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In *Jacobus v. Binns* (*In re Binns*), No. 05-6008 (B.A.P. 8th Cir., July 21, 2005), the Eighth Circuit B.A.P. held that, under Illinois state law, a creditor who has obtained a default judgment cannot use it to collaterally estop debtors from defending a nondischargeability action under 11 U.S.C. § 523(a)(2)(B). The Eighth Circuit also held that the *Rooker-Feldman* doctrine does not apply to support a determination of nondischargeability under 11 U.S.C. § 523 (a)(2)(B) where a judgment was obtained by default.

The Plaintiff brought a state court action against the Debtors for alleged fraud with respect to the sale of the Debtors' business to the Plaintiff. The Debtors did not respond to the state court litigation, and a default judgment was entered against them. Subsequently, the Debtors filed for Chapter 7 bankruptcy. The Plaintiff initiated an adversary proceeding against the Debtors to determine whether the default judgment debt owed should be excepted from the Debtors' discharge. The Plaintiff moved for summary judgment in the adversary proceeding on the basis that the default judgment was sufficient proof of the fraud contemplated in 11 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(B). The bankruptcy court granted partial summary judgment in favor of the Plaintiff under 11 U.S.C. § 523(a)(2)(B) based on the application of collateral estoppel and the *Rooker-Feldman* doctrine, but denied summary judgment under 11 U.S.C. § 523(a)(2)(A). The Debtors timely appealed the bankruptcy court's partial summary judgment order. Only § 523(a)(2)(B) was addressed on appeal.

The Debtors raised four issues: (1) whether the findings in the default judgment was entitled to collateral estoppel effect; (2) the extent of that effect, ***i.e.***, whether the findings contained in the default judgment satisfied the requirements of § 523(a)(2)(B); (3) whether the application of the *Rooker-Feldman* doctrine to the default judgment supported determination of nondischargeability under § 523(a)(2)(B); and (4) whether the punitive damages awarded in the default judgment were nondischargeable. On de novo review, the B.A.P. held that the default judgment was not entitled to collateral estoppel effect and that the *Rooker-Feldman* doctrine did not apply under the circumstances of the case. Consequently, issues (2) and (4) were deemed moot by the B.A.P.

With regard to collateral estoppel, the B.A.P stated that the bankruptcy court correctly found that "the preclusive effect of a state court judgment in a subsequent federal case is determined by reference to state law." Although the bankruptcy was filed in Missouri, the default judgment was obtained in Illinois, and thus the bankruptcy court was required to examine the preclusive effect of a default judgment under Illinois law. The bankruptcy court held that under Illinois law, a default judgment does have collateral estopple effect on a nondischargeability action. However, the B.A.P. disagreed with the bankruptcy court's assessment of Illinois law. Additionally, the B.A.P. held that even if collateral estoppel did apply, the default judgment in this case was insufficient to satisfy the requirement under 11 U.S.C. § 523(a)(2)(B). Specifically, the B.A.P. stated that the default judgment lacked any allegation that the Plaintiff "reasonably relied" on the Debtors' representation as required under 11 U.S.C. § 523(a)(2)(B). The state court decision only stated that the Debtors had committed fraud. The B.A.P. found this omission of the reasonable reliance element to be critical because reasonable reliance cannot be inferred from a "bald finding" of fraud under Illinois law.

Applying a recent U.S. Supreme Court decision, the B.A.P. also held that the *Rooker-Feldman* doctrine did not supply an alternative basis to uphold the bankruptcy court's decision. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp*.,____U.S.____, 125 S. Ct. 1517 (2005). The court stated that the *Rooker-Feldman* doctrine applies only to incidences where the state court loser (the Debtors in the present case) seeks review of the adverse decision in a federal court. Here, the Debtors were not trying to overturn the default judgment, rather the Plaintiff was attempting to use the default judgment offensively to establish the nondischargeability of debt owed by the Debtors. Since the Debtors were not seeking to have an adverse state court action reversed by a federal court, the *Rooker-Feldman* doctrine simply did not apply to this context.

