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In *Moratzka v. Morris, et al. (In re Senior Cottages of America, LLC)*, --F.3d--, 2007 WL 958145 (8th Cir. 2007), the Eighth Circuit aligned itself with the First, Third, Fifth, and Eleventh Circuits in holding that a corporate insider's collusion with third parties to injure the corporation does not deprive the corporation (or a subsequently appointed bankruptcy trustee) of standing to sue third parties. In *Moratzka*, Timothy D. Moratzka, Chapter 7 trustee ("Trustee"), brought an action against the defendants ("Defendants"), former attorneys for debtor Senior Cottages of America, LLC ("SCA"), Murray Klane, SCA's majority shareholder ("Klane"), and Millennium Properties, LLC ("MP"), alleging claims for malpractice and aiding and abetting a breach of fiduciary duty. Trustee based his claims on a transaction in which Defendants advised and assisted Klane in transferring SCA's valuable assets, including certain low-income housing tax credits, to MP for little or no consideration. The Eighth Circuit's holding that Trustee has standing to assert these claims reversed the District Court's and Bankruptcy Court's decisions, which held otherwise.

The Eighth Circuit began its analysis by noting that whether a particular cause of action belongs to a debtor's bankruptcy estate is determined by state law. *Moratzka*, 2007 WL 958145 at *6. The *Moratzka* Court noted that claims for both malpractice and aiding and abetting a breach of fiduciary duty belong to a debtor's bankruptcy estate under Minnesota law, provided the causes of action accrue prior to the debtor's bankruptcy filing. *Id*. The Eighth Circuit then addressed the standing issue in two pertinent parts.

First, the Eighth Circuit explained that whether a party has standing to bring certain claims, and whether those claims are barred by an equitable defense, are two separate questions. *Moratzka*, 2007 WL 958145 at *7 (*quoting Official Comm. Of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d Cir. 2001)). In other words, the Eighth Circuit found that when corporate insiders collude with third parties in actions that ultimately injure a corporation, the corporation is not deprived of standing. *Id*. at *8. The *Moratzka* opinion further states "Even if an *in pari delicto* defense appears on the face of the complaint, it does not deprive the trustee of constitutional standing to assert the claim, though the defense may be fatal to the claim." *Id*. The Eighth Circuit then addressed the sufficiency of Trustee's allegations and found that the amended complaint sufficiently alleged an injury in order to survive a motion to dismiss for lack of standing.

Second, the Eighth Circuit addressed Defendants' argument that because SCA was insolvent at the time of the transfer, any harm done to SCA harmed SCA's creditors and not SCA itself. The *Moratzka* Court rejected this argument in light of the language in two deepening insolvency cases. It adopted the language in *Lafferty*, 267 F.3d 348-49, which states "Simply because the creditors of a[n] estate may be the primary or even the only beneficiaries of such a recovery does not transform the action into a suit by the creditors." The Eighth Circuit then quoted language from a Ninth Circuit opinion, which states "Acknowledgement that [the dissipation of assets limited the firm's ability to repay its debts in liquidation] is not…a concession that only the creditors…have sustained any injury. Instead, it is a recognition of the economic reality that any injury to an insolvent firm is necessarily felt by its creditors." *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1004 (9th Cir. 2005). The Eighth Circuit then concluded that Trustee was the proper plaintiff to bring the claims against Defendants.

Circuit Judge Colloton, with whom Chief Judge Loken joined, authored a concurring opinion.

