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Editors-In-Chief:

Andrew P. Moratzka
Mackall, Crounse & Moore, PLC
1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
612-305-1418
apm@mcmlaw.com

David B. Galle
Oppenheimer Wolff & Donnelly LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
612-607-7572
dgalle@oppenheimer.com

Henry T. Wang
Gray, Plant, Mooty, Mooty & Bennett, P.A.
500 IDS Center
80 South 8th Street
Minneapolis, MN 55402
612-632-3370
henry.wang@gpmlaw.com

Editorial Board:

Amy J. Swedberg
Maslon Edelman Borman & Brand, LLP
612-672-8367
amy.swedberg@maslon.com

Troy Gunderman
Educational Credit Management Corporation
651-221-0566
tgunderman@ecmc.org

Gary D. Kanwischer
Wells Fargo & Company
612-667-2407
gary.d.kanwischer@wellsfargo.com

Ryan T. Murphy
Fredrickson & Byron, P.A.
612-492-7310
rmurphy@fredlaw.com

Michael D. Gordon
Briggs & Morgan, P.A.
612-977-8562
mgordon@briggs.com

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INCARCERATION DOES NOT EXCUSE FAILURE TO OBTAIN CREDIT COUNSELING

In the case of In Re Benjamin James Rendler, Bankr. D. Minn., No. 07-31126, (May 1, 2007) (J. Kishel). The Bankruptcy Court for the District of Minnesota held that incarceration was not a permissible grounds for waiver of financial counseling and debtor education requirements required under 11 U.S.C. § 109.

The debtor filed a voluntary Chapter 7 case and moved the court "to waive financial counseling and debtor educational requirements due to exigent circumstances" as the debtor was incarcerated in the Minnesota Correctional facilities at Rush City, MN. Because of his incarceration, the debtor claimed he was unable to attend credit counseling or participate via telephone or internet.

The court found that there were only two ways to override the requirement of credit counseling. The first is to request an "exemption". The "exemption" does not completely excuse the debtor from going through credit counseling but only gives a thirty-day extension of the debtor's deadline to go through counseling or file the credit-counseling certificate. This would not provide the excuse from credit counseling the debtor sought to obtain.

The second possible override is full absolution from the requirement to go through credit counseling, but only on three very specific grounds of either incapacity, disability, or active duty in a military combat zone. Unless the debtor meets one of these exemptions, failure to comply with the credit counseling requirement of §109 of the bankruptcy code provides that an individual "may not be a debtor under" the bankruptcy code. As the debtor did not meet one of the three requirements for an exemption, he is ineligible to be a "Debtor" under the bankruptcy code, even though it is not possible for him to go through credit counseling during his incarceration.

The court concluded that the debtor had an obligation to go through credit counseling before he filed his petition. Failing to do so the court denied the motion and determined the debtor was ineligible to receive relief under chapter 7 of the bankruptcy code and dismissed the case.

APPEAL WAS TOO LATE AND TOO EARLY

In Hicks v. Missouri Department of Revenue (In re Robert Wayne and Janice Virginia Hicks), No. 07-6023EM (B.A.P. 8th Cir. 2007) the B.A.P dismissed the debtors' appeal because it was not timely filed pursuant to Federal Rule of Bankruptcy Procedure 8002 and because it was a premature appeal of an interlocutory order.

The debtors commenced an adversary proceeding against the Missouri Department of Revenue, Arizona Department of Revenue and the Internal Revenue Service challenging the validity of various tax debts and liens. The Missouri Department of Revenue filed a motion for summary judgment, which motion was granted by the bankruptcy court on April 23,

2007 and was accompanied by a judgment in favor of the Missouri Department of Revenue.

As noted by the bankruptcy court, jurisdiction depends on (i) timely filing of a notice of appeal and (ii) the existence of a final judgment.

Bankruptcy Rule 8002 requires that a notice of appeal be filed within ten days of the date of the entry of the judgment, order, or decree appealed from. The debtors' notice of appeal was filed on May 8, 2007, 15 days after the April 23 order and judgment. Because the debtors' notice of appeal was not timely, the B.A.P lacked jurisdiction over the appeal.