The Eighth Circuit B.A.P. Finds Multiple Representations Of A Creditor And A Debtor To Be A Conflict Of Interest

In *Needler v. Rendlen* (*In re Big Mac Marine, Inc.*), No. 04-6083 (B.A.P. 8th Cir., June 20, 2005), the B.A.P. held that an attorney already representing the largest creditor (the "Schmidts") in the Debtor's Chapter 11 case, could not be retained as the Debtor's counsel.

The Debtor was owned by the Schmidts when the Debtor filed for bankruptcy under Chapter 11. The Schmidts had sold their business to their son sometime prior to the bankruptcy, but then purchased the company stock back from their son. The Schmidts asserted a secured claim against the Debtor for approximately $500,000.00 for the repayment of a bank loan on behalf of the Debtor. However, the Schmidts' secured status was undocumented. Nine months before the Debtor filed for bankruptcy, the Schmidts filed a petition under Chapter 11 and retained William Needler ("Needler") to represent them. Needler had a duty to pursue claims on behalf of the Schmidts as their Chapter 11 bankruptcy counsel. After the Debtor filed under Chapter 11, Needler sought the bankruptcy court's approval to be retained as the Debtor's Chapter 11 counsel. The United States Trustee and the bank who lent the money to the Debtor (the "Bank") both objected to this multiple representation by Needler.

The bankruptcy court held that, because Needler was already representing the Schmidts (as the single largest creditor in the Debtor's case) and the Bank was a creditor in both the Debtor's case and the Schmidts' case, Needler would be put into an inevitable conflict of interest in having to represent both the Debtors and the Schmidts' interests against the Bank. The bankruptcy court stated that if the Bank's claim against the Schmidts was resolved, and the Schmidts withdrew their undocumented secured claim against the Debtor, then perhaps Needler would not have a conflict of interest. Until such time, the court concluded that Needler's employment as the Debtor's bankruptcy counsel must be denied. The bankruptcy court also denied an application for fees brought by Needler for work performed on behalf of the Debtor prior to the obtaining the court's approval to be employed.

Needler sought reversal of the bankruptcy court's decision to be retained as the Debtor's counsel and for denial of his fee application. The B.A.P. had no trouble finding that Needler manifested a conflict of interest when he proposed to represent the Debtor and the Schmidts. The B.A.P .found that when Needler applied to be retained as the Debtor's counsel, he was representing the Schmidts and could not have appropriately exercised his duties as counsel to both the Debtor and the Schmidts. What troubled the B.A.P. the most was that, while representing the Debtor prior to obtaining court approval, Needler filed a plan on behalf of the Debtor which apparently preferred the Schmidts as secured creditors despite a clear lack of evidence of their secured status. The B.A.P. stated that this action showed that conflict of interest was manifest.

As to the feed application, the B.A.P. affirmed the bankruptcy court's determination that Needler was not entitled to any recovery because no order authorizing his employment as the Debtor's counsel was ever issued. Section 330 allows the court to award compensation only to professionals employed under section 327 or 1103.

Delivery Of Copy Of Bankruptcy Pleading To Prosecutor Did Not Violate Bankruptcy Code § 524's Discharge Injunction

The Eighth Circuit Bankruptcy Appellate Panel affirmed the Bankruptcy Court's finding that creditors who were issued a pre-petition bad check by a Chapter 7 Debtor did not violate the Bankruptcy Code Section 524 discharge injunction by delivering a copy of a pleading in the bankruptcy case to the local prosecutor. *Swain v. Dredging, Inc. (In re Swain)*, No. 05-6007WM (B.A.P. 8th Cir., June 13, 2005). The B.A.P. concluded that actions taken against the debtor by the prosecutor were not attributable to the defendants, and the defendants actions did not violate the discharge injunction.

On February 15, 2000, Esther Swain delivered to Scott's Concrete a check in the amount of $17,261.00. The check was returned marked "insufficient funds." Jane Martin, the president or Scott's Concrete, contacted the county prosecutor and completed a referral form for bad checks provided by his office. The prosecuting attorney informed Mrs. Swain that the check had been returned for insufficient funds and that restitution must be made for the check plus a $10 merchant fee and a $25 statutory penalty. On May 30, 2000, Mrs. Swain delivered funds to the prosecuting attorney to cover the bad check and the merchant fee. The prosecutor forwarded the funds to the defendants.