BUYER NOT IN POSSESSION OF GOODS QUALIFIES AS BIOC ONLY IF BUYER HAS A RIGHT TO RECOVER GOODS

In the case of *In Re Western Iowa Limestone, Inc.*, No. 06-6068NE (8th Cir., 3/19/2007), the debtor appealed from an Iowa Bankruptcy court decision that fertilizer and chemical dealers who purchased limestone from the debtor were "buyers in the ordinary course of business" under Iowa law. The debtor, Western Iowa Limestone, Inc., marketed agricultural lime. Six fertilizer and chemical dealers purchased lime prior to the filing of the debtor's bankruptcy petition. The dealer's each paid for the limestone and received a bill of sale, which noted that the limestone could remain on the debtor's property. The debtor's business operations were financed, in part, by United Bank of Iowa ("United Bank"). The debt was secured by all of the debtor's assets including inventory, accounts receivable, and proceeds. The lime was part of the debtor's inventory. The debtor filed Chapter 11 on December 12, 2005, and on January 3, 2006, the debtor filed a motion to sell substantially all of its assets free and clear of the liens. The Bankruptcy court granted the motion, but preserved the dealer's rights to make claims against proceeds of the sale. The dealers argued in their appeal that their interest in the proceeds from sale of the lime is superior to United Bank's because they are a "Buyers in the ordinary course of business ("BIOC")" under Iowa law who purchased the lime free and clear of United Bank security interest.

Initially the bankruptcy court entered an order finding that the dealers did not qualify as BIOCs, because under it's interpretation of Iowa law, a BIOC must have physical possession of the goods, the goods to the contract must have been identified and the seller insolvent at the time of purchase, or the dealer must have been entitled to specific performance of the contract.

The dealers filed a motion to alter or amend the judgment or for a new trial making the sole argument in the motion that the bankruptcy court committed legal error when they concluded that a purchaser must actual physical possession of goods to qualify as a BIOC. The dealers argued that the possession requirement of BIOC status is satisfied by "constructive possession" which they contended they had by virtue of the fact that the lime had been "identified" to the contract at the time of sale. The bankruptcy court subsequently held a hearing and concluded that its original legal conclusion that the BIOC status required actual physical possession of the goods was erroneous, and that the dealers in fact had "constructive possession" of the goods because the lime had been "identified" to the contracts.

The 8th Circuit Court of Appeals reversed, finding that identification of a fungible good, solely by reference in a contract to an undivided share in an existing specified fungible bulk satisfies the requirement of constructive possession under Iowa law for purposes of a priority contest between a purchaser and a secured creditor of the seller. The court stated, "The possession of the person claiming personal property as against creditors of his vendor must be visible, apparent, and actual to strangers to the transaction."

Applying these guidelines to the facts, the court found that the dealers never obtained constructive possession of the lime. It stated, "In order for the dealers to have taken constructive possession of goods of this nature, i.e., a fungible commodity, they would have had to have taken some visible and apparent step to inform the world of the change in possession from the debtor to the dealers."

The court further to stated that "this application of Iowa law, and the result flowing there from, is also consistent with, if not mandated by the definition of BIOC in §554.1201(9). As discussed above, a buyer not in possession of goods purchased qualifies as a BIOC only if he has the right to recover those goods. That right arises where the buyer is entitled to replevin under §554.2502 or a right to specific performance under §554.2716."

PAYMENT PURSUANT TO SETTLEMENT AGREEMENT NOT A PREFERENCE BECAUSE IT WAS NOT ON ACCOUNT OF AN ANTECEDENT DEBT

In *In re Bridge Information Systems, Inc.,* 460 F.3d 1041 (8th Cir. 2006), the Chapter 11 Plan Administrator ("Plan Administrator") for Debtor, BIS Administration, Inc. f/k/a Bridge Information Systems, Inc., et al., ("Bridge") filed an adversary proceeding against Edward C. Vancil, Inc. ("Vancil, Inc.") to avoid the transfer of $46,176.77 as a preference under § 547(b). Pre-petition, Vancil, Inc. leased office space in a commercial property owned by Bridge, and the parties entered into a settlement agreement whereby the Debtor paid Vancil, Inc. $46,176.77 less than two months before Bridge filed its Chapter 11 petition. The Bankruptcy Court found in favor of the Plan Administrator. Vancil, Inc. appealed to the Bankruptcy Appellate Panel ("B.A.P."), which reversed the Bankruptcy Court. Plan Administrator appealed the B.A.P.'s decision to the Court of Appeals which found that Bridge's payment to a lessee in settlement of lawsuits arising out of lessee's exercise of renewal options was not on account of an antecedent debt under § 547(b)(5) and, therefore, could not be avoided as a preferential transfer.

