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Landlord Claim Cap Does Not Limit Actual Fraud Exception from Discharge

In *Lariat Companies, Inc. v. Wigley (In re Wigley)*, 15 F.4th 1208 (8th Cir. Oct. 18, 2021), the Eighth Circuit Court of Appeals affirmed both the Eighth Circuit B.A.P. and bankruptcy court in that the landlord cap of 11 U.S.C. § 502(b)(6) establishes the amount of the allowed claim against the bankruptcy estate, but the cap does not preclude an exception from discharge under 11 U.S.C. § 523(a)(2)(A) for actual fraud.

In the case, a landlord obtained a state court judgment against the husband of the debtor for damages under a lease and a personal guaranty. Further, the state court entered judgment based on voidable transactions for transfers of interests in a checking account and in partnerships. The state court found the transfers from the husband to the debtor were done "with actual intent to hinder, delay, or defraud any creditor of the debtor." Minn. Stat. § 513.44. The husband and debtor were held jointly and severally liable for the voidable transactions.

Thereafter, the husband filed a bankruptcy case. The landlord filed a claim in the husband's bankruptcy for the lease termination. The bankruptcy court applied section 502(b)(6) to cap the landlord's allowable claim in the husband's bankruptcy case.

Then, the debtor filed her own bankruptcy case. The landlord filed a claim in the debtor's bankruptcy for the voidable transaction judgment. The bankruptcy court held the landlord cap as applied in the husband's case did not extinguish the debtor's liability to the landlord. Further, the bankruptcy court held that the claim against the debtor was excepted from discharge pursuant to section 523(a)(2)(A). The Eighth Circuit B.A.P. affirmed. *Lariat Cos. v. Wigley (In re Wigley)*, 620 B.R. 87 (B.A.P. 8th Cir. 2020).

The Eighth Circuit affirmed that the landlord cap of section 502(b)(6) does not preclude an exception from discharge under section 523(a)(2)(A) to the extent it was obtained by actual fraud. Further, the Eighth Circuit determined that the bankruptcy court did not err in its application of the badges of fraud under state law or in its determination that the debtor received voidable transfers. The Eighth Circuit affirmed the bankruptcy court's findings as to the financial distress surrounding the transfers and requisite wrongful intent. The Eighth Circuit noted that the debtor's fraudulent transfer scheme was not as egregious as other cases, but nevertheless the evidence supported that the debtor intended to commit actual fraud. Therefore, the Eighth Circuit affirmed the nondischargeability under section 523(a)(2)(A).

Discharge Exception for Violation of Securities Laws Does Not Apply to Violations by a Third Party

In *Nationwide Judgment Recovery, Inc. v. Simons (In re Simons)*, Ch. 7 Case No. 20-40631, Adv. No. 21-04027, 2021 WL 5225940 (Bankr. D. Minn. Nov. 9, 2021), Judge Sanberg held that § 523(a)(19)(A)(i) does not apply to a debtor that has not been found to have violated securities laws and that the plaintiff failed to present evidence that the debtor purchased or sold securities as required under § 523(a)(19)(A)(ii).

Simons was a net winner in a Ponzi scheme perpetrated by an entity that consented to judgment in favor of the SEC for violation of the Securities Act of '33. The court-appointed receiver of the entity prevailed on state law fraudulent transfer actions against all net winners, including Simons.

A few years after judgment was entered against him for fraudulent transfer, Simons filed a voluntary petition under chapter 7 and the receiver filed a complaint to except the judgment from discharge pursuant to § 523(a)(19). The defendant filed a motion for summary judgment arguing that the complaint fails to plead that he violated any securities laws or bought or sold any securities. The receiver argued that the fraudulent transfer judgment relates back to the SEC action against the Ponzi scheme perpetrator or, in the alternative, that the fraudulent transfer resulted from common law fraud in connection with Simon's purchase or sale of securities.

Noting that the case raises a question of first impression in the Eighth Circuit, Judge Sanberg analyzed the circuit split on whether a debt traceable to a securities law violation that was not committed by the debtor falls under § 523(a)(19)(A)(i). *See Lunsford v. Process Techs. Servs., LLC (In re Lunsford)*, 848 F.3d 963 (11th Cir. 2017) (stating that § 523(a)(19) applies to violations of securities laws by a third party); *Okla. Dep't of Sec. ex rel. Faught v. Wilcox*, 691 F.3d 1171 (10th Cir. 2012); *Sherman v. SEC (In re Sherman)*, 658 F.3d 1009 (9th Cir. 2011) (holding that § 523(a)(19) applies only when the debtor is directly responsible for the violation).

In agreeing with the Ninth and Tenth Circuits, Judge Sanberg reviewed the legislative history and held that "[t]he basic question [under § 523(a)(19)(A)(i)] is whether the underlying judgment is '*for the violation*' of any securities law" (emphasis added), not whether a fraudulent transfer judgment could be traced to a securities violation committed by a non-debtor. Judge Sanberg noted that holding otherwise would be contrary to the Eighth Circuit's directive that exceptions to discharge be construed narrowly.
For § 523(a)(19)(A)(ii), Judge Sanberg held that the plaintiff failed to show that the fraudulent transfer was in connection with the purchase or sale of securities.

Because § 523(a)(19) does not apply to a non-debtor's violation of securities law and the plaintiff failed to prove that the defendant purchased or sold securities, Judge Sanberg granted summary judgment in favor of the defendant.

Chapter 7 Counsel Cannot Charge More for Postpetition Fee Arrangements

In *In re Ralph*, Case No. 21-31428 (Bankr. D. Minn. Dec. 13, 2021), Judge Fisher took a first step toward addressing whether consumer bankruptcy attorneys may enter into arrangements with their chapter 7 clients to receive payment post-petition. The fee arrangement at issue provided that the debtor would pay the attorney no fees pre-petition and instead would pay $2,497 post-petition in twelve monthly installments. The record included evidence that if the Debtor instead paid the fee in full pre-petition, the fee would have been less than $2,497. Judge Fisher held that, as a general matter, "fees paid over time post-petition which are greater than what would be charged as a lump sum pre-petition are unreasonable." Despite this holding, Judge Fisher left the fee arrangement intact because there had been no clear guidance in place.