On June 28, 2000, Esther and Frank Swain filed a Chapter 13 petition. The case was later converted to a Chapter 7 and the Debtors received a discharge on February 20, 2002. On March 6, 2002, the Chapter 7 trustee filed a complaint pursuant to Section 547 against Scott's Concrete seeking to avoid the May 30, 2000 payment from Mrs. Swain as a preferential transfer. The trustee and Scott's Concrete entered into a settlement agreement under which Scott's Concrete agreed to pay the trustee $11,500.00.

The day the preference action was filed, Jane Martin provided the prosecutor's office with a copy of the motion to convert the Swain's Chapter 13 case to a Chapter 7. Neither Martin nor anyone else at Scott's Concrete had any further communication with the prosecutor's office regarding this matter.

After the settlement of the preference action, the prosecutor's office sent another bad check letter to Mrs. Swain. In response, the Debtors' bankruptcy counsel and the Chapter 7 trustee sent letters to the prosecuting attorney. The prosecutor's office filed an affidavit of probable cause with the Circuit Court regarding the bad check. A warrant was issued and Mrs. Swain was arrested on February 29, 2004. The prosecutor eventually dismissed the criminal charges against Mrs. Swain.

In August 2004, the Debtors sued Dredging, Inc. doing business as Scott's Concrete, and Jane Martin, seeking compensatory and punitive damages for their alleged violation of the Debtors' discharge injunction issued under Section 524. The bankruptcy court concluded that the defendants did not violate the discharge injunction and granted summary judgment in favor of the defendants. The Debtors appealed.

Section 524 of the Bankruptcy Code provides that a bankruptcy discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any debt as a personal liability of the debtor. The Debtors argued that the defendants violated the discharge injunction by causing the prosecutor to prosecute Mrs. Swain for the pre-petition check. However, the B.A.P. stated that "the plaintiff's are simply wrong." The court noted that the only acts taken by the defendants were filling out the bad check referral form pre-petition and delivering a copy of the motion to convert to the prosecuting attorney's office post-petition. The B.A.P. agreed with the bankruptcy court that the defendant's actions did not violate the discharge injunction. No debt existed at the time the pleading was delivered because Scott's Concrete was paid in full pre-petition and there was no new debt until after the preference action was settled. Moreover, the delivery to the prosecutor of a copy of a public document, the motion to convert, did not constitute an act to collect a debt.

The Debtors' argument could only prevail if the prosecutor was acting as the defendants' agent for debt collection purposes. Agency relationship in this case would require the Debtors to show that: (i) the prosecutor held the power to alter legal relations between the defendants and the Debtors; (ii) the prosecutor was a fiduciary for the defendants within the scope of the agency; and (iii) the defendants had the right to control the conduct of the prosecutor with respect to the matters entrusted him. The B.A.P. found that none of the elements were present and this affirmed the bankruptcy court's granting of summary judgment in favor of the defendants. In a footnote, the court stated that the analysis and the result would be the same if the Debtors had also argued a Section 362 violation.

The Effect Of A Settlement Agreement On When A Debt/Claim Arises For § 547(b) Purposes

Peltz v. Edward C. Vancil, Inc. (In re Bridge Info. Sys., Inc.), 327 B.R. 759 (B.A.P. 8th Cir., 2005), involved a preference action brought by a Chapter 11 plan administrator ("Plaintiff") seeking the recovery of a settlement payment made during the preference period to the defendant, Edward C. Vancil, Inc., ("Vancil"). The B.A.P. reversed the bankruptcy court's judgment in favor of the Plaintiff, finding that the bankruptcy court failed to look behind the settlement agreement to discern the nature of the dispute.