The parties agreed that all of the elements of § 547(b) were satisfied except whether the payment was made on account of an "antecedent debt" under (b)(5).

A debt is "antecedent" if it was incurred before the alleged preferential transfer. The Bankruptcy Court had concluded that Bridge's settlement payment to Vancil, Inc. was on account of an antecedent debt because of its finding of anticipatory repudiation of the lease, accomplished through a letter from Bridge. The B.A.P. found that the Bankruptcy Court had failed to look behind the settlement agreement to discern the nature of the dispute and concluded that the doctrine of anticipatory breach by repudiation did not apply in this case.

The Court of Appeals agreed with the B.A.P. reasoning, "[t]he dispute here was as to the market rate of rent Vancil, Inc. would pay to Bridge after Vancil, Inc. validly exercised one of its options to renew the Lease. The settlement simply involved an agreement to purchase those options from Vancil, Inc." The Court of Appeals found, "that is not a payment on account of an antecedent debt; therefore, section 547(b) of the Code is not applicable. We conclude the [bankruptcy] court erred when it failed to look behind the settlement to discern that this was a negotiation over the value of an asset, and when it incorrectly based its holding on the doctrine of anticipatory breach of contract." The Court concluded "[t]he [B.A.P.] correctly applied the law to the facts to reach its conclusion that Bridge's payment to Vancil [, Inc.] was not on account of an antecedent debt."

INTENT UNDER 523(A)(2)(a) MAY BE PROVEN BY DIRECT OR CIRCUMSTANTIAL EVIDENCE.

In *Blue Skies, Inc. et. al v. Preece (In re Preece),* Case Nos. 06-6040, 6041 (B.A.P. 8th Cir. March 19, 2007), the B.A.P. affirmed the Bankruptcy Court's holding that debts were non-dischargeable under 11 U.S.C. § 523(a)(2)(A) where the money comprising the debts was obtained by actual fraud.

James Preece, the Debtor, was the sole-shareholder, director, and CEO of Helicopter Flight, Inc., which sold new and used helicopters. Plaintiffs Blue Skies, Inc. and Central Boiler, Inc. separately contracted with Helicopter Flight to purchase helicopters. Both paid Helicopter Flight in advance for the purchases.

Helicopter Flight failed to supply the helicopters, the business failed, and the Debtor filed Chapter 7. The Plaintiffs commenced separate adversary proceedings seeking a determination that the Debtor's debts were non-dischargeable. The Bankruptcy Court consolidated the proceedings and held that the debts were non-dischargeable under § 523(a)(2)(A) because the payments were obtained by actual or common law fraud.

The Debtor appealed that determination on the grounds that Plaintiffs failed to prove he subjectively intended to deceive them at the time he made the representations. The B.A.P. noted that because a debtor's mental state is difficult to prove, fraudulent intent may be proven by direct or circumstantial evidence. The B.A.P. held such evidence existed in this case. The Debtor continued to represent himself as an authorized dealer, when in fact he was not. Indeed, after each of the Plaintiffs received a letter informing them the Debtor was no longer an authorized dealer, he continued to represent and assure Plaintiffs he was. The Debtor expressly told each of the Plaintiffs that he was using their respective funds to purchase a specific helicopter. He failed to do so and, instead, deposited those funds into Helicopter Flight's general operating account.

The B.A.P. held that at the time the Debtor obtained the Plaintiffs' funds, he had to have known that they would not be able to purchase the helicopters promised. Finally, the Debtor attempted to hide the fact that the money was spent by tendering a fake bill of sale and failed to earmark the funds as initially agreed. The Court held that all of the above factors were sufficient to find "intent to deceive."

