AMERICAN BANKRUPTCY INSTITUTE

2017 Midwest Regional Bankruptcy Seminar

Great Debates

Timothy J. Hurley, Moderator
Taft Stettinius & Hollister LLP; Cincinnati

Resolved: Passively holding an asset of the estate in the face of a demand for turn-over violates the stay. (I swear, Your Honor, I didn't do anything!)

Casey M. Cantrell Swartz
Taft Stettinius & Hollister LLP; Cincinnati

Robert A. Goering, Sr.
Goering & Goering, LLC; Cincinnati

Resolved: Gift plans violate the Bankruptcy Code and are outlawed by *Jevic*. (Is it really a birthday without the gifts?)

William J. Rochelle, III
American Bankruptcy Institute; New York

Hon. Robert E. Gerber (ret.)
Joseph Hage Aaronson LLC; New York

Resolved: A trustee should be permitted to avoid transfers occurring many years prior to the petition date by stepping into the shoes of "special" creditors such as the IRS or the FDIC pursuant to § 544(b). (I'm Baaaack!!!)

Robert G. Sanker
Keating Muething & Klekamp PLL; Cincinnati

Henry E. Menninger, Jr.
Wood & Lamping LLP; Cincinnati

Debate 1: Passively holding an asset of the estate in the face of a demand for turn-over violates the stay. (I swear, Your Honor, I didn't do anything!)

Pro – Casey M. Cantrell Swartz, Taft Stettinius & Hollister LLP; Cincinnati

Con - Robert A. Goering, Goering & Goering, LLC; Cincinnati

Articles of Interest

"Possession is not 9/10ths of Bankruptcy Law – Second Circuit Enforces Sanctions Against a Secured Creditor for Refusing to Return Collateral Properly Seized Prior to Bankruptcy Filing," Weil Bankruptcy Blog, https://business-finance-restructuring.weil.com/automatic-stay/possession-is-not-910ths-of-bankruptcy-law-second-circuit-enforces-sanctions-against-a-secured-creditor-for-refusing-to-return-collateral-properly-seized-prior-to-bankruptcy-filing/

Cases of Interest

Knaus v. Concordia Lumber Company, Inc. (*In re Kraus*), 889 F.2d 773 (8th Cir. 1989) – Prepetition, Sheriff seized grain and equipment belonging to the debtor under a writ of execution filed by the creditor. The debtor then filed for Chapter 11 bankruptcy protection. Creditor refused to return the property to the debtor on debtor's request. The court held that the duty to turnover property arises upon the filing of the bankruptcy petition and the failure to fulfill this duty constitutes an attempt to exercise control over property of the estate in violation of the automatic stay.

Thompson v. General Motors Acceptance Corp. LLC, 566 F.3d 699 (7th Cir. 2009) – Chapter 13 debtor moved for sanctions for willful violation of the automatic stay after secured creditor, which has repossessed debtor's vehicle prepetition, refused to return vehicle based on a perceived lack of adequate protection. The court held that the debtor held an equitable interest in the vehicle which is property of his bankruptcy estate and that the creditor exercised control over the vehicle when it refused to return it upon request. The court stated that upon request of a debtor, the creditor must first return the assets and then, if necessary, seek adequate protection of its interest.

Weber v. SEFCU (*In re Weber*), 719 F.3d 72 (2nd Cir. 2013) – Creditor's refusal to return vehicle to debtor promptly upon learning of the Chapter 13 bankruptcy filing constituted an unlawful exercise of control over the property of the bankruptcy estate in violation of the automatic stay. While the creditor's pre-petition repossession was lawful, New York law provided a continuing equitable interest in the vehicle. This equitable interest is property of the bankruptcy estate over which the creditor exercised control.

WD Equipment v. Cowen (In re Cowen), 849 F.3d 943 (10th Cir. 2017) – The automatic stay provisions prohibiting any post-petition act to "obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" prohibit only affirmative acts to gain possession of, or to exercise control over, estate

property, and do not prohibit secured creditors from passively retaining possession of collateral repossessed prepetition.

United States v. Inslaw, 932 F.2d 1467 (D.C. Cir. 1991) – The automatic stay applies only to acts taken after bankruptcy petition is filed; continuing use of intangible trade secret rights in enhancements to case-tracking software program after software developer filed bankruptcy did not constitute an act to exercise control over property of the estate.

In re Hall, 502 B.R. 650 (Bankr. D.D.C. 2014) – After the debtor filed for Chapter 11 bankruptcy protection, the debtor's condo homeowner's association and management company withheld from the debtor the condo's access code to a storage area in which the debtor stored various property. The debtor alleged that the delay in providing the access code and continued retention of his property violated the automatic stay. The court held that when a creditor holds property it seized prepetition, the debtor does not possess the property and the creditor's continued retention of possession is not an exercise of control over a present possessory interest in the property.