This holding tracked *In re Allen*, a recent decision by the Bankruptcy Appellate Panel for the Eighth Circuit. 628 B.R. 641 (B.A.P. 8th Cir. 2021). Like the B.A.P. in *In re Allen*, Judge Fisher declined to reach the substance of whether bifurcated fee arrangements are *per se* impermissible. Instead, he briefly surveyed the split of authority on this and related issues, and noted the new procedure required in this district by the Bankruptcy Court's recent *en banc* administrative order requiring attorneys to file an application for approval of fee arrangements that include a post-petition payment. Post-Pet. Attorney's Fee Arrangements in Chapter 7 Cases, *In re Administrative Orders and Amendments to Local Rules and Forms*, No. 21-00401 (Bankr. D. Minn. Nov. 8, 2021) (*en banc*), Dkt. No. 3; Post-Pet.

Attorney's Fee Arrangements in Chapter 7 Cases, *In re Administrative Orders and Amendments to Local Rules and Forms*, No. 21-00401 (Bankr. D. Minn. Dec. 13, 2021) (amended *en banc*), Dkt. No. 6.

Although Judge Fisher's ruling does not provide binding precedent for future decisions, the amended *en banc* order indicates that the bankruptcy judges in this district are closely watching this issue and coordinating to provide a consistent approach.

A Post-Verdict Motion for Judgment as a Matter of Law Cannot Raise New Issues

In *Olsen as Trustee for Xurex, Inc. v. Di Mase et al.*, 24 F.4th 1197 (8th Cir. 2022), the Eighth Circuit affirmed the lower court's determination that the defendant's post-verdict motion for judgment as a matter of law did not comply with Fed. R. Civ. P. 50(b) because it raised legal errors and factual omissions that were not identified in defendant's *pre-verdict* motion for judgment as a matter of law under 50(a).

In 2010, Xurex and DuraSeal Pipe Coatings Company, LLC (DPCC) executed a license agreement requiring DPCC to make minimum monthly purchases and pay royalties through 2018. Defendant Lee O. Krause was engaged as a consultant by the owner of DPCC's parent company, DuraSeal Holdings. In 2014, Xurex and the head of DuraSeal Holdings began discussing bankruptcy with Krause. Krause drafted an amendment to the 2010 license agreement which eliminated minimum purchase obligations, *but* allowed DuraSeal to keep its exclusive licenses, and gave manufacturing rights to DuraSeal Holdings and DPCC. Krause signed the amended agreement on behalf of DuraSeal Holdings and DPCC as "CEO."

In 2014, Xurex filed for bankruptcy. Xurex's Chapter 7 trustee sued Krause and twenty other defendants for conduct leading up to the 2014 agreement. After his counsel withdrew, Krause proceeded pro se. Before the verdict, Krause moved orally for judgment as a matter of law under Rule 50(a). After the jury verdict against him, Krause renewed his motion under 50(b). In his post-verdict 50(b) motion, Krause made arguments that he did not make in his 50(a) motion—specifying for the first time the alleged legal errors and factual omissions on which he based his motion. The district court held that Krause's post-verdict motion did not comply with 50(b) as his pre-verdict 50(a) motion did not contain any of the arguments Krause raised in his 50(b) motion. The post-verdict motion challenged wholly different grounds than the pre-verdict motion, and as such, the pre-verdict motion failed to put the plaintiff on notice of the arguments in his later 50(b) motion. As a result, the district court held Kraus' earlier motion failed to preserve the arguments in the 50(b) motion.

The Eighth Circuit affirmed, holding that despite the liberal construction given to pro se litigants, the 50(a) motion "[did] not implicate, in any way" the arguments Krause raised in his Rule 50(b) motion." As a result, Krause's post trial 50(b) motion failed to comply with the Federal Rules.

BAP Affirms Denial of State of North Dakota's Statutory and Contract Claims

In *State of North Dakota, ex rel. Wayne Stenehjem v. Bala (In re Racing Services, Inc.)*, 635 B.R. 498 (B.A.P. 8th Cir. 2022), the Bankruptcy Appellate Panel affirmed the denial of the State of North Dakota's statutory claim and contract claim in a case that has dragged on for over 17 years.

In this case, the State of North Dakota (the "State") agreed to pay the Debtor $15 million for collecting unauthorized taxes from the Debtor while it provided pari-mutuel horse wagering services. Creditors filed claims to partake in the distribution of those funds.

A month after the court held a week-long evidentiary hearing on claims filed, the State filed a new proof of claim, which prompted the court to hold an evidentiary hearing. At the conclusion of the evidentiary hearing, the State orally moved to amend its claim to add a theory of breach of contract on behalf of Team Makers Club, Inc., a charity that at one time had a contractual relationship with the Debtor to provide off-track betting services. The Debtor's president objected to the State's claims.

The bankruptcy court concluded that the State's statutory claim must fail because the State lacked standing to file a claim on behalf of Team Makers and the claim was barred by laches. On appeal, the BAP in a previous decision affirmed that the State lacked standing but reversed the court's decision on laches and remanded for the bankruptcy court to determine the Team Maker's claim and any objections thereto. *In re Racing Servs., Inc.*, 619 B.R. 681 (B.A.P. 8th Cir. 2020).

On remand, the State filed yet another new claim in an attempt to formally include the breach of contract claim just hours before the bankruptcy court held a hearing on how to proceed with the remand. The State contended that the remand was broad enough to allow it to add the breach of contract claim and to supplement the evidentiary record. However, the bankruptcy court disagreed and denied the State's claims in their entirety.

First, the bankruptcy court denied the State's statutory claim. In short, the State failed to articulate any basis to support its claim that the Debtor owed it money under the North Dakota Administrative Code, North Dakota Century Code, and Constitution of North Dakota. Further, the State failed to provide any evidence of the concrete amount the Debtor owed. Lastly, the State argued that the Debtor should not retain the excess funds once all allowed creditors are paid in full. The bankruptcy court held that that would be in contravention of the priority of payment provided for under the Bankruptcy Code pursuant to 11 U.S.C. § 727. The BAP found that the bankruptcy court did not err in sustaining the objection to the State's statutory claim.

Second, the bankruptcy court denied the State's breach of contract claim on both procedural and substantive grounds. In denying the State's attempt to amend its claim, the bankruptcy court relied upon its inherent authority to control its docket and prevent undue delays in the disposition of its cases, as further reflected by the public policy underlying Federal Rule of Civil Procedure 1 and the equitable powers granted by 11 U.S.C. § 105. The BAP held that the bankruptcy court did not abuse its discretion in denying the addition of the breach of contract claim.

The bankruptcy court quickly disposed of the State's contract claim. First, the State failed to provide evidence that the contract at issue was in place at the applicable time. Second, even if that evidence existed, the State failed to prove that the Debtor breached the contract because it provided no evidence of the amounts the Debtor paid to Team Makers. Lastly, the State failed to provide the amount of damages. Thus, the BAP affirmed that the State failed to meet its burden of proof for the contract claim.