NOTATION OF CREDITOR'S NAME ON VEHICLE TITLE IS NOT A SECURITY AGREEMENT

In *J. Kevin Checkett, Trustee v. Andy Lee and Kerri Lynn Sutton, (In re Andy Lee and Kerri Lynn Sutton)*, No. 06-6059WD (GFK) (B.A.P. 8th Cir. 2006) the B.A.P. affirmed the Bankruptcy Court's order overruling the Trustee's objection to Andy Lee and Kerri Lynn Sutton's (the "Debtors") claim of exemption with respect to a 1999 Dodge truck (the "Vehicle").

Jimmy Richardson ("Richardson"), father of Kerri Sutton, loaned the Debtors $7,000 (the "Loan") to purchase the Vehicle. There was no documentation to memorialize the transaction, except that Richardson was noted as a lien holder on the title for the Vehicle. On October 14, 2005, the Debtors filed for relief under Chapter 7 of the Bankruptcy Code. The Debtors claimed the entire fair market value of the Vehicle as exempt under Missouri law. The Debtors also listed Richardson as a secured Creditor in their petition.

The Trustee filed an adversary proceeding to avoid Richardson's interest in the vehicle under 11 U.S.C. § 544(a), which Richardson did not contest. The Trustee also objected to Debtor's exemption of the Vehicle on the grounds that the Debtors could not, under 11 U.S.C. § 522(g)(1), exempt property in which the Debtors made a prepetition voluntary transfer that was later avoided by the Trustee.

The Bankruptcy Court entered judgment in favor of the Trustee on his action under 11 U.S.C. § 544(a), but overruled his objection to the Debtor's exemption of the Vehicle. The Bankruptcy Court held that because the Debtors did not execute a security agreement in favor of Richardson, a prepetition voluntary transfer to Richardson did not occur and therefore 11 U.S.C. § 522(g)(1)(A) was inapplicable.

The B.A.P. affirmed. It started its analysis by noting a security interest only attaches to collateral under Missouri's version of Revised Article 9 if: (1) the creditor has given value; (2) the debtor has rights in the collateral; and (3) the debtor has authenticated a security agreement that provides a description of the collateral. Although Richardson had given value and the Debtors had rights in the Vehicle, the B.A.P. disagreed with the Trustee's assertion that the application for title for the Vehicle constituted a valid security agreement. Citing ***Gassway v. Erwin (In re Shelton)***, 472 F.2d, 1118, 1121 (8th Cir. 1973) and ***Forker v. Duenow Manag. Co. (In re Calvert)***, 227 B.R. 153, 160-61 (B.A.P. 8th Cir. 1998), the B.A.P. held that (i) an application for title with the creditor denoted as a lien holder, by itself, is not a security agreement under Article 9, (ii) because there was no security agreement between Richardson and the Debtors, there was no prepetition voluntary transfer for the Trustee to avoid and therefore 11 U.S.C. § 522(g)(1)(A) is inapplicable, and (iii) because 11 U.S.C. § 522(g)(1)(A) is inapplicable, the Debtors are entitled to exempt the full value of the Vehicle.

B.A.P. AFFIRMS AVOIDANCE UNDER § 544 ON THE BASIS OF AN INCORRECT LEGAL DESCRIPTION

In *In re Vondall*, No. 06-6069MN (B.A.P. 8th Cir. March 16, 2007), Debtors executed a note and mortgage in favor of Household Industrial Finance Co. ("Household") which contained an incorrect legal description of the property. Due to the incorrect legal description, the tract index contains no record of Household's mortgage. Household's mortgage appears only in the Hennepin County grantor-grantee index.

The Trustee filed a complaint and moved for summary judgment seeking to avoid Household's mortgage under 11 U.S.C. § 544(a)(3), which provides the trustee the power to avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by a bona fide purchaser of real property ... whether or not such a purchaser exists. Minnesota law permits a bona fide purchaser ("BFP") to avoid prior conveyances that have not been recorded in accordance with the law. A BFP is one who in good faith pays value for an interest in property without actual, constructive, or implied notice of the inconsistent, outstanding rights of others.

