that the debtors lacked the means to satisfy the incidental costs of owning the property. The Court made clear that the opinion should not be relied upon as a means to leverage a way out of the bargaining table. The line between forceful negotiations and improper coercion is not always easy to delineate, and each case will be assessed within the context of its particular facts.

Manning v. Citimortgage (In re Manning), 505 B.R. 383 (Bankr. D. N.H. 2014)

Mortgagee did not violate discharge injunction by insisting that debtor execute a reaffirmation agreement and bring his account current before post discharge mortgage payments would be reported on debtor's credit report. Although a post discharge reaffirmation agreement was executed, it was not effective and mortgagee did not report the post discharge payments. §524(j) provides a safe harbor exception to the discharge injunction for creditors who hold claims secured by a debtor's principal residence. The mortgagee's request that debtor become current and execute the reaffirmation agreement falls within that exception.

In re Dolinak, 497 B.R. 15 (Bankr. D. N.H. 2013)

In so called Chapter 20 case, debtors permitted to strip off wholly unsecured mortgage even though debtors were not entitled to receive a discharge by reason of a recent Chapter 7 case. The Court held that there is nothing in §1322(b) that conditions a Chapter 13 debtor's ability to modify a wholly unsecured lien on the eligibility for a discharge, and BAPCPA did not change this result. Chapter 20 cases however warrant careful inquiry as to good faith of the debtor proposing a plan under §1325(a)(3).