In re Burbano, 2017 WL 1058219 (Bankr. N.D. Ga. Mar. 20, 2017) – After the debtor failed to pay a judgment awarded in state court in favor of Grange Mutual Insurance ("Grange"), the debtor's driver's license was suspended. The debtor then filed bankruptcy. In order to release the suspension, the debtor needed Grange to execute a release. Grange insisted that it had no affirmative duty to take any actions, and would not provide the release. The court disagreed and held that a creditor's "act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a)(3)."

In re Waldrop, 2017 WL 1183937 (Bankr. W.D. Okla. Mar. 29, 2017) – Debtor filed an adversary proceeding claiming that Discover violated the automatic stay by instructing the bank to retain possession of funds garnished pre-petition. The court held that there was no stay violation because Discover did not commit an affirmative "act" to exercise control over the garnished funds in possession of Chase. Chase was simply told to hold onto the funds which had already been put in Chase's possession pre-petition.

Davis v. Tyson Prepared Foods Inc. (In re Garcia), Case No. 17-5006 (Bankr. D. Kan. July 7, 2017) – After settling a workers compensation claim against Tyson, and after filing bankruptcy, the Debtor sued Aramark for her injuries, settling the personal injury claim for $45,000. Tyson claimed a right of subrogation and a lien against the settlement proceeds to recoup the workers compensation benefits it paid her post-petition. The Chapter 13 trustee sought to void the lien as having been created in violation of the automatic stay. The court held that because the subrogation lien arose by operation of law, and not because of any affirmative act by Tyson, neither the right of subrogation or the lien violated the automatic stay.

Debate 2: Gift plans violate the Bankruptcy Code and are outlawed by Jevic. (Is it really a birthday without the gifts?)

Pro - William J. Rochelle, III, American Bankruptcy Institute; New York

Con - Hon. Robert E. Gerber (ret.), Joseph Hage Aaronson LLC; New York

Articles of Interest

Anna Haugen, Courtney A. McCormick and Kathryn Z. Keane, *Re-"Structuring" Dismissal Flexibility: An Analysis of the Supreme Court's Jevic Decision*, XXXVI ABI Journal 5, 12, 71-73, May 2017

"Supreme Court Ruling Draws a Vague Line in Bankruptcy Cases," Stephen J. Lubben, https://www.nytimes.com/2017/04/14/business/dealbook/supreme-court-ruling-draws-a-vague-line-in-bankruptcy-cases.html?ref=dealbook

"*Jevic*: SCOTUS Holds that Priority Rules Apply in Structured Dismissals," Harvard Law School Bankruptcy Roundtable, http://blogs.harvard.edu/bankruptcyroundtable/2017/03/28/jevic-scotus-holds-that-priority-rules-apply-in-structured-dismissals/

"Breaking News: Structured Dismissals Survive Supreme Court Scrutiny, Strict Adherence to Absolute Priority Rule Specified," Weil Bankruptcy Blog, https://business-finance-restructuring.weil.com/chapter-11-plans/breaking-news-structured-dismissals-survive-supreme-court-scrutiny-strict-adherence-to-absolute-priority-rule-specified/

"Supreme Court Reverses *Jevic*, Bars Structured Dismissals that Violate Priority Rules,: Rochelle's Daily Wire, http://www.abi.org/newsroom/daily-wire/supreme-court-reverses-jevic-bars-structured-dismissals-that-violate-priority

"*Jevic* Applied to Ordinary Settlements in the Midst of a Chapter 11 Case," Rochelle's Daily Wire, http://www.abi.org/newsroom/daily-wire/jevic-applied-to-ordinary-settlements-in-the-midst-of-a-chapter-11-case

Cases of Interest

Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017) – The Supreme Court held that bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of the affected creditors.

In re Fryar, 2017 WL 1489822, at *6 (Bankr. E.D. Tenn. Apr. 25, 2017) – "In light of the Supreme Court's recent ruling in *Jevic,* parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" based on the factors to be considered by the Sixth Circuit, *Bauer*, 859 F.2d at 441, but also that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective."

Debate 3: A trustee should be permitted to avoid transfers occurring many years prior to the petition date by stepping into the shoes of "special" creditors such as the IRS or the FDIC pursuant to § 544(b). (I'm Baaaack!!!)

Pro - Robert G. Sanker, Keating Muething & Klekamp PLL; Cincinnati

Con - Henry E. Menninger, Jr., Wood & Lamping LLP; Cincinnati

Articles of Interest

"A longer statute of limitations period for pursuing fraudulent transfer actions may exist," http://www.lexology.com/library/detail.aspx?g=ba43fdba-ff14-4345-8064-85215f5c634b

"Split Brewing on Trustee's Ability to Use the IRS' Longer Statute of Limitations," Rochelle's Daily Wire, http://www.abi.org/newsroom/daily-wire/split-brewing-on-trustee%E2%80%99s-ability-to-use-the-irs%E2%80%99-longer-statute-of-limitations

Peter Russin & Meaghan Murphy, "*An Unlimited Reach-Back Period When IRS Is Triggering Creditor?"*, Am. Bankr. Inst. J., January 2017