In summary, the BAP affirmed the denial of the State of North Dakota's statutory and contract claims. In doing so, the BAP declared: "The time to reach a final adjudication on claims is long overdue."

Standing and Judicial Estoppel in Litigation Collateral to Chapter 13 Case Determined by Debtor's Intent and Whether Bankruptcy Estate Stands to Benefit

In *Hughes v. Wisconsin Central Ltd et al.*, 2021 WL 5042101 (D. Minn. Oct. 29, 2021), U.S. District Court Judge Donovan W. Frank denied defendants Wisconsin Central Ltd., Portaco,

Inc. and Racine Railroad Products, Inc.'s motion for summary judgment and held that it was premature to determine whether plaintiff had standing to pursue claims or should be judicially estopped.

The plaintiff filed a voluntary petition under chapter 13 in 2012. In 2018, the bankruptcy court closed the plaintiff's chapter 13 bankruptcy case. A year after receiving a chapter 13 discharge, the plaintiff brought various federal and state-law claims against defendants for injuries that resulted from accidents that occurred in 2016 and 2017 while he was employed at Wisconsin Central Ltd. Before the case was closed, plaintiff did not amend his schedules to disclose his claims against defendants. The plaintiff reopened his Chapter 13 case in August 2020 and amended his Schedule B to disclose the claims against defendants.

In their motions for summary judgment, defendants argued that plaintiff lacked standing to pursue a claim that belongs to the bankruptcy estate and that he should be judicially estopped from taking a position that is inconsistent with the position in his bankruptcy case.

The court noted that although the trustee generally is the only one with authority to pursue claims that belong to the bankruptcy estate, a chapter 13 debtor may have standing to bring a suit on behalf of the bankruptcy estate. The court rejected the defendants' argument that the bankruptcy estate could not benefit after the chapter 13 plan was completed because it might be possible for the plan to be modified. Therefore, it was too early to know if the claim was being pursued for the benefit of the estate.

While not citing *Stallings v. Hussman*, 447 F.3d 1041, 1047 (8th Cir. 2006), the court implicitly applied its three factor test to determine whether to apply judicial estoppel. Because the case had been reopened and the schedules were amended, it was not clear that the party took inconsistent positions. Second, the court held that the record did not indicate that the plaintiff acted with intent to mislead or manipulate the judicial system (possibly because the bankruptcy estate might benefit). Third, because the interests of creditors may still be implicated, it was not clear that there would be unfair detriment to the defendants if not estopped.

Based on the foregoing, the Court denied defendants' motions for summary judgment without prejudice, stayed the case so the parties could seek clarification on whether the plaintiff's claims against defendants would benefit his bankruptcy estate, and instructed the parties to update the Court on said issue.

District Court Affirms Discovery Order for Bankruptcy Scrub Procedures

In *Lynch v. Experian Information Solutions, Inc.*, 581 F. Supp. 3d 1122 (D. Minn. 2022), the district court affirmed a discovery order for production as to the accuracy of credit reporting procedures to remove debt discharged in bankruptcy (so called "bankruptcy scrubs").

Plaintiffs alleged that the credit reporting agency continued to report a particular account as owing for more than one year after it was discharged in bankruptcy. Plaintiffs asserted this error violated the Fair Credit Reporting Act ("FCRA"), as a negligent or willful failure to follow reasonable procedures intended to assure the accuracy of credit reporting for 15 U.S.C. § 1681e(b). In the case, Plaintiffs filed a motion to compel discovery. In his order, the magistrate judge granted and denied in part these requests. Experian objected on the grounds that certain production ordered was unduly burdensome, irrelevant, or duplicative.

The district court first addressed discovery ordered with respect to production of limited communications and documents from third-

party data providers "containing precatory language about the reliability of the information provided." The district court affirmed that the limited production was relevant as it alerted Experian to the potential unreliability of the data on which it based its reports.

The district court next examined the proportionality for Federal Rule of Civil Procedure 26(b)(1) of the discovery ordered limited to information that would allow an experienced attorney in FCRA to understand how Experian's procedures worked to remove the debt discharged in the bankruptcy from the credit reporting. The district court was unpersuaded that the magistrate judge failed to assess the proportionality factors. In its analysis, the district court noted that the discovery order limited the production based on the burden on Experian and the time period relevant to the case. Notable, the district court rejected Experian's arguments that the discovery had already been produced, or the case merits little discovery based on similarity to other cases. The district court also declined to assume the magistrate judge failed to apply the correct rules because he did not detail every aspect of his proportionality analysis in his written order.

The discovery order was affirmed.

District Court Dismissed Invasion of Privacy Claim and Referred Stay Violation Claim

In *Reinhardt v. Rent-A-Center West, Inc.*, No. 21-CV-2158 (NEB/LIB), 2022 WL 161571 (D. Minn. Jan. 18, 2022), the district court refused to exercise supplemental jurisdiction over a state law claim for invasion of privacy and referred to the bankruptcy court the other claim for violation of the automatic stay under 11 U.S.C. § 362.

In the case, the defendants attempted to repossess a mattress and box spring after the plaintiff filed a bankruptcy petition. The plaintiff sued the defendants on the following claims: (1) violation of the automatic stay under 11 U.S.C. § 362(k) and (2) state law invasion of privacy. The defendants filed a motion to dismiss or, in the alternative, to refer the matter to the bankruptcy court.

In response to the motion, the plaintiff argued that courts in the District of Minnesota have historically retained jurisdiction over actions with both a Section 362(k) claim and an additional count. In rejecting the argument, the court noted that it had original jurisdiction over the Section 362(k) claim, but the additional count for invasion of privacy was not the type of claim that the district court had historically exercised supplemental jurisdiction to retain, such as federal claims of action or disputes that arose outside the bankruptcy proceedings. As such, the district court declined to exercise supplemental jurisdiction over the claim for invasion of privacy.

For the Section 362(k) claim, the court held that referral to the bankruptcy court was appropriate and would not impair the plaintiff's right to a jury trial.

The state law claim for invasion of privacy was dismissed without prejudice.

District Court Dismissed Claims Against the Debtor's Liquidators that Filed a Chapter 15 Petition for Recognition of a Foreign Proceeding

In *ASI, Inc. v. Aquawood, LLC*, No. CV 19-763 (JRT/HB), 2022 WL 980398 (D. Minn. Mar. 31, 2022), the court determined that it did not have personal jurisdiction for alter ego and fraudulent transfer claims against a debtor's liquidators that filed a petition for recognition of a foreign proceeding under Chapter 15 of the Bankruptcy Code.