The settlement agreement arose from a lease dispute. On February 18, 1994, Vancil and the Debtor's predecessor executed a lease for a term of three years which also contained a renewal option for an additional three years at market rate. On February 14, 1997, Vancil and the Debtor's predecessor signed a lease extension for an additional three-year term. The extension agreement contained an option to renew for two additional three-year terms at market rate, with market rate defined as "the rental rate quoted by Landlord for the building in which Tenant is located at the time the renewal option is exercised."

In 1999, the Debtor purchased the building and sent a letter to Vancil informing it that the Debtor did not intend to renew any leases. The Debtor proffered small settlement offers but Vancil did not accept them and instead, Vancil informed the Debtor of its intention to exercise the first of the two three-year options to renew the lease. The parties quarreled over the market rate now being quoted for the space which resulted in Vancil filing a petition for declaratory relief in the Missouri state court, asking the court to determine the fair rental rate. In the meantime, Vancil continued to pay rent to the Debtor's agent until December of 2000.

On May 19, 2000, the Debtor notified Vancil by letter that it considered the lease terminated, since Vancil did not accept the Debtor's market rate determination. On June 7, 2000, the Debtor again notified Vancil that it had terminated its lease and on June 30, 2000, the Debtor filed an unlawful detainer complaint in the Missouri state court.

On December 28, 2000, the Debtor and Vancil signed a settlement agreement which provided that the Debtor would pay Vancil a cash payment of $46,176.77 and an additional $15,000 when Vancil vacated the premises. On February 15, 2001, before Vancil vacated the premises, the debtor filed its Chapter 11 bankruptcy petition. Vancil timely vacated the premises after the filing, but it did not receive the additional $15,000.

The critical issue in the preference action was whether the settlement payment that Vancil received was payment on account of antecedent debt. The Plaintiff, as well as the bankruptcy court, relied on *Energy Coop., Inc. v. SOCAP Int'l, Ltd. (In re Energy Coop., Inc.)*, 832 F.2d 997 (7^{th} Cir. 1987), for the premise that a debtor incurs an antecedent debt, and becomes liable on a claim, at the time the debtor breaches a contract that gives rise to damages. The bankruptcy court reasoned, if a creditor has a claim against a debtor, then that debtor has incurred a debt to the creditor. The bankruptcy court found that Vancil's claim against the Debtor arose on May 19, 2000, when the Debtor sent the letter purporting to terminate the lease. The bankruptcy court relied on the doctrine of anticipatory breach of contract as the basis for the claim. The doctrine applies when one party to a contract repudiates that contract by manifesting by words or conduct a positive intention not to perform, this giving the injured party an immediate right to damages as if for a total breach. Vancil argued that the payment was nothing more than the negotiated sum for the value of its two remaining options to renew the lease.

The B.A.P. disagreed with the bankruptcy court and found that: "[t]he mere making of a request, however, by one party for more than he is entitled to is not a breach of the contract that gives the other party the right to rescind." The May 2000 letter informing Vancil of the lease termination "did not manifest a positive intention not to perform…," and "neither party acted as if the [l]ease was terminated." Therefore, Vancil did not suffer any damages as a result of the lease termination letter, and no debt was created.

The B.A.P. reasoned that, from the beginning of this dispute, the debtor and Vancil were attempting to negotiate the value of the two renewal options remaining on the lease. At the end of the negotiations, the parties agreed on a value and funds were paid in exchange for Vancil giving up its options, not to compensate it for damages suffered from any prior actions taken by the Debtor. The B.A.P. concluded: "That is not a payment on account of an antecedent debt; therefore, section 547(b) of the Code is not applicable. We conclude the 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 B.A.P. thus reversed the decision of the bankruptcy court.

Failure To Fulfill A Promise Is Not An Intentional Misrepresentation Under § 523(A)(2)(A)

In *Clauss v. Church (In re Church)*, No. 05-6010 SI (B.A.P. 8th Cir., July 26, 2005), the B.A.P. affirmed the bankruptcy court's finding that a creditor-attorney failed to demonstrate that a debt owed to him for attorney's fees was nondischargeable under 11 U.S.C. § 523(a)(2)(A).