The bankruptcy court granted the Trustee's motion and thus avoided Household's mortgage. The bankruptcy court found that the defect in the legal description was not apparent on the face of Household's mortgage so the mortgage did not provide constructive or implied notice of Household's purported interest in the Debtors' homestead. Therefore, the court concluded, the Trustee qualifies as a BFP under Minnesota law and may avoid Household's mortgage under § 544(a)(3). Household appealed to the Bankruptcy Appellate Panel for the Eighth Circuit ("BAP").

Household asserted the bankruptcy court erred for three reasons. First, Household argued that a hypothetical purchaser would have had actual knowledge of Household's mortgage because it appeared in the Hennepin County grantor-grantee. Second, Household contended that there was constructive and implied notice of its mortgage because lots in Minnesota are described by numbers, not letters, so the error was obvious on the face of the mortgage and would have triggered a duty to investigate what was intended. Third, Household argued that there was implied notice of its mortgage because the tax parcel I.D. listed in the mortgage's legal description is accurate and, if further inquiry was made of the county treasurer's records, a hypothetical purchaser would have found the correct legal description.

The BAP disagreed. First, it found the mortgage indexed in the grantor-grantee index does not accurately describe the Debtors' property. Unless the defect in the property description is apparent, the presence of the mortgage on the grantor-grantee index is irrelevant and without any legal effect. Second, the BAP found the Trustee's actual knowledge of the property is irrelevant under § 544, as the revelation by Household that lots in Minnesota may be designated by numbers or letters precludes a finding that Household's mortgage is facially defective. Third, the BAP held if there is nothing on the face of a mortgage to alert a purchaser that the property description is defective, then there is nothing on the face of the mortgage to trigger a duty of further inquiry.

CURING OF DEFAULT MEANS RETURN TO STATUS QUO

In the case of ***In Re Robert Edward Olsen, Sr. & Roselita Marie Olsen***, No. 06-6044NE (B.A.P. 8th Cir. 03/09/2007 (corrected 3/14/2007)), the debtors purchased a home from Habitat for Humanity and executed two promissory notes. Note one required that the debtors pay $35,773.00 without interest over 224 months making monthly payments of $160.00 ("Note One"). Note two was a non-recourse loan requiring the debtors to pay Habitat $35,000.00, but did not require payments so long as debtors continued to live in the property, timely paid amounts due under note one and were not in default of the deed of trust ("Note Two"). If the debtors met these requirements then the amount due under Note Two would decline to zero. The debtors failed to make timely payments and Habitat made demand for amounts outstanding under Note One and the full $35,000.00 outstanding on Note Two.

The Debtors subsequently filed a chapter 13 petition. Their plan called for 36 payments of $250.00 to be applied to arrearages on Note one and made no provisions for payments on Note Two. Habitat objected to the plan and the Debtors amended the plan to provide for 48 monthly payments of $250.00 to be applied to Note One, but again nothing to Note two. Habitat again objected to the plan because it did not adequately compensate for all amounts due under Note One and Note Two. At the confirmation hearing on the amended plan the court issued an order for a hearing as to whether the debtors could reinstate the original terms of Note Two by curing the default on Note One through the plan.

The bankruptcy court denied the debtors amended plan and held that the debtors were required to pay the full amount of Note Two because it is a fixed obligation becoming immediately due and payable when the debtors violated the condition of the Note. The court further held that the "fixing" of the obligation cannot be modified under § 1322(b)(2) because this would constitute an impermissible modification of Note Two. The debtors appealed from this order.

In this decision, the B.A.P. stated that a chapter 13 plan may modify the rights of holders of secured claims, but the plan may not modify the right of holder's claims that are secured only by an interest in the debtor's principal residence. 11 USC § 1322(b)(2). However, the court stated that §1322(b)(5) provides an exception in that "notwithstanding paragraph (2) of this subsection, [the plan may] provide for the curing of any default within a reasonable period of time and maintenance of payments while the case is pending on any unsecured claim to which the last payment is due after the date on which the final payment under the plan is due."