The plaintiff won a judgment in the District of Minnesota in the amount of $8.5 million

against the debtor. Thereafter, the debtor initiated proceedings in its home jurisdiction of Hong Kong to liquidate its assets. The principals of the debtor also provided funding to the liquidators to carry out a Chapter 15 bankruptcy petition in the District of New Jersey for recognition of the foreign proceeding, but allegedly concealed the debtors' assets and otherwise misled the liquidators into believing the debtor conducted little of its business in the United States and had less than $100,000 in assets in the United States. The liquidators filed the Chapter 15 bankruptcy petition, triggered a bankruptcy stay, and blocked the plaintiff's efforts to pursue legal action against the debtor. Thereafter, a Hong Kong court in the liquidation proceedings rejected a settlement that would have given the debtor's creditors .1% of their claims against the debtor.

In the instant case, the defendants included the debtor, the principals of the debtors, and the liquidators in the Hong Kong liquidation. The plaintiff alleged that the defendants were a complex web of alter egos of another, engaged in fraudulent transfers intended to prevent the plaintiff from recovering its judgment from the debtor, and aided and abetted the fraudulent transfers. The amended complaint included allegations that the principals shifted sales, employees, accounts, documents, intellectual property, product inventory, good will, and payment demands to other entities to defraud creditors. The defendants filed motions to dismiss the amended complaint for failure to state a claim and lack of personal jurisdiction.

In its decision, the court held that the plaintiff failed to state a fraudulent transfer claim against the liquidators. The court also concluded that aiding and abetting fraudulent transfer claims are not cognizable under the Minnesota Uniform Voidable Transactions Act. For the alter ego claims, the court dismissed the claims that alleged corporate defendants were alter egos of other corporate defendants.

As to personal jurisdiction, the plaintiff argued the court had jurisdiction over the liquidators based on the minimum contacts test for the Due Process Clause of the Fourteenth Amendment. In rejecting the argument, the court determined that the liquidators lacked sufficient minimum contacts with Minnesota because the liquidators were residents of Hong Kong and never engaged in business in Minnesota. Further, the court found that the only nexus between the case and Minnesota was the Chapter 15 bankruptcy case in New Jersey where liquidators sought to dispose of the debtor's assets. The court also recognized that a foreign representative filing a bankruptcy petition does not subject itself to the jurisdiction of a U.S. Court for any purpose under 11 U.S.C. § 1510. As such, the court concluded it did not have jurisdiction over the liquidators under the minimum contacts test.

The plaintiff also argued that the court's jurisdiction over the debtor was imputed to the liquidators. In rejecting the argument for imputed jurisdiction, the court determined that the debtor was not acting on behalf of the liquidators. Rather, the court found that the liquidators served an entirely different function—to liquidate the debtor's business and distribute its assets to creditors.

The plaintiff further argued that the court had personal jurisdiction over the liquidators based on the "effects test" articulated in *Calder v. Jones*, 465 U.S. 783 (1984), which required the plaintiff to demonstrate that the liquidators (1) had acted intentionally, (2) knew the plaintiff would be harmed, and (3) knew that the brunt of injury would be suffered in Minnesota (as the state of residence of the plaintiff). In finding the first element had not been met, the court noted that the liquidators did not have the requisite intent given the amended complaint demonstrated that the principals concealed the debtor's assets from the liquidators.

As to the third element of the effects test, the plaintiff argued that the liquidators intentionally directed their actions by filing bankruptcy proceedings that disrupted the flow of litigation in the District of Minnesota. Unpersuaded by the argument, the court pointed to the amended complaint wherein the allegations included that the other defendants acted to drain the debtor of assets prior to the filing of the chapter 15 bankruptcy, misled the debtor's liquidators and the court, and made it more difficult for creditors to trace or seize the debtor's assets. Thus, the court held that the plaintiff failed to establish the effects test was met for jurisdiction over the liquidators.

The Court dismissed the liquidators from the action. The Court denied motions to dismiss as to (1) fraudulent transfer claims against certain remaining defendants including the principals and the debtor; and (2) alter ego claims asserting that certain corporate defendants were alter egos of the principals of the debtor.

District Court Granted Summary Judgment Against Chapter 7 Debtor for Claim Under the Fair Credit Reporting Act

In *Beers v. Experian Information Solutions, Inc.*, No. 20-CV-1797 (WMW/JFD), 2022 WL 891620 (D. Minn. Mar. 25, 2022), the court granted summary judgment to a credit reporting agency on the claim under the Fair Credit Reporting Act (FCRA) given a lack of evidence that (1) the erroneous credit report caused actual damages and (2) the defendant's procedures for reporting Chapter 7 bankruptcies were willful or reckless.

The plaintiff received a Chapter 7 bankruptcy discharge. The defendant, a credit reporting agency, issued a credit report which erroneously reported that two accounts discharged in the bankruptcy were still open with amounts due. The plaintiff maintained that the credit report led to her denial of credit by two department stores. In her amended complaint, the plaintiff alleged that the defendant willfully or negligently failed to establish and/or follow reasonable procedures to assure accuracy in its credit reports, thereby harming the plaintiff, in violation of the FCRA, 15 U.S.C. §§ 1681e(b), 1681n, 1681o.

The court recognized that to survive a motion for summary judgment on a negligence claim under the FCRA, the plaintiff must present sufficient evidence of actual damages. Further, to recover statutory damages for willful violations of the FCRA—a claim that does not require proof of injury—the plaintiff must demonstrate that the defendant willfully violated the FCRA. 15 U.S.C. § 1681n.

The plaintiff argued that she presented sufficient evidence that she suffered actual damages as a result of the defendant's failure to comply with the FCRA requirements. In rejecting the argument, the court found that (1) there was no evidence that the plaintiff was denied credit based on the defendant's misreporting of the two accounts, (2) nothing in the record showed that any denial or adverse action that occurred after the plaintiff's bankruptcy discharge was based on the defendant's credit report, and (3) the plaintiff's allegations of emotional distress were insufficient and based solely on vague testimony. As such, the court held that the plaintiff failed to establish a negligence claim pursuant to 15 U.S.C. §§ 1681e(b), 1681o.