Cases of Interest

MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.), 675 F.3d 530 (5th Cir. 2012) – The special litigation entity sought to avoid a guaranty made by the debtor in favor of the bank and to recover funds paid pursuant to the guaranty. The bank filed a motion to dismiss contending, among other things, plaintiff could not use the Federal Debt Collection Procedures Act ("FDCPA") to avoid the guaranty. The Fifth Circuit held that FDCPA is not applicable law under Section 544(b). Because the FDCPA explicitly states "[t]his chapter shall not be construed to supersede or modify the operation of – (1) title 11," the court found that treating the FDCPA as applicable law under 544(b) would impermissibly modify the operation of Title 11. In addition, the court looked to the legislative history for support of its holding where the committee chairman stated, " . . . [t]his provision was carefully worded to make clear that the act would have absolutely no effect on the Bankruptcy Code; even provisions of the Bankruptcy Code making reference to nonbankruptcy law are to be read as if this act did not exist."

Hirsch v. Marinelli (In re Colonial Realty Co.), 168 B.R. 506 (Bankr. D. Conn. 1994) - Federal Deposit Insurance Corporation's (FDIC's) statutory right, as conservator or receiver for insured depository institution, to set aside transfers made with intent to hinder, delay or defraud that institution was personal claim accruing only to the FDIC, which could not be asserted by Chapter 7 trustee in strong-arm proceeding, though FDIC was unsecured creditor of Chapter 7 estate.

In re Republic Windows & Doors, LLC, 2011 WL 5975256 (Bankr. N.D. Ill. October 17, 2011) – The issue before the court was whether the Chapter 7 trustee could invoke the IRS' ten-year limitations period under 544(b) when the IRS had not filed a claim. The court held that the generous IRS limitation provision is not available unless the IRS files its own claim or the Trustee files a claim on behalf of the IRS.

In re Tronox Incorporated, 503 B.R. 239 (Bankr. S.D. N.Y. 2013) – FDCPA and its longer six-year statute of limitations on fraudulent transfer claims qualified as applicable law under 544(b).

Vaughan Co. v. Ultimate Homes, Inc. (In re Vaughan Co.), 498 B.R. 297, 303 (Bankr. D.N.M. 2013) – Chapter 11 trustee sought to recover transfers made by the debtor by invoking Section 544(b) statute of limitations available to any unsecured creditor, including the IRS. Because Section 6502 of the Internal Revenue Code provide a ten-year statute of limitations for collection of taxes by the IRS, the trustee contended that she is entitled to recover fraudulent transfers under UFTA made within ten years of the petition date. The court held that the trustee is not immune from state statutes of limitations, and held that the trustee could not could not circumvent the state's four-year statute of limitations on fraudulent transfer claims in order to bring strong-arm claim to avoid, as fraudulent transfers, transactions which took place more than four years prior to petition date, by asserting that unsecured creditor in whose shoes he stood was the IRS.

In re Kaiser, 525 B.R. 697 (Bankr. N.D. Ill. 2014) – Chapter 7 trustee sought to avoid transfers within the statute of limitations of the IRS, a creditor of the bankruptcy estate. Defendants filed a motion to dismiss and also objected to the underlying IRS claim. The court held that the defendants lacked standing to object to the IRS claim because they did not have a pecuniary interest in the estate. The court also held that the trustee could use the IRS' statute of limitation despite amending its proof of claim to $0 because the IRS' claim as it existed when the adversary was filed is sufficient to support the trustee's complaint.

In re Kipnis, 555 B.R. 877 (Bankr. S.D. Fla. 2016) – In order to avoid allegedly fraudulent transfers that debtor had made more than four years prepetition, outside Florida's four-year statute of limitations on fraudulent transfer claims, the trustee could select the IRS as existing creditor holding an allowable unsecured claim, in whose shoes the trustee was authorized to step by strong-arm statute, and which was not subject to state statute of limitations.

In re Alpha Protective Servs., Inc., 2017 WL 1487621, at *3 (Bankr. M.D. Ga. Apr. 24, 2017) - FDCPA is applicable non-bankruptcy law under § 544(b) that may be utilized by the Trustee. The Trustee may "step into the shoes" of the IRS because it is a holder of an unsecured claim against the Debtor for a debt owed to the United States. In addition, the transfer occurred within the two years reach back period as provided by the FDCPA.

In re CVAH, Inc., No. AP 15-06030-JDP, 2017 WL 1684119, at *6–7 (Bankr. D. Idaho May 2, 2017) – By standing in the shoes of the IRS and invoking the lookback periods of

the FDCPA and Internal Revenue Code ("IRC"), the Chapter 7 trustee sought to avoid transfers made by the debtor during the ten years prior to bankruptcy filing. The court held that both the FDCPA and the IRC are applicable law available to the trustee under 544(b)(1). The court also found that the language found in the FDCPA which states that it "shall not be construed to supersede or modify the operation of – (1) title 11" does not prohibit the trustee from using the provisions of the FDCPA under 544(b)(1) if the creditor could invoke the FDCPA outside of bankruptcy.