

Problems, Problems, Problems (Consumer)

Hon. Mary Ann Whipple, Moderator
U.S. Bankruptcy Court (N.D. Ohio); Toledo



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Problems, Problems, Problems: Consumer Cases

**Judge Mary Ann Whipple
United States Bankruptcy Court for the
Northern District of Ohio
Toledo, Ohio**

1. Hey, Somebody's Out Front Taking My Car

Debtor lives in a medium size midwestern city with, at best, dysfunctional public transportation. He and his non-filing spouse have two young children. Their only transportation is a 5 year old mini-van worth a lot less than the debt owed on it, which carries a 25% interest rate. But they could afford the payments, which is all he cared about. So Debtor signed a reaffirmation agreement, which counsel sent back to the creditor for filing even before the first meeting of creditors occurred. The Trustee filed a no asset report, Debtor got his discharge and the case was closed. Debtor just kept making his car payments on time. None of them were ever returned to him.

Debtor looked out the window one morning to see the mini-van, which they parked out on the street, getting loaded onto a car transport vehicle. He immediately called his lawyer in a panic, because he had to leave for work in a half hour. He insisted to the lawyer that he was current on all the payments on the van. The lawyer was outraged and told the Debtor he would look into it immediately, and that at the very least Debtor he had a solid case for contempt of the discharge injunction. Counsel checked the case docket and discovered that the creditor had never signed or filed the reaffirmation agreement, as it got lost in the paper shuffle on some new employee's desk. The creditor just assumed Debtor decided not to reaffirm. But the creditor's lawyer told Debtor's counsel his client would still be willing to sign the Reaffirmation Agreement even though it had repossessed the car.

What can Debtor's lawyer do to resolve this situation and make sure Debtor has the car?

2. Do We Have A Reaffirmation Agreement, Or Not?

Debtor has signed a reaffirmation agreement with Big Bank, N.A. for the first mortgage debt on his home, in which he has equity, several times. Each time his lawyer has forwarded the signed document back to Big Bank, but they have been returned it unsigned with a new edit or a new revision that required review, re-signing and return. Counsel has filed several motions to extend time to dates certain so the reaffirmation agreement can be timely filed with the court. The court granted each extension.

Debtor has finally signed the most recent document sent back by Big Bank and that Big Bank finds acceptable, with, at last, no more changes requested or suggested. At this point, however, Big Bank won't file the document. Not knowing when he could get Big Bank to get the document filed, counsel filed another motion for extension of time with the court, asking for an indefinite extension this time. But the court balked at this request.

So counsel filed a motion to compel Big Bank to file the reaffirmation agreement, which he served on Big Bank at the name and P.O. Box address of the representative he has been working with for months. No response to the motion has been filed and the reaffirmation agreement