As to a willful violation of the FCRA, the plaintiff argued that the defendant knew the methodology it used would result in some reporting inaccuracies and that the defendant should have assumed, as a rule, that all debts other than those specifically exempted are discharged in a Chapter 7 bankruptcy. In rejecting the arguments, the court concluded that the defendant's procedures for reporting Chapter 7 bankruptcies was not willful or reckless, nor did the plaintiff establish than any inaccuracy occurred more than occasionally. Therefore, the court concluded that the plaintiff failed to demonstrate a dispute as to

any material fact necessary to establish a claim under the FCRA.

The court granted the defendant's motion for summary judgment.

District Court Held Derivative Claims Belong Solely to Bankruptcy Trustee

In *Kamal v. Baker Tilly US, LLP*, No. CV 21-1549 (MJD/DTS), 2022 WL 1050053 (D. Minn. Apr. 7, 2022), the court granted a motion to dismiss aiding and abetting claims as derivative claims belonging exclusively to the bankruptcy trustee.

In this case, a holding company issued notes. The holding company was part of a complex web of entities. A retail energy company (the "Company") assumed the notes in a restructuring. The Company structured the borrowed funds under another entity thereby allegedly giving unfettered access to a principal owner ("Principal") without any personal guarantees and collateral requirements. It was further alleged that the Principal made a fraudulent loan to artificially inflate valuations, the Company's accounting firms aided and abetted the fraud, and the Principal withdrew millions in funds and stopped paying on the notes. As a result, the Company financially collapsed and entered bankruptcy. The bankruptcy trustee sued the Principal for fraud, breach of fiduciary duty, and other claims. A settlement was reached on the claims.

In the present case, the plaintiffs are among 800 noteholders who lost their investments when the Company entered bankruptcy. The plaintiffs filed a putative class action against the accounting firms for (1) negligent misrepresentation, (2) aiding and abetting fraud; and (3) aiding and abetting breach of fiduciary duty. The accounting firms filed a motion to dismiss the claims.

The court addressed whether the plaintiffs had standing to pursue the aiding and abetting claims. In doing so, the court noted that the plaintiffs did not allege that the Principal stole money directly from the noteholders. Rather, the plaintiffs maintained that the Principal misappropriated funds from the Company, and the plaintiffs' suffered losses when the theft left the Company unable to pay on the notes. Further, the plaintiffs' injuries were derivative to the Company's injuries, the entire bankruptcy estate and all of its creditors were victims of the alleged torts, the plaintiffs' injuries were the same as the Company's other creditors, and the bankruptcy trustee already had settled claims with the Principal for the alleged conduct. As such, the court held that the plaintiffs lacked standing because the aiding and abetting claims are derivative claims belonging exclusively to the bankruptcy trustee.

The court also held that the plaintiffs failed to allege sufficient facts to survive a motion to dismiss for the aiding and abetting claims.

The court denied the motion to dismiss for a negligent misrepresentation claim against one of the accounting firms. All other claims were dismissed.

Case Remanded to District Court to Further Consider Safe Harbor Exception to Avoidance

In *Kelley v. Safe Harbor Managed Account 101, Ltd.*, No. 20-3330, 2022 WL 1177748 (8th Cir. Apr. 21, 2022), the Eighth Circuit reversed the district court and remanded to consider whether certain transfers to a financial institution where made in connection with a securities contract for the safe harbor exception to avoidance pursuant to 11 U.S.C. § 546(e).

This case is one of many arising from the multi-billion-dollar fraud perpetuated by former Minnesota businessman, Thomas Petters, through his company, Petters Company, Inc. ("PCI"). Appellee Safe Harbor Managed

Account 101, Ltd. ("Safe Harbor") purchased equity in a PCI feeder fund named Arrowhead Capital Partners II, L.P. ("Arrowhead"). For the equity purchase, Safe Harbor transferred $6 million into Arrowhead's cash account at Wells Fargo Bank ("Wells Fargo"). Pursuant to a note purchase agreement, Arrowhead bought secured notes from Metro I, LLC ("Metro"). For the secured notes, MGC Finance, Inc. ("MGC Finance") agreed to pay amounts due and owing to Metro or its assignee. In satisfaction of the secured notes, MGC Finance transferred $6.9 million to Arrowhead's cash account at Wells Fargo. Safe Harbor redeemed its investment in Arrowhead and received wire transfers for the $6.9 million.

Appellant, in his capacity as court-appointed trustee, previously received a default judgment for fraudulent transfers under 11 U.S.C. § 548 against Arrowhead for the pre-bankruptcy transfers from MGC Finance. In the present case, the trustee alleged that the transfers were recoverable from Safe Harbor under 11 U.S.C. §§ 550(a) and 551. Safe Harbor filed a motion to dismiss pursuant to 11 U.S.C. § 546(e), which, in relevant parts, precludes the avoidance of "a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7) . . . ."

The bankruptcy court denied the motion to dismiss. After discovery, the case was transferred to the district court for trial. Safe Harbor filed a motion for summary judgment and argued that the $6.9 million it received from Arrowhead cannot be avoided. The district court agreed that § 546(e) protects the transfers given Arrowhead is a "financial institution," the note purchase agreement was a "securities contract," and the relevant transfers were "in connection with a securities contract." The trustee appealed.

On appeal, the trustee argued the district court erred in finding no genuine dispute of material fact as to whether (1) Arrowhead was a "financial institution," and (2) the relevant transfers were made "in connection with a securities contract."

The Eighth Circuit noted "financial institution" for § 546(e) includes the customer of "an entity that is a commercial or savings bank" when that "entity is acting as agent or custodian for [the] customer . . . in connection with a securities contract . . . ." 11 U.S.C. § 101(22)(A). The trustee argued Wells Fargo was not acting as Arrowhead's custodian. In response, the Eighth Circuit indicated the transfers from MGC Finance to Arrowhead were the overarching, relevant transfers for § 546(e), and the district court properly relied on the basic assumption that the customer of a financial institution may itself qualify as a financial institution for purposes of § 546(e). The Eighth Circuit affirmed that Arrowhead was a "financial institution" for § 546(e).

The trustee argued the note purchase agreement was not a "securities contract" for § 546(e). In its statutory interpretation, the Eighth Circuit recognized a security included the senior notes as promises to pay at specified times, and a securities contract included the note purchase agreement.

