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Recent Developments in Consumer Bankruptcy 2011

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RECENT DEVELOPMENTS IN CONSUMER BANKRUPTCY 2011

State Law Generally

Matter of Hoff, 644 F.3d 244 (5th Cir. 2011)

Grandmother of Chapter 7 debtor had created spendthrift trust for debtor that required the trust's settlor(s) to pass away and debtor to reach specific ages in order to debtor to be able to access the funds contained therein. The debtor's mother

subsequently provided most of the contributions made to the trust. Agreeing that the language of the trust made the grandmother the sole settlor, the Circuit Court also held that even though debtor had not exercised his age-specific withdrawal rights before filing bankruptcy he remained entitled to make such withdrawals. As such, the bankruptcy trustee would be entitled to withdraw such funds for the benefit of the estate.

Miscellaneous

***Rea v. Federated Investors*, 627 F.3d 937 (3d Cir. 2010)**

Former bankruptcy debtor sued prospective employer under § 525(b) for refusing to hire him based upon his prior bankruptcy filing. The Circuit Court upheld the district court's Rule 12(b)(6) dismissal for failure to state a claim on the grounds that § 525(b) does not prohibit private employers from discriminating against prospective employees on the basis of their prior bankruptcy filings.

***In re Burnett*, 635 F.3d 169 (5th Cir. 2011)**

The Debtor filed a complaint against Stewart Title alleging that it violated 11 U.S.C. §525(b) when it refused to hire her on the basis of an earlier bankruptcy filing. When Debtor interviewed for prospective employment, they made an offer to hire her contingent on the results of a background check. Stewart discovered the Debtor's bankruptcy and rescinded its offer to employ her.

The Court compared the language in §525(a) and §525(b). It noted that §525(a) prohibits "a governmental unit" from denying employment to a person as a result of a bankruptcy filing. However, §525(b) talks about a "private employer" being prohibited from "terminating" the employment of an individual. The Court said that that section didn't say anything about prohibiting the employment to begin with. The bottom line is that a private employer can't terminate you from filing bankruptcy but is well within its rights to not hire you in the first place.

***Myers v. Toojay's Management Corp.,* 640 F.3d 1278 (11th Cir. 2011)**

Plaintiff, who had filed a Chapter 7 petition, was denied employment by a gourmet deli on the grounds that it was company policy not to hire people who had filed for bankruptcy. Plaintiff argued that this was a violation of § 525(b), as pertains to private employers. Court held that language of § 525(b) does not apply to refusals to hire by private employers.

***In re Bohannon*, 2010 WL 3957477 (Bankr. S.D. Tex. 2010)**

The bankruptcy court held that a 15% interest in a litigation claim held by the Debtor should not be transferred back to the Debtor free of the claims of the bankruptcy estate and creditors in order to incentivize the Debtor to participate fully in the prosecution of that claim.

The Debtor held a litigation claim that was determined to be non-exempt property in the bankruptcy case. In a motion to transfer a 15% interest in the litigation claim back to the Debtor, the Trustee reasoned: "Without the Debtor's willing cooperation, Trustee believes the estate's prosecution of the Lawsuit will be jeopardized. Debtor is willing to assist the Trustee . . . as long as he is compensated for his assistance." While no party objected to this motion, the Court raised its own concerns. To begin, the Court pointed out that the Debtor has a legal duty to cooperate with the Trustee without compensation. While there was some question as to whether this statutory duty would continue post-discharge, the Court indicated that it could be persuaded to enter an order requiring such cooperation. The Court dismissed assertions that the transfer of the interest to the Debtor was necessary because the debtor would incur expenses associated with the litigation because neither the Trustee nor the Debtor could afford to pay for those expenses in the first place, and a 15% interest in the outcome of the litigation does nothing to solve that problem. Rather, expenses would have to be borne by contingency counsel in any event. Finally, the Court noted that in light of the Debtor's relatively small amount of debt and the magnitude of the potential from the litigation, the Debtor would still receive some of the proceeds from the litigation if they were realized in any significant amount.

***In re Guidry*, 2010 WL 4052173 (Bankr. S.D. Tex. 2010)**

The bankruptcy court held that vacating a properly entered order of statutory dismissal of a Chapter 7 case was not appropriate.

In this case, the Debtor failed to file certain information required under section 521(a), and despite the fact that the Court issued a notice of such deficiency, the Debtor did not seek an extension of time or timely file the documents. Pursuant to section 521(i)(1), on the 46th day of the case, the Court entered an order dismissing the case. On a motion to vacate the dismissal order, counsel for the Debtor acknowledged that the statutory dismissal was appropriate, but argued that the bankruptcy court had the authority to vacate such an order because section 521(i) does not specifically say that the Court may not do so. The Court disagreed, noting that "if the Court has the authority to act in contradiction of statutes that do not specifically prohibit such action, then those statutes would cease to have meaning."

***In re Okwonna-Felix*, 2011 WL 3421561 (Bankr. S.D. Tex. 2011)**

Chapter 13 debtor failed to list on his bankruptcy schedules a claim against his homeowner's insurance company; debtor later sought permission from the bankruptcy court to amend his schedules and settle that claim. Because the debtor did not act in bad faith and the creditors were not prejudiced, the court determined that the debtor would be allowed to amend his schedules to reflect the settlement that was to be received from the insurance company. However, because the lienholder on the debtor's home had a contractual right to a lien on such proceeds, the court held that the lienholder would hold the settlement funds for the debtor in order to ensure that those funds were used to make repairs to the debtor's home (the lienholder's collateral). Since the debtor's estimates for repairs necessary exceeded the amount received under the settlement, the court ruled that

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