The attorney represented the Debtor in modifying a marital dissolution decree. The attorney realized that the Debtor's only intention in seeking the modification was to harass his former spouse. He testified that because of the Debtor's unreasonable behavior, he incurred substantial attorney's fees. The Debtor did make monthly payments during the representation, but he still owed approximately $32,000. At the end of their relationship, and despite the attorney's concerns, he turned all the files over to the Debtor thus releasing his attorney's lien.

At some point during the course of the representation, the Debtor indicated that he was considering filing bankruptcy, but he allegedly assured the attorney that he would pay his bill in full and not seek to discharge it. The Debtor disputed this. The attorney filed a complaint under Section 523(a)(2)(A) alleging that the Debtor obtained his legal services through false representation, false pretenses or actual fraud. After a trial, the bankruptcy court found the attorney had failed to meet his burden of proof on any alleged cause of action and the debt was therefore dischargeable.

Section 523(a)(2)(A) excepts from discharge a debt obtained by the debtor's misrepresentation. According to the Eighth Circuit, the creditor must prove, by a preponderance of the evidence, that: (1) the debtor made false representations; (2) at the time made, the debtor knew them to be false; (3) the representations were made with the intention and purpose of deceiving the creditor; (4) the creditor relied on the representations; and (5) the creditor sustained the alleged injury as a proximate result of the representations. Furthermore, as emphasized by the U.S. Supreme Court, the creditor must also prove that his reliance was justifiable. The creditor's reliance is justifiable when "under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." Quoting *Field v. Mans*, 516 U.S. 59, 71 (1995).

The B.A.P. concluded that a promise to pay a debt is not misrepresentation merely because the Debtor fails to pay after the promise is made. The misrepresentation must be intentional and the creditor must show justifiable reliance on the misrepresentation. This, the bankruptcy court found, the attorney had failed to do, and the B.A.P. held that the court's findings were fully supported by the record. Both courts expressed skepticism concerning the justifiable reliance prong given the attorney's alleged knowledge and expertise.

Involuntary Petition Filing Upheld By The B.A.P.

In *Bock Transp., Inc., v. Paul (In re Bock Transp., Inc.)*, No. 04-6082WM (B.A.P. 8th Cir., July 5, 2005), the Debtor sought review of the bankruptcy court's denial of the Debtor's motion to dismiss the involuntary petition for filing in bad faith. The Bankruptcy Appellate Panel for the Eighth Circuit found no clear error in the bankruptcy court's factual findings that the creditor did not know that the Debtor had twelve or more creditors and that the case was not filed in bad faith.

Pursuant to 11 U.S.C. § 303(b)(1), an involuntary petition under Chapter 7 or 11 may be filed against a debtor by three or more entities holding claims. If the debtor has fewer than twelve creditors, one creditor may file the petition. 11 U.S.C. § 303(b)(2). Although the Bankruptcy Code does not have an explicit good faith requirement for filings, the Eighth Circuit has previously held that there is an implicit good faith requirement. Moreover, in *Basin Elec. Power Coop v. Midwest Processing Co.*, 769 F.3d 483, 486 (8th Cir. 1985), the court found that a bad faith filing can be cause for dismissal of a petition. The threshold question for bankruptcy courts to determine is whether the creditor knew that the debtor had twelve or more creditors.

Prior to filing an involuntary petition against the Debtor, the creditor conducted post-judgment discovery pursuant to a state court judgment. During a deposition, the Debtor's sole remaining principal identified eight creditors but could not positively identify more. Through its counsel, the Debtor promised to notify the creditor with the identity of other creditors by September 30, 2003. In an August 25, 2004 letter, counsel for the Debtor again indicated that the Debtor had more than 12 creditors but never produced the list of additional creditors as promised at the deposition. On August 27, 2004, the creditor filed an involuntary Chapter 7 petition against the Debtor.

The B.A.P. held that the determination of whether a creditor has knowledge of the debtor's creditors is a factual one that is reviewed for clear error. Unlike the court in *Basin Electric*, where the filing creditor admitted to having actual knowledge of additional creditors, the bankruptcy court here had to make a determination regarding the filing creditor's knowledge. Although conflicting evidence supported both parties' positions, the B.A.P. found no clear error in the bankruptcy court's findings that the creditor did not actually know that the Debtor had more than twelve creditors. Accordingly, the bankruptcy court did not abuse its discretion in denying the motion to dismiss.