Notably, the Eighth Circuit determined that the district court erroneously confused Metro as making the $6.9 million transfer to Arrowhead in the analysis of whether the transfers were "in connection with a securities contract" for § 546(e). In response, Safe Harbor asked the Eighth Circuit to view the $6.9 million transfer from MGC Finance to Arrowhead as made "in connection with" the note purchase agreement because the transactions between MGC Finance and Metro and Metro and Arrowhead were part of an "integrated transaction." In rejecting the request, the Eighth Circuit remanded the matter so the district court can examine the facts and decide whether the transfers from MGC Finance to Arrowhead were made "in

connection with" the note purchase agreement.

In summary, the Eighth Circuit affirmed that for § 546(e) Arrowhead was a financial institution, and the note purchase agreement was a securities contract. However, the Eighth Circuit reversed and remanded the matter of whether the transfers from MGC Finance to Arrowhead were made in "connection with" the note purchase agreement.

Eighth Circuit Reversed Summary Judgment Based on Failure to Address Alternative Theories for Personal Liability

In *Lund-Ross Constructors, Inc. v. Buchanan (In re Buchanan)*, No. 21-1856, 31 F.4th 1091 (8th Cir. 2022), the Eighth Circuit reversed the bankruptcy court's grant of summary judgment given the bankruptcy court's failure to address alternative tort claims.

The debtors owned a corporation hired to do electrical projects for the general contractor plaintiff. The debtors closed their business and filed a voluntary petition under chapter 7. Suppliers to the debtors' business filed construction liens for amounts owed. The plaintiff obtained default judgment against the corporation for damages due to misrepresentations made by the debtors that suppliers and subcontractors had been paid. The plaintiff sought exception to discharge pursuant to 11 U.S.C. § 523(a)(2)(A) for "any debt for money . . . to the extent obtained by— false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." When the trustee gave notice of assets, the plaintiff filed a proof of claim. The trustee objected to the claim on the grounds that the claim alleged a corporate debt of the business rather than a personal debt of the debtors. The plaintiff did not respond and the bankruptcy court sustained the trustee's objection. The debtor moved for summary judgment in the adversary proceeding on the same grounds. The bankruptcy court granted the motion. The BAP affirmed and the plaintiff appealed.

On appeal, the debtors argued that the Eighth Circuit should affirm given the plaintiff cannot pierce the corporate veil to hold the debtors personally liable. The Eighth Circuit rejected this argument because liability can be imposed against an officer or director of a company based on a tort under applicable state law. The debtors did not address this alternative ground for a valid claim. As such, the Eighth Circuit held that the bankruptcy court improperly granted summary judgment.

The debtors also argued the Eighth Circuit could affirm on the alternative ground of claim preclusion because the bankruptcy court disallowed the plaintiff's claim. But, the Eighth Circuit noted that it has denied claim preclusion when there are difficult questions including (1) whether to treat the debtors as a party to a proof-of-claim dispute when they did not appear at the proof-of-claim proceeding, or (2) whether the debtors even could be parties-in-interest to a claim objection when their estate was insolvent and the debtors could not benefit financially. Further, the debtors previously failed to argue claim preclusion before the lower courts (despite knowing about the action for exception to discharge), and the debtors failed to demonstrate why claim preclusion should apply. Thus, the Eighth Circuit declined to affirm on the alternative ground of claim preclusion.

Therefore, the Eighth Circuit reversed the bankruptcy court's grant of summary judgment and remanded for further proceedings regarding whether the corporate veil can be pierced or whether there is independent tort liability.

U.S. Supreme Court Holds 2017 U.S. Trustee Fee Increase Is Unconstitutional

In *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022), the U.S. Supreme Court unanimously held that a

temporary increase in U.S. Trustee ("UST") quarterly fees enacted by Congress in 2017 violated the uniformity requirement of the Constitution's Bankruptcy Clause because it did not apply in the same way in the six districts under the Administrator Program.

The temporary increase applied to both new and pending cases in UST districts (funded by user fees) beginning the first quarter of 2018 through the end of 2022. In the six judicial districts with a taxpayer funded Administrator Program, the increase in fees applied only to new cases, but not pending cases, beginning October 1, 2018. In other words, the increase started 9 months later and applied to a smaller set of cases.

The chapter 11 plan for Circuit City was confirmed in 2010 and provided that UST quarterly fees would be paid until the chapter 11 cases closed or converted. Because the case was in a UST district, quarterly fees totaled $632,542 during the first three quarters of 2018. Without the increase, or if the case had been in an Administrator Program district, the quarterly fees would have been only $56,400.00.

The trustee for the Circuit City Stores, Inc. Liquidating Trust challenged the constitutionality of the increase on the basis that it was not uniform across judicial districts. The bankruptcy court agreed and directed the trustee to pay the prior rate for the fees due from January 1, 2018, forward. The Fourth Circuit reversed, but the panel was divided. The U.S. Supreme Court granted certiorari to resolve a circuit split regarding the constitutionality of the fee increase.

The Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. The UST argued that the uniformity requirement did not apply to the 2017 fee increase because it is not substantive, but rather administrative. The Court disagreed, noting that the Bankruptcy Clause does not distinguish between substantive and administrative laws, nor had the Court made such a distinction. Furthermore, the Court found that the fee increase did indeed have a substantive impact, as it decreased the funds available for distribution to creditors.

The UST next argued that bankruptcy fees are exempt from the uniformity requirement under historical practice, noting that the Bankruptcy Act of 1800 allowed districts to establish fees "in view of local needs and conditions." The Court was not persuaded, finding the 2017 fee increase to be materially different. In particular, the fee increase did not confer discretion on districts to set policies in accordance with their regional needs. Instead, Congress had simply exempted six judicial districts from the fee increase without an identified material difference between the debtors in Administrator Program districts and the debtors in UST Program districts.

The Court found that the 2017 fee increase was not geographically uniform because the increase applied differently to debtors in different judicial districts. The Court noted that while the Bankruptcy Clause provides Congress some flexibility, it does not permit "the arbitrary, disparate treatment of similarly situated debtors based on geography." While the disparity at issue resulted from an effort to resolve the UST Program's funding shortfall, the Court noted that the shortfall resulted not from a geographically isolated need, but instead from Congress's arbitrary creation of a dual system of bankruptcy administration. The Court held that the Bankruptcy Clause does not permit such differential treatment of bankruptcy debtors based on artificial distinctions.

Thus, the Court held that the temporary UST fee increase violated the Bankruptcy Clause's uniformity requirement. The Court remanded

to the Fourth Circuit Court to consider the proper remedy.

District Court Applying Judicial Estoppel for Failure to Disclose Excessive Force Claim on Bankruptcy Schedules

In *Bell v. Arneson*, 2022 WL 2835068 (D. Minn. July 20, 2022), the United States District Court for the District of Minnesota applied judicial estoppel to prevent a plaintiff from litigating a claim he had intentionally withheld from his bankruptcy case, to his benefit.