Curing a default returns the situation to pre-default conditions and nullifies the consequences of that default. *See DiPierro v Taddeo (In re. Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982). The court found that Note Two became fixed when the debtor defaulted on Note one. However, § 1322(b)(5) allows the debtor to cure the default on Note One, return it to its status prior to default and consequently "unfix" the amount due under Note Two.

Although the debtors may cure the default on Note two in return to the status quo ante, their plan must still provide for Note two. In addition, because the bankruptcy court denied confirmation on these grounds, it did not address other issues regarding confirmation. Therefore, the B.A.P. reversed and remanded to the bankruptcy court for further proceedings.

CREDITOR NOT ENTITLED TO DEFICIENCY CLAIM ON "910-DAY VEHICLE" WHEN VEHICLE SURRENDERED

In *Capital One Auto Finance v. Osborn*, Case No. 06-6061WM (B.A.P. 8th Cir. February 23, 2007), the Osborns' ("Debtors") plan proposed to surrender a vehicle purchased within 910 days of bankruptcy as full payment for the outstanding debt, leaving Capital One Auto Finance ("COAF") without an unsecured claim. COAF objected under the new "hanging paragraph" under section 1325(a) of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The Bankruptcy Court approved the Plan.

Under section 506(a) of the Code, a creditor is only secured for the value of its collateral, and it is unsecured for any deficiency. Under the hanging paragraph of 1325(a), section 506(a) does not apply to a secured creditor holding a purchase money security interest on a vehicle purchased within 910 days of the bankruptcy petition. The issue on appeal was whether the hanging paragraph applied when a debtor proposed to surrender the collateral through a Chapter 13 plan. The Bankruptcy Appellate Panel held that the hanging paragraph does apply, which means that debtors can surrender vehicles purchased within 910 days of their bankruptcy petition in full satisfaction of their obligation, despite the anti-bifurcation language in the hanging paragraph.

SUMMARY JUDGMENT AWARDED TO PIERCE CORPORATE VEIL OF COMPANIES CREATED BY NON-DEBTOR SPOUSE IN ATTEMPT TO SHIELD DEBTOR'S ASSETS PRIOR TO BANKRUPTCY

In the case of *Patti J. Sullivan, Trustee for the Chapter 7 Bankruptcy Estate of Shawn Michael Kluver v. L.M.E. Equipment Corp., et. al.,* Adv. No. 06-3333 (Bankr. D. Minn. March 22, 2007) (J. O'Brien), Judge O'Brien granted summary judgment finding the defendant corporations to be "alter egos" of the Debtor and his non-debtor spouse, thus extending an earlier judgment against the corporate defendants in favor of the Trustee in the amount of $488,076.40 to the Debtor and his spouse.

The Bankruptcy Court determined that the Debtor and his spouse had engaged in a pre-bankruptcy scheme to create corporate entities that were allegedly owned and run by the spouse. The record established that all of the defendant companies were, in fact, the Debtor's business activities and that the Debtor had contributed, produced or procured all of their assets. The scheme originated from property of the Debtor that was lost by foreclosure after the Debtor had given his collaborating partner a nominal mortgage on the property. Knowing that the value of the property was far in excess of the foreclosing mortgage, the collaborating partner redeemed, "laundering all intermediate liens," and the Debtor and his partner split the equity realized through a repurchase of a portion of the property for a nominal price by one of the defendant companies. It was also clear that the defendant companies owned by the non-debtor individual defendant were created to protect the assets from the Debtor's creditors.

In awarding summary judgment for the Trustee, the Bankruptcy Court evaluated all of the factors elucidated in the *Victoria Elevator* case for piercing the corporate veil under Minnesota law. These factors include insufficient capitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of the corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records and existence of the corporation as merely a facade for individual dealings. The Court also determined that failure to pierce the corporate veil under the circumstances would result in fundamental unfairness because the entire value in the defendant companies initially came from the Debtor's property and dealings, and the Debtor's controlling participation in the companies' affairs was solely responsible for whatever preservation and enhancement of value that has since occurred.