Criminal Convictions Upheld For Failures To Disclose And Concealment Of Assets

United States v. Ryder, Nos. 03-3478 and 03-3479 (8th Cir., July 14, 2005) presents a case of debtor clients that you do not want to have, especially under the new bankruptcy law. The Debtors were farmers in Southern Iowa for many years and owned Ryder Farms, Inc. of Iowa ("Ryder Farms"). The Debtors and the entities they controlled owned approximately 4,300 acres of farmland in Iowa, Missouri, and Illinois. In July 1995, the Debtors filed for individual Chapter 7 bankruptcy relief in Iowa. Taking the position that Ryder Farms owned all of their farming assets, the Debtors did not disclose any real property, livestock, crops, or farm equipment in their bankruptcy schedules.

During the course of their bankruptcy proceedings, the bankruptcy trustee discovered that the Debtors had failed to disclose government subsidy payments for their participation in a conservation reserve program. It was also discovered that the Debtors owned land in both Illinois and Iowa, from which they received rental income. Upon discovery of the undisclosed assets, the Debtors continued to thwart the trustee's administrative efforts by filing, in Missouri, a Chapter 12 bankruptcy petition, and subsequently a Chapter 11 bankruptcy petition, on behalf of Ryder Farms. In their Chapter 7 proceeding, the Debtors had originally attempted to deny any ownership interest in Ryder Farms. Both cases were dismissed.

Based on their failure to disclose assets from their farming operation to the bankruptcy trustee, the Debtors were indicted on federal bankruptcy fraud charges. They were convicted on various counts of conspiring to conceal assets, concealing assets, and money laundering. Their convictions were upheld on appeal.

Avoidance Of A Post-Petition Property Transfer Under § 549

In *Georgen-Running v. Bidwell (In re Bidwell)*, 326 B.R. 759 (Bankr. D. Minn. 2005), the bankruptcy court, the Honorable Robert J. Kressel, found that the Debtor had an interest in property not originally disclosed in his bankruptcy schedules and subsequently avoided a post-petition transfer of property of the estate. The Debtor did not disclose his interest because he did not know that it existed.

On March 7, 1996, Florence E. Bidwell ("Bidwell"), the Debtor's mother, signed a quitclaim deed to her home, naming her children Colleen A. McFarlane and the Debtor as cotenants, each with a one half remainder interest in the property. Bidwell signed the deed, and on Marcy 19, 1996, her attorney filed it with the Hennepin County Recorder. Neither McFarlane nor the Debtor knew about the execution or filing of the deed. The Debtor filed his petition under Chapter 7 on October 1, 1998. The Debtor did not list his one half remainder interest in the property in his schedules and as a result, the trustee did not administer the property prior to the closing of the case on December 28, 1999.

In the fall of 2002, Bidwell decided to sell her home and as part of the sale process, the Debtor became aware of his one half remainder in the property. On December 30, 2002, the Debtor and his wife executed a quitclaim deed for the property transferring their remainder interest in the property back to Bidwell. On that same day, Bidwell sold the property netting $148,700.00 after expenses. Bidwell subsequently died. The

Debtor filed an application to reopen his bankruptcy case which was granted.

The trustee filed this adversary proceeding seeking to avoid the transfer of the real estate interest from the Debtor to Bidwell pursuant to 11 U.S.C. § 549 and recover the property or its equivalent value from one or more of the defendants under 11 U.S.C. § 550. The Debtor claimed that he did not have an interest in the disputed property at the time of his bankruptcy case.

Judge Kressel stated that for the Debtor to have an interest in the property, Bidwell must have transferred title to the Debtor. Under Minnesota law, the essential element for delivery depends on the intent of the grantor. ***Vessey v. Dwyer***, 133 N.W. 613, 614 (1911). When addressing a deed recorded without the transferee's knowledge, the bankruptcy court adopted the reasoning from ***Vessey***, wherein if the transfer is beneficial to the transferee, it is presumed that delivery is completed in the absence of evidence that the grantor did not intend a delivery.