The plaintiff in *Bell* filed a civil lawsuit against two police officers who he alleged used excessive force while arresting him in violation of his Fourth Amendment rights. About one year before the civil lawsuit, the plaintiff filed for bankruptcy. At the time of his bankruptcy filing, the plaintiff declared to the bankruptcy court that he had no lawsuits nor claims against third parties. The bankruptcy case closed in four months. Several months later, and only two months before filing the civil lawsuit, the plaintiff applied to reopen the bankruptcy case to add two personal injury claims that arose before his bankruptcy filing but were not disclosed in the bankruptcy proceedings when the case was open. The bankruptcy case was reopened and remained open for approximately three months beyond the commencement of the civil lawsuit. During that time, the plaintiff never amended his bankruptcy schedules to include the claims in the civil lawsuit. The bankruptcy case, again, closed, and since that time the plaintiff never applied to reopen the bankruptcy case to include the claims asserted in the civil lawsuit.
The defendant police officers moved to dismiss the civil lawsuit, arguing that the plaintiff should be estopped from pursuing his claims against the defendants because he failed to amend his bankruptcy schedules to include those claims. The plaintiff did not oppose the defendants' motion.

Outlining the judicial estoppel framework, the court in *Bell* noted that courts consider three factors when determining whether to apply judicial estoppel: (1) whether the party's later position is clearly inconsistent with a prior position; (2) whether the court in the previous case was persuaded by the party's prior position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Courts may find judicial estoppel inappropriate in instances where a party's prior position was based on inadvertence or mistake.

In *Bell*, the court agreed with defendants, finding the facts supported all three judicial estoppel factors. First, the court found the plaintiff's position in the civil lawsuit was clearly inconsistent with his prior position in the bankruptcy court as evidenced by his failure to amend his bankruptcy schedules to include the claims in the civil lawsuit. Second, the court found the bankruptcy court adopted the plaintiff's representation that he had no claim against the defendants. Third, the court found the plaintiff could have received an unfair advantage because, had he disclosed the civil lawsuit claims to the bankruptcy court, the trustee could have asked the bankruptcy court to order any potential settlement proceeds stemming from the civil lawsuit available to the plaintiff's unsecured creditors. Finally, the court found the plaintiff's actions were clearly not inadvertent based on his knowledge regarding amending schedules to disclose claims.

The court concluded the plaintiff was estopped from pursuing the civil lawsuit against the defendants and dismissed the plaintiff's claims against the defendants with prejudice.

Bell serves as a reminder of the importance of full disclosure in bankruptcy schedules (and, of course, all other court filings), and that, sometimes, nondisclosure *itself* is a position

against which litigants cannot contradict in future legal proceedings.

District Court Denies Request to Review Bankruptcy Court's Spoliation Sanctions De Novo

In *Kelley v. BMO Harris Bank N.A.*, No. 19-CV-1756, 2022 WL 1771999 (D. Minn. June 1, 2022), the district court denied the defendant's request for a pretrial evidentiary hearing to review *de novo* the bankruptcy court's imposition of spoliation sanctions.

The plaintiff, the chapter 11 trustee for the bankruptcy proceeding concerning Petters Company Inc. ("PCI"), alleged that the defendant, BMO Harris N.A. ("BMO Harris"), was complicit with PCI's fraudulent conduct. The bankruptcy court sent this case to the district court for trial, scheduled for October 2022, on four counts: violation of the Minnesota Uniform Fiduciaries Act, breach of fiduciary duty, aiding and abetting fraud, and aiding and abetting breach of fiduciary duty.

The defendant sought a case management conference and an order: (1) holding an evidentiary hearing to review *de novo* the spoliation sanctions imposed by the bankruptcy court on BMO Harris, (2) re-opening fact discovery, and (3) setting deadlines for pre-trial motions, including motions to exclude expert testimony. The district court decided these issues without a case management conference because the parties had sufficiently briefed the issues. It denied requests (1) and (2), and granted (3).

First, the district court denied the defendant's request for a pretrial evidentiary hearing and *de novo* review of the bankruptcy court's imposition of spoliation sanctions. It held that the bankruptcy court's spoliation sanctions are reviewed for an abuse of discretion both as to the sanction imposed and the factual basis for the sanction. It compared bankruptcy judges in this respect to magistrate judges, whose rulings on discovery sanctions are granted substantial deference. The district court also concluded that the bankruptcy court has authority to order non-dispositive spoliation sanctions that will impact trial, even if the bankruptcy court lacks authority to conduct the trial.

Second, the district court denied the defendant's request to re-open fact discovery related to the losses sustained by PCI's third-party investors as untimely and procedurally improper. The bankruptcy court had already denied discovery of the third-party losses in a September 2017 order, which BMO Harris never formally appealed.

BMO Harris also argued that discovery should be re-opened because there was good cause to amend the pre-trial scheduling order. The district court rejected this argument, primarily because the defendant failed to act diligently. Crucially, BMO Harris waited over two years to request re-opening discovery for information about investor losses, and the bank failed to properly file a motion as required by Fed. R. Civ. P. 7(b). The district court also noted that the additional discovery sought was irrelevant, referencing a prior order where it held that the losses caused direct harm to PCI, and not to the investors in PCI. Furthermore, re-opening discovery would prejudice the plaintiff.

Third, the district court granted defendant's request to set deadlines for pre-trial motions to exclude expert testimony.

District Court Denied Summary Judgment on Reasonableness of Procedures in Credit Reporting for Debt Discharged in Bankruptcy

In *Ferrin v. Experian Information Solutions, Inc.*, No. 20-CV-841 (NEB/TNL), 2022 WL 2954026 (D. Minn. July 26, 2022), the court denied summary judgment to the credit reporting agency ("CRA") on the issue of reasonable procedures to assure maximum

possible accuracy of credit report information for the plaintiff's claim under 11 U.S.C. § 1681e(b) of the Fair Credit Reporting Act ("FCRA").

Defendant Experian Information Solutions, Inc. ("Experian") used bankruptcy scrub procedures that left certain debts less than 90 days delinquent on credit reports. The plaintiff had two accounts—a credit union account and a Target account—that were not scrubbed from his credit report despite being discharged in his Chapter 7 bankruptcy case. Both the credit union and Target attempted to report the accounts as discharged, but Experian rejected the updates as noncompliant with formatting requirements.

