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Recent Developments in Consumer Bankruptcy 2021

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MISCELLANEOUS.....

***Dean v. Seidel (In re Dean),* 3:20-CV-01834-X, 2021 WL 1541550 (U.S.D.C., N.D. Tex. April 20, 2021).** Issue on appeal was whether a chapter 7 trustee may grant a 30% interest in the bankruptcy estate's litigation recoveries to a creditor in the bankruptcy case in exchange for that creditor advancing funds for the litigation even if the creditor will be reimbursed for making those advances. Creditor and the trustee entered into a Litigation Funding Agreement where creditor would advance $200,000 for litigation fees to prosecute claims against third parties. All recoveries from this litigation would be used to 1) pay trustee's statutory commission and allowed expenses; 2) reimburse the creditor; 3) pay creditor a 30% investment return and 4) pay pro rata debtor's creditors. Debtor objected claiming the Agreement allowed the creditor to receive a disproportionate and larger share of distributions to be made to creditors in violation of section 507's priority scheme and the distribution equality requirements of section 726. Debtor also argued that the Agreement violated section 550 because by granting creditor a 30% interest in gross litigation proceeds, "a significant portion of any avoidance recoveries will not be for the benefit of the estate and will not be used to satisfy or pay claims of any creditors." Trustee had reached out to multiple firms to pursue the litigation on a contingency basis, and none were interested. The bankruptcy court approved the Agreement noting that trustee endeavored to obtain favorable terms but had limited options given the lack of unencumbered cash on hand and law firms' lack of interest. The district court noted that litigation funding agreements are still relatively novel funding arrangements and that there can be legitimate ethical concerns. Although the lack of any supporting case law in approval of the Agreement, the novelty of the Agreement and the Agreement's possible incompatibility with provisions of the Bankruptcy Code caused the district court concern, after careful examination of the Bankruptcy Code, the district court approved the Agreement as it was not "left with the definite and firm conviction that a mistake had been committed."

***Foster v. Holder et al (In re Foster),* 19-4131-ELM, 2020 WL 6390671 (Bankr. N.D. Tex. October 30, 2020).** After resolving years of litigation involving debtor (an attorney) and her family, the chapter 7 trustee obtained court approval of a final report and distribution and the bankruptcy case was closed. Nearly a year later, debtor sought to reopen the bankruptcy case, apparently to again assert claims and arguments that the bankruptcy court had denied prior to closing of the case; the bankruptcy court denied the motion to reopen. Several months after that, debtor initiated a lawsuit in state court suing the chapter 7 trustee and her counsel as well as a third-party that had purchased assets of the bankruptcy estate and debtor's husband; among the claims asserted by the debtor were quiet title as to property sold by the chapter 7 trustee to the third-party. The trustee moved to reopen the bankruptcy case and remove the state court lawsuit to the bankruptcy court. The trustee and her counsel moved to dismiss under the Barton Doctrine because debtor not only had not gotten court approval to pursue the claims against them but actually had been denied in prior efforts to obtain approval to bring claims against them. The court found that the debtor's complaint addressed only actions taken by the trustee and her professionals pursuant to orders from the court itself and therefore utterly failed to present any *ultra vires* acts, and dismissal was therefore appropriate under both the Barton Doctrine and immunity doctrine.

***America v. Mays (In re Mays),* 852 Fed. Appx. 801 (5th Cir. 2021).** Debtor, acting as trustee for his minor daughter, misappropriated over $1.8 million in royalty revenues. When debtor filed personal bankruptcy and failed to disclose the bank accounts where the royalties were deposited and that he had been using the funds for his personal benefit, he was charged with violating 18 U.S.C. 152(3) (making false bankruptcy declaration). Debtor plead guilty and agreed to pay restitution. At sentencing, the court varied upwards from the Sentencing Guidelines and gave the debtor the maximum sentence. Debtor appealed, arguing that his guilty plea was unsupported by the proffered factual basis to the effect that he had been under no obligation to disclose his misappropriation of funds. The appellate court affirmed, finding that withdrawals from accounts for which a debtor is a trustee for a minor can fall within the definition of "income" required by question two on Official Form 7 and that debtor had failed to adequately or accurately disclose the claims his daughter had against him arising out of his misappropriation of funds.

***Griffith v. Lone Star FLCA et al (In re Griffith),* 20-4038-mxm, 2021 WL 2389671 (Bankr. N.D. Tex. June 10, 2021).** Debtor filed chapter 13 case in order to prevent foreclosure; case was dismissed for failure to file required documents. Debtor obtained reinstatement of the chapter 13 case, but not before lender foreclosed on property. Debtor then sued lender and the person who purchased the property at foreclosure. At trial on breach of contract and wrongful foreclosure claims, the court found that the debtor had waived certain of the notice provisions in the deed of trust by establishing a history of verbally changing his notice address (instead of in writing, as required under the deed of trust) and because debtor had received actual notice of the foreclosure at at least one of the addresses that he was using at the time.

***Barbknecht Firm, P.C. v. Keese (In re Keese),* 18-4057, 2021 WL 811572 (Bankr. E.D. Tex. February 28, 2021)**. Debtor involved in messy divorce failed to make payments to her divorce counsel. In order to convince divorce counsel to continue representation, debtor represented that she would pay him from proceeds from the sale of her house and the receipt of a portion of her ex-husband's pension plan. When divorce was finalized, debtor convinced attorney to allow transfer of pension plan award to go directly to her instead of through attorney. Instead of paying attorney, debtor kept all of the pension funds for herself and filed for bankruptcy. Divorce attorney sought a determination of nondischargeability and included a claim under the Texas Theft Liability Act; debtor countersued for breach of fiduciary duty. The Court found that the divorce attorney failed to prove that at the time the debtor represented that she would pay out of proceeds from the divorce she had other intentions, denied relief on the debtor's counterclaims, but awarded the debtor her reasonable and necessary attorney's fees and costs because the Texas Theft Liability Act authorizes the prevailing party to recover attorney's fees and costs.

***Rose et al v. Aaron et al (In re Rose),*[1] 4:19-cv-98, 2021 WL 3795421 (E.D. Tex. August 25, 2021).** Horse breeder seeking to liquidate her operations entered into several expansive contracts to transfer her stock to buyer who was to pay several million dollars over five years for the horse breeder to continue to keep and care for the stock on the horse breeder's farm. Horse breeder subsequently reneged on the contractual arrangement in various ways, including by forcing the buyer to pay tens of thousands of dollars in spurious charges allegedly related to caring for the horses, by refusing to comply with her obligation to provide further continued care for the horses, which caused the buyer to incur substantial costs to, among other things, upgrade their own farm

[1] Appeal pending.

Title search: Recent Developments in Consumer Bankruptcy 2021

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