In addition to being late, the debtors' appeal was premature. Bankruptcy Rule 7054(a) and Federal Rule 54(b) provide that every adversary proceeding should have one judgment that disposes of all claims and which is entered at the conclusion of the proceeding.

Rule 54(b) does provide an opportunity to appeal an order for summary judgment, but only after a determination by the bankruptcy court that there is no just reason for delay and upon an express direction for the entry of judgment. No such determination was made by the bankruptcy court in this case and, notwithstanding the entry of a document denominated a judgment, the bankruptcy court's decision in favor of the Missouri Department of Revenue did not terminate the adversary proceeding as to the Missouri Department of Revenue. Because the April 23 order was interlocutory, the appeal was premature.

REFORMATION OF CONTRACT

In Phongsisattanak v. Caberallo, LLC (In re Alex and Chahnsamone Phongsisattanak), Adv. No. 06-3373 (Bankr. D.Minn. 2007) (J. O'Brien) the bankruptcy court refused to reform a contract in the absence of clear and consistent, unequivocal and convincing evidence that a mutual mistake occurred and that the contract did not express the parties real intentions.

Alex and Chanhsamone Phongsisattanak, the plaintiffs, deeded four properties to a third party who then sold them back to the plaintiffs on a single contract for deed. The properties consisted of three investment properties and the plaintiffs' homestead. The third party assigned its rights under the contract for deed to the defendant, Caberallo, LLC ("Caberallo"). Caberallo then commenced proceedings to cancel the contract for deed. As alternative to litigation, the plaintiffs and Caberallo entered into an agreement which provided, in relevant part, that "at such time as Alex [plaintiff] is able to convey marketable title to 2205 Chicago Ave. So. [investment property], to Caberallo, Caberallo will deliver marketable title to the [sic] 16188 Homity Path [homestead] to Alex".

The homestead was encumbered by three mortgages (i) a purchase money mortgage in favor of NovaStar Mortgage in the amount of $270,000, (ii) a second mortgage in favor of Dennis Wagner in the amount of $125,000 and (iii) a third mortgage in favor of Sterling Equity and Investment, Inc. in the amount of $105,000. The second and third mortgages were unknown to the plaintiffs at the time they entered into the agreement with Caberallo.

The bankruptcy court cited Knudsen v. Transport Leasing/Contract. Inc. for the proposition that "when a contract is unambiguous, a court gives effect to parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." 672 N.W.2d 221 (Minn. Ct.

App.2004). However, the court also noted that "A … court may reform a written instrument if the party requesting the reformation proves with 'clear and consistent, unequivocal and convincing' evidence the following: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.

Gopher Smelting and Refining Co., 2006 WL 2474184, 2 (Minn. Ct. App. August 29, 2006). The plaintiffs agreed that a mutual mistake had occurred and that the agreement should be reformed to clarify that the parties did not intend to require Caberallo to satisfy the purchase money mortgage encumbering the homestead. Caberallo, however, insisted that the agreement be reformed consistent with the parties understanding that the homestead would be subject to all three mortgages.

The plaintiffs denied that they understood and agreed to the delivery of marketable title to their homestead subject to anything other than the purchase money mortgage. The bankruptcy court determined that Caberallo's claim was not "supported by 'clear and consistent, unequivocal and convincing' evidence, and, accordingly, ordered Caberallo to deliver to plaintiffs marketable title to the homestead, subject only to the purchase money mortgage.

JUDGMENT FOR INTENTIONAL INTERFERENCE WITH CONTRACT IS NON-DISCHARGEABLE BY COLLATERAL ESTOPPEL; DEFAMATION JUDGMENT MUST BE REVIEWED FOR WILLFUL AND MALICIOUS INJURY

In the case of KYMN, Inc. a/k/a KYMN Radio and Wayne Eddy v. Sharon Katheryne Langeslag (In re Sharon Katheryne Langeslag, Adv. No. 06-3350 (Bankr. D. Minn. Apr. 6, 2007), Judge Kishel denied granted summary judgment on plaintiff creditor's non-dischargeability complaint for willful and malicious injury. Judge Kishel found that the collateral estoppel effect of plaintiff's $75,000 state court judgment for intentional interference with contractual relations satisfied the willful and malicious requirements, but that debtor's conduct that resulted in a $10,000 defamation judgment must be examined by further proceedings before summary judgment could be awarded under Section 523(a)(6)'s willful and malicious injury grounds for non-dischargeability.