INJUNCTION AND PREJUDGMENT ATTACHMENT AWARDED TO SECURE PROPERTY SOUGHT IN FRAUDULENT TRANSFER AVOIDANCE ACTION

In the related case of *Patti J. Sullivan, Trustee for the Chapter 7 Bankruptcy Estate of Shawn Michael Kluver v. Sandhill Properties, LLC, et. al.*, Adv. No. 07-3006 (Bankr. D. Minn. March 22, 2007) (J. O'Brien), Judge O'Brien granted the Chapter 7 Trustee's motion for a preliminary injunction enjoining the defendants from taking any action to transfer or encumber real and personal property and granted the Trustee's request for prejudgment attachment. The Court found that the Trustee had shown a probability of success on the merits of her fraudulent transfer claims and that the injunctions were necessary to preserve the status quo and secure the property during the pendency of the case. Specifically, the Trustee submitted detailed evidence showing that the defendants, acting in conjunction with the Debtor, had engaged in a series of pre-petition transactions that had resulted in the Debtor transferring its real and personal property for far less than a reasonably equivalent value and that the defendants were unlikely to satisfy a money judgment against them should the Trustee prevail.

DEFENDANT CANNOT SHIFT BURDEN TO PRODUCE FINANCIAL RECORDS

In the case of ***Terri A. Running, Trustee v. Terres, Thomas Raymond (In Re Terres),*** Case No. 05-60276 (Bankr. D. Minn. January 24, 2007) (J. O'Brien) the Minnesota Bankruptcy Court, held that the obligation to keep and provide financial records is with the Debtor, and that his incarceration did not establish an impossibility for him to provide those records.

The Trustee moved for summary judgment barring the defendant's discharge under 11 USC § 727(a)(3) for the defendants failure to produce adequate financial records regarding his pre-petition financial condition, including his disposition of more than $300,000.00 in fraudulently obtained funds. The defendant sought dismissal of the adversary proceeding, claiming impossibility of performance due to his incarceration in prison. He further stated that he provided the Trustee with signed authorizations to obtain the records, but she failed to use them.

In granting the Trustee's motion, the Court noted that "the plaintiff was entitled to the records, needed them to administer the estate, and that the defendant's circumstances that he claims now make it impossible for him to furnish the records are of his own making. The defendant cannot shift his burden of production to the estate and its creditors." The Court further stated, "The obligation to keep and provide financial records is with the debtor. It is not fulfilled by providing signed authorizations to the trustee allowing her to chase and catch whatever she might find." Also, "The debtor was not yet in prison when he filed his bankruptcy case and has not shown that the records were not available to him at filing. It was his responsibility to secure the records and leave them with his attorney who prepared his petition and schedules and filed the case."

REAL ESTATE NOT WITHIN THE BOUNDARIES OF A CITY NOT SUBJECT TO ONE-HALF ACRE HOMESTEAD EXEMPTION

In the case of *In Re Willhite,* Case No. 06-50498 (Bankr. D. Minn. February 15, 2007) (C.J. Kishel), the Bankruptcy Court held that the determining factor as to whether the claimed homestead was subject to the one-half acre size limitation provided by Minn. Stat. § 510.02, or the larger acreage limitation of Minn. Stat. § 510.01, was dependent on whether the real estate is located within the boundaries of a city.

The Willhite's home is located on 0.86 acres of land fronting on Crystal Lake in Cass County, Minnesota. The property does not lie in an organized city. The Willhites claimed the entire property as homestead and thus exempt under Minn. Stat. § 510.01. The Trustee objected, contending that the homestead was subject to the one-half acre size limitation contained in the statute. The Court found that if the property is included in a "laid out or platted portion of a city," it is subject to the one-half acre limitation and, as the property was not within the city, it was not subject to the restriction. The Court concluded that if the value of the interest in the real estate is less than the $200,000.00 maximum of Minn. Stat. § 510.02, the borrowers in this case would be able to retain their entire 0.86 acre claimed homestead.