For the pending motions for summary judgment, Experian did not dispute that it reported inaccurate credit information of outstanding balances.

The parties sought summary judgment on the issue of whether the procedures Experian followed were reasonable as a matter of law. Experian argued that § 1681e(b) does not require it to determine the legal status of bankruptcy on a particular debt. Further, Experian contended that it could rely on presumptively reliable institutions—the credit union and Target—until it had notice that those institutions were unreliable. In denying summary judgment as a matter of law, the court held that it is for a jury to decide if Experian's procedures that led to the rejection of updates from the credit union and Target were reasonable, and a jury may use evidence that other credit reporting agencies did not make the same error.

Experian also argued that its procedures were reasonable as a matter of law because it followed the procedure mandated by the federal injunction imposed on credit reporting agencies in *White v. Experian Information Solutions, Inc.*, No. 05-CV-1073, 2008 WL 11518799, at *10 (C.D. Cal. Aug. 19, 2008), wherein Experian agreed to update certain unsecured debts as discharged in consumer bankruptcies, except for certain tradelines reporting as "Current Status," meaning no outstanding, overdue, or delinquent balance at the time of the filing of the petition for Chapter 7 bankruptcy relief. Experian argued that the credit union and Target accounts fell within this exception. Nevertheless, the court held that compliance with *White* did not conclusively establish the reasonableness of Experian's procedures.

The parties also sought summary judgment on the issue of the plaintiff's damages. The court held that the plaintiff's testimony and a friend's corroborating declaration were enough to raise a genuine issue of material fact as to whether the plaintiff suffered emotional distress damages as a result of the inaccurate reporting.

The court granted summary judgment to Experian on the plaintiff's claim of willful violation of the FCRA because the plaintiff failed to show that Experian's rejection of the credit union and Target updates was more than mere carelessness.

Eighth Circuit Affirmed Dismissal for Failure to State Plausible FCRA Claims

In *Rydholm v. Equifax Information Services LLC*, 44 F.4th 1105 (8th Cir. 2022), the Eighth Circuit affirmed the district court's dismissal of a complaint for failure to state plausible claims for alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. ("FCRA").

Plaintiff filed a petition for relief under Chapter 7 of the Bankruptcy Code. On his bankruptcy schedules, Plaintiff listed Wells Fargo with an unsecured nonpriority claim. After the discharge order was entered, Plaintiff received credit reports from the defendants, Experian Information Solutions, Inc. ("Experian") and Trans Union, LLC ("Trans Union"). The Trans

Union report stated that Plaintiff received a bankruptcy discharge, but still listed the Wells Fargo account as "Current; Paid or Paying as Agreed" with an outstanding balance. The Experian report also listed the account as open with the same balance. The Experian report listed the bankruptcy but did not mention the discharge.

Plaintiff sued the defendants alleging the credit reporting agencies violated § 1681e(b) for failing to maintain reasonable procedures to ensure debts that are derogatory prior to a consumer's bankruptcy filing do not continue to report balances owing or past due amounts when those debts are almost certainly discharged in bankruptcy. The defendants filed a motion to dismiss for failure to allege unreasonable reporting procedures. The district court granted the motion and the plaintiff appealed.

Before the Eighth Circuit, the defendants argued Plaintiff does not have standing to appeal. The Eighth Circuit rejected the defendants' argument and held that Plaintiff's alleged tangible financial harm and intangible emotional injury due to denials of credit and less favorable credit rates were sufficient to establish standing.

However, the Eighth Circuit held Plaintiff's complaint presented a bare legal conclusion that the defendants employed unreasonable reporting procedures. The Eighth Circuit stated that for reasonable procedures for § 1681e(b) a credit reporting agency can rely on information from a reputable furnisher, unless the agency receives notice of systemic problems with its procedures. The Eighth Circuit noted that Plaintiff's complaint did not allege the defendants knew or should have known about systemic problems. Further, Plaintiff never directly contested credit reporting to the defendants, nor did Plaintiff allege that the furnisher, Wells Fargo, lacked reliability as a source. The Eighth Circuit stated that credit reporting agencies are not required to hire individuals with legal training to preemptively determine the validity of reported debts.

The Eighth Circuit held that the complaint failed to state plausible claims against the defendants.

District Court Held Plaintiff Failed to Establish Damages from Inaccurate Credit Reporting for Debt Discharged in Bankruptcy

In *Campbell v. Experian Information Solutions, Inc.*, No. CV 20-2498(DSD/BRT), 2022 WL 3716982 (D. Minn. Aug. 29, 2022), the court granted summary judgment to a defendant, Experian Information Solutions, Inc. ("Experian"), because the plaintiff failed to show actual, statutory, or punitive damages from the inaccurate credit report for a discharged debt in bankruptcy.

The plaintiff received a discharge under Chapter 7 of the Bankruptcy Code. The plaintiff's truck lease was discharged in the bankruptcy, but credit reports from the credit reporting agencies showed the lease with an outstanding balance. The plaintiff filed this lawsuit against the agencies alleging negligent and willful violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. ("FCRA"), by reporting his truck lease as still outstanding after his bankruptcy. Experian is the remaining defendant after the other credit reporting agencies entered into a settlement with the plaintiff.

The plaintiff's complaint included allegations that he was denied credit on several occasions. For the motion for summary judgment, the court noted that the plaintiff failed to show that he was denied credit because of the inaccurate information in the Experian credit report. Rather, the court received deposition testimony that led to the conclusion that the plaintiff failed to show that he suffered actual damages.

The court noted a reasonable jury would not award emotional distress damages because the inaccurate credit report did not result in the plaintiff receiving treatment for a physical, psychological, or emotional injury. Because the plaintiff failed to show actual damages, the court granted summary judgment to Experian.

The plaintiff alleged that Experian willfully failed to employ reasonable procedures because it knew that his truck lease was discharged in bankruptcy but failed to update its report to remove the lease. In rejecting the argument, the court stated that at most the plaintiff's allegations establish negligence in the inaccurate credit reporting, but there was a lack of evidence that Experian knowingly and intentionally disregarded the plaintiff's rights, especially when Experian used procedures approved in *White v. Experian Information Solutions, Inc.*, No. 05-CV-1073, 2008 WL 11518799 (C.D. Cal. Aug. 19, 2008). Further, the *Campbell* court held that the plaintiff failed to present evidence that Experian acted with conscious disregard of this right to support statutory or punitive damages under § 1681n.

The *Campbell* court held that the plaintiff's claim failed as a matter of law and Experian was entitled to summary judgment