Several years prior to the debtors' bankruptcy filing, plaintiff obtained state court judgments against the debtor in the amount of $75,000 for intentional interference with contractual relations and $10,000 for defamation. After the debtor filed bankruptcy, plaintiff creditor filed a non-dischargeability complaint citing only Section 523(a)(6) (willful and malicious injury) and sought summary judgment based on the earlier proceedings. The court first noted that the doctrine of collateral estoppel would apply to bind the debtor on those issues of law or fact that were common to both proceedings and that were settled by adjudication in the earlier proceeding. The court also recognized that U.S. Supreme Court's interpretation of "willful" in Section 523(a)(6) to mean "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury" and the Eighth Circuit's pronouncement that "malice" is "the intent to cause harm" or that the harm was "substantially certain or nearly certain to result."

The court examined the jury's findings for each tort and concluded that the

"willful and malicious" requirements were satisfied by collateral estoppel with respect to the jury's finding the debtor liable for intentional interference with contractual relations. However, the jury's finding with respect to the defamation claim were ambiguous as to whether the debtor intentionally or negligently caused the publication of the defamatory statements. Thus, summary judgment was denied on the complaint.

TRUSTEE'S TURNOVER MOTION AGAINST DEBTOR DENIED WITH RESPECT TO DEBTOR'S CHECKS HONORED AFTER BANKRUPTCY FILING

In Brown v. Pyatt (In re Pyatt), No. 06-3404 (8th Cir. May 23, 2007), the Eighth Circuit affirmed the Bankruptcy Appellate Panel's decision that had reversed the bankruptcy court's grant of a turnover motion in favor of the Chapter 7 trustee. In a case in which amicus briefs were filed for both sides, the Eighth Circuit found that the turnover motion must be denied with the debtor lost "possession, custody, or control" of the funds in his bank account when checks written to his account prior to his bankruptcy filing had been honored post-petition, but prior to the time the Trustee filed its motion for turnover.

On the date the debtor Pyatt filed for Chapter 7 bankruptcy, he had $1,938.76 in his account. The debtor had written several checks to creditors before he filed his petition that were honored after he filed for bankruptcy. On his bankruptcy schedules, Pyatt reported that he had only $300 in his checking account apparently subtracting the amount of the outstanding checks. Several months after the debtor filed his petition, the Chapter 7 trustee filed a motion for turnover with respect to the funds in his bank account on the date the petition was filed, and the bankruptcy court granted the motion. On appeal, the bankruptcy appellate panel reversed concluding that the Chapter 7 trustee was in a better position to recover funds paid out by a bank to third parties after the debtor's filing because only the trustee was authorized by the bankruptcy code to avoid postpetition transfers.

On appeal, the Eighth Circuit affirmed the bankruptcy appellate panel's decision denying the turnover motion finding that at the time the turnover motion was filed, the checks had already been honored and thus the debtor lacked "possession, custody or control of the funds." The court reasoned that under the trustee's interpretation of Section 542(a), the trustee could obtain a double-recovery by proceeding against both the debtor and the payees of the checks, and the statute's failure to include a prohibition on double-recovery meant that the drafters did not intend to permit the trustee to proceed against everyone who may have had control over property of the estate at some point after the petition was filed. The Eighth Circuit also found support for its decision in a pre-code decision.

BANKR. CT. DENIES CHAPTER 7 TRUSTEE'S 727 ACTION

In Charles Ries v. Dawn Nuetzman, No. 06-3033 (D. Minn. May 29, 2007) (J. O'Brien), the Chapter 7 Trustee brought a complaint under 11 U.S.C. §727(a)(4)(A) and §727(a)(2)(A) seeking to deny the Defendant debtor a discharge. The Bankruptcy Court found for the Defendant holding that she should be granted a general discharge in her main bankruptcy case.