The bankruptcy court noted that Bidwell consulted an attorney, acted on his advise and signed a quitclaim deed on her home naming her children, including the Debtor, as cotenants, while reserving for herself a life estate. The deed was properly recorded with the Hennepin County recorder. By recording the deed, the court found that Bidwell indicated an intent to surrender control of the remainder interest as the recording of the deed raises the presumption that she intended to transfer title according to its terms to her children. The bankruptcy court further found that the Debtor failed to provide any competent evidence to rebut the presumption. The court concluded that additional circumstances also supported the finding that the recording of the deed was intended to transfer the remainder interest. "Clearly [Bidwell] delivered a deed transferring a remainder interest in the property to the Debtor, and did do intentionally."

With regard to acceptance, the court found that "the majority of cases state that if the grantor's actions meet the elements for delivery, then acceptance of the deed is presumed when the grant does not impose a burden upon the grantee." The court was not persuaded by the Debtor's arguments that the remainder interest was a future interest, did not benefit him and was actually a detriment to him. Instead, the bankruptcy court held that remainder interest in property "is an asset that has value," can be valued and sold for monetary gain," "improved the debtor's net worth" and "[i]n Minnesota, a party gains a present interest in property when he receives a remainder interest." The court concluded that the Debtor accepted the gift because it represented a benefit to him, and he did not make any attempt to disclaim his remainder interest once he was aware of it. The filing of the deed created his interest in the property.

The court further determined that the interest in the property was property of the estate because the Debtor held a one half remainder interest in the property from March 19, 1996 until December 30, 2002, and his bankruptcy petition was filed in 1998. 11 U.S.C. § 541(a)(1) provides that the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." Further, "[o]nly property that is properly scheduled under 11 U.S.C. § 521(1) is deemed abandoned by the closing of the case. 11 U.S.C. § 554(c); ***Vreugdenhill v. Navistar Int'l Transp. Corp.***, 950 F.2nd 524, 526 (8th Cir. 1991). Since the Debtor never included the property on his schedules, and the trustee was unaware of it, the property remained property of the estate even after the bankruptcy case was closed." Therefore, "[t]he transfer of the property from the Debtor back to [Bidwell] on December 30, 2002 represented a post-petition transfer of property of the estate. It was not authorized by any provision of the bankruptcy code or by the court. It is therefore avoidable pursuant to 11 U.S.C. § 549(a)(1)."

Finally, pursuant to Bankruptcy Code § 550(a), the trustee may recover from any initial transferee or any immediate transferee of the initial transferee. However, the recovery issue was previously resolved by the parties' stipulation. As part of the stipulation, $73,000.00 was deposited in the trustee's trust account that would pay for any judgment in favor of the trustee resulting from the bankruptcy court's determination that the Debtor had an interest in the property. Therefore, the bankruptcy court granted the trustee's motion for summary judgment which allowed her to collect the $72,920.00 from the trust account.

Did Bank's Administrative Freeze On Chapter 7 Debtors' Checking Account Violate Sections 362 Or 542?

In *Calvin v. Wells Fargo Bank, N.A. (In re Calvin)*, Case No. 05-35925 (Bankr. S.D. Tex., Aug. 25, 2005), the United States Bankruptcy Court for the Southern District of Texas, Houston Division, held that the bank did not violate the automatic stay when, upon receipt of notice of its customers filing bankruptcy, the bank froze funds in the Debtors' account and tendered the funds to the trustee.

On April 15, 2005, the Debtors, Stanley H. Calvin and Barbara A. Calvin, filed Chapter 7 bankruptcy. Wells Fargo Bank has a nationwide policy of placing an "administrative freeze" on accounts exceeding $5,000 of debtor-customers who file Chapter 7. Upon freezing an account, the bank notifies the trustee and the debtor of the freeze and tenders the funds to the trustee along with a request that the trustee direct the Bank to whom the funds should be paid. On April 18, the Bank learned of the Debtors' bankruptcy, froze $8,320.26 in the Debtors checking account and sent the above described notices to the Debtors and to the trustee. On April 27, the Debtors filed a motion to hold the Bank in civil contempt and for damages for violation of the automatic stay.