SATISFACTION OF DEBT AND MORTGAGE NOT VALID IF THE TRANSACTION INTENDED TO REFINANCE SUCH DEBT AND MORTGAGE IS RESCINDED

In *American Residential Mortgage, LP v. Bradley R. Thayer and Judith N. Thayer (In re: Bradley R. and Judith N. Thayer*), Adv. No. 04-3338 (Bankr. D. Minn. February 1, 2007) (C.J. Kishel) the Bankruptcy Court granted American Residential Mortgage, LP's ("American Residential") motion for summary judgment on Count I of its complaint.

On September 11, 2002, American Residential made a loan to the Bradley R. and Judith N. Thayer (the "Debtors") evidenced by a promissory note in the amount of $157,700 and secured by a mortgage on the Debtors' residence. Shortly thereafter, the promissory note (the "TCF Note") and mortgage (the "TCF Mortgage") were assigned by American Residential to TCF Mortgage Corporation ("TCF").

In August 2003, the Debtors decided to refinance the TCF Note and TCF Mortgage pursuant to a new transaction with American Residential. In connection therewith, Debtor, Bradley R. Thayer, executed a promissory note dated August 25, 2003 in favor American Residential in the amount of $170,000 (the "American Note"). To Secure the American Note, both Debtors executed a mortgage granting American Residential a lien against their residence (the "American Mortgage"). At the closing on August 25, 2003, the Debtors received a "Notice of Right to Cancel," as required by the Truth In Lending Act. On August 28, 2003, the Debtors completed, signed and sent the Notice of Right to Cancel to American Residential via certified mail.

On August 29, 2003, unaware that the Debtors had exercised their right of rescission, the title company disbursed the proceeds of the American Note in accordance with the settlement statement executed at closing, which included a disbursement in the amount of $151,061.76 to TCF in repayment of the TCF Note. On September 30, 2003, an officer of TCF executed a satisfaction of the TCF Mortgage and delivered the same to the title company. The satisfaction, however, was never recorded or delivered to the Debtors.

In lieu of returning the erroneously disbursed proceeds of the American Note, TCF instead assigned the TCF Note and TCF Mortgage to American Residential.

In their Chapter 7 petition, the Debtors listed American Residential as "Creditors Holding Unsecured Nonpriority Claims." American Residential filed a complaint seeking a declaration that it holds all rights as the mortgagee under the TCF Note and Mortgage ("Count I"), and that any obligations incurred by Bradley Thayer under the American Note and Mortgage are non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(B) ("Count II"). In their answer, the Debtors' asserted that the mortgage satisfaction executed by TCF in connection with the refinancing "is a valid memorialization of a full release of the [TCF Mortgage], is binding on American Residential, and under Minnesota law must now be recorded." American Residential moved for summary judgment on Count I, but not Count II.

The Debtors, American Residential and the Bankruptcy Court all agreed that the loan evidenced by the American Note and American Mortgage was properly cancelled. As noted by the Bankruptcy Court, the rescission of the August 2003 transaction imposed upon American Residential an obligation to return the Debtors to their status prior to the transaction and treat the August 2003 transaction as a nullity, which American Residential has done.

In light of the validity of the Debtors' rescission, the Bankruptcy Court granted American Residential's motion for summary judgment on the grounds that (i) TCF would not have executed a Satisfaction of Mortgage had it been aware of the Debtors' rescission, (ii) there is nothing to show that any party relied up on the satisfaction of the TCF Mortgage, (iii) the satisfaction was never delivered to the Debtors or recorded and (iv) American Residential was within its rights to seek vindication of its position through the commencement of an adversary proceeding.

Ultimately, the Bankruptcy Court held that, as the assignee of TCF, American Residential holds a valid, perfected, enforceable mortgage and that the Satisfaction of Mortgage executed by TCF is null and void.