The Defendant jointly owned with another party a home and business. The relationship ended and the two entered into a division of assets agreement in which the Defendant would receive all of the net proceeds from the sale of their home which

was titled in both of their names. The Defendant scheduled her interest in the home as a one half interest only. The Trustee filed an objection to the claimed homestead exemption and a motion for turnover, both of which were granted by default. Defendant later brought and was granted relief from the order sustaining the objection to exemption and Defendant was allowed a scheduled homestead exemption of $17,000.

Also at issue were the Defendant's transfers of a motor home formerly titled to her parents back into her parents names without receiving consideration and a Ford vehicle sold to a friend for less than market value that Defendant continued to have the use of.

The Trustee argued that Defendant knowingly and intentionally made false oaths in connection with her bankruptcy case when she said she never drove the conveyed vehicle after she sold it and her failure to disclose her interest in all of the net proceeds from the sale of her home. Further arguing that Defendant conveyed the vehicle and motor home with the intent to hinder, delay and defraud her creditors. Defendant argued that she in good faith made honest disclosures to the best of her ability.

The Bankruptcy Court found that despite the intent of the title transfer being specifically to prevent the property from being at risk in her bankruptcy, the transfer from her parents was a conveyance only of limited possession and use and that the transfer of title back to her parents simply terminated her possession and use of property she never had any real ownership interest in anyway. Thus, concluding that transfer of the motor home did not provide a basis for a §727(a)(2)(A) claim.

The Bankruptcy Court also found the sale of the Ford vehicle was legitimate, noting the disclosure of the transfer. The Court found the Defendant was desperate for cash, the discrepancy in her testimony regarding payments was nervous mistake, and her continued use of the vehicle after the sale was mere happenstance, thus there was not a basis for a §727(a)(2)(A) claim.

The Trustee's §727(a)(4) claim regarding Defendant's undisclosed interest in all of the proceeds from the sale of the home also failed. The Bankruptcy Court concluded the Defendant's disclosers were truthful in what was disclosed, she followed counsel's legal advice as towards how her interest should be scheduled and the trustee's roundabout questioning tactics at the 341 hearing interfered with Defendant's full disclosure.

DEBT FOUND NONDISCHARGEABLE UNDER SECTION 523(A)(2)(B)

The Society of Lloyd's v. Forgosh (In re Meredith Ann Forgosh) Bky. No. 05-38890, Adv. No. 06-3056 (Bankr.D.Minn. 2007) (J. O'Brien).

Finding no issues of fact, the Bankruptcy Court granted summary judgment in favor of The Society of Lloyd's under section 523(a)(2)(B) of the Bankruptcy Code. The undisputed facts justifying the finding of credit obtained by false pretenses were fairly egregious. Debtor, a law student, sought to become a member of The Society of Lloyd's. She listed as assets cash in the amount of $20,000, fee simple ownership of real estate in New York valued at $465,000, and investments in excess of $170,000. She valued her net worth to be $650,000. In fact, Debtor did not own the real estate and most of the investments were held in her parents' names for Debtor's benefit. Regardless, Debtor declared as part of the

application that the information was true and complete and that she understood the risks and benefits of a membership with The Society of Lloyd's.

After an underwriting loss in excess of over $12 billion, The Society of Lloyd's charged Debtor a premium. She did not pay the premium, and The Society of Lloyd's commenced an action which was ultimately reduced to judgment. The Society of Lloyd's commenced this action after Debtor petitioned for bankruptcy relief.

Section 523(a)(2)(B) of the Bankruptcy Code excepts from discharge any debt for money property or services obtained by use of a statement in writing "(i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with an intent to deceive." Debtor made two principal arguments in her defense, both of which the Court rejected. First, she claimed to have no idea that her representations to The Society of Lloyd's were false. Given Debtor's education, the Court determined she could not argue that she did not understand the declarations. Second, Debtor asserted the reliance by The Society of Lloyd's on her application was unreasonable under the circumstances. The Court disagreed, finding no cause for alarm when Debtor was an educated daughter of wealthy parents, who were themselves members of The Society of Lloyd's.