In opposing the Debtors' motion, the Bank contended that its policy was in compliance with Section 542 and it was therefore not liable to the Debtors for any violations under Section 362. The court resolved the case by holding that the Debtors did not have standing to object to the freezing of funds. Once the Debtors filed Chapter 7, the funds became part of the estate, and only the trustee had standing to object.

Nonetheless, the court did use the case as an opportunity to evaluate Wells Fargo's policy of freezing funds in light of Section 542. The court began by examining whether subsection 542(a) or 542(b) applied. The court determined that 542(b) likely controlled in that the Bank was an "entity," a bank account is a "debt that is property of the estate," and therefore, the Bank had an obligation to pay the funds to the trustee or "on order of the trustee." If so, the court noted that the Bank's policy of tendering funds to the trustee satisfied the requirements of 542(b). But, the court further stated that if Section 542(a) applied, the Bank "deliver" property to the trustee. The Bank needed to close the account and mail a check to the trustee to constitute delivery under Section 542(a). Yet, the court cautioned, some, if not many, Chapter 7 trustees would “take umbrage at having to establish a separate account for each check received from a bank.”

However, the court noted that it probably make good business sense for the Bank to have a policy that freezes the accounts of depositors who file a Chapter 7 petition. In this manner, the Bank can shield itself from liability to a trustee while the trustee determines whether the funds are exempt, non-exempt or of inconsequential value to the estate. It is this potential exposure to trustees, not to debtors, upon which a bank must focus.

While a Texas bankruptcy court decision, the facts and legal conclusions of this decision have national implications. The bank involved in this case has offices throughout the United States, including Minnesota. Large banks and other large lending institutions will undoubtedly review their policies regarding accounts of Chapter 7 debtors. As a result, debtor-attorneys and trustees need to be aware of current bank policies and future policies that may develop as a result of this decision.

BANKRUPTCY COURT'S OCTOBER SCHEDULE

Deadlines for filing under existing law: The Bankruptcy Abuse Prevention and Consumer Protection is effective Monday, October 17, 2005. Therefore, the deadline to file in paper or on diskette is **Friday, October 14th by 5 p.m.** The deadline to file electronically is **Sunday, October 16th at 11:59 p.m.**

Clerk's Office Hours on October 15 and 16: Minneapolis Clerk's office personnel will be available to assist callers with electronic filing problems on **Saturday, October 15 from 8:00 a.m. to 3:00 p.m.** and on **Sunday, October 16 from 1:00 p.m. to 6:00 p.m.** An emergency number will be posted on the court's website for use by attorneys encountering electronic filing problems between 6:00 p.m. and 11:59 p.m. on Sunday, October 16. Attorneys are urged to complete their filings before 6:00 p.m. on Sunday to avoid any last minute problems.

Case Search Function to be Deactivated: To ensure proper functionality of the ERS system over the weekend of October 15 and 16, when the court anticipates receiving a large volume of filings, the "case research" function will be deactivated. ERS registered attorneys can search the court record using the "case filing" option, after entering their log in and password.

Conversion to CM/ECF begins at 12:01 a.m. on October 17: The ERS case filing system will be shut down at 12:01 a.m. on Monday, October 17, marking the beginning of the court's conversion to CM/ECF. The court anticipates the conversion will take approximately nine days; CM/ECF is expected to be operational on Thursday, October 27.

Filings between October 17 and 27: During the nine day period during which the court will convert its database and images from ERS to CM/ECF, filings can be made on diskette or CD/ROM, via e-mail after receiving permission from the clerk's office or, as a last resort, in paper. As much as possible, attorneys are encouraged to submit filings prior to October 17 and to avoid making any but emergency filings during the conversion period.

CM/ECF Test Filings: Attorneys are further encouraged to complete their test filings required for CM/ECF registration as soon as possible. The CM/ECF training database, to which attorneys submit test filings, will be operational during the conversion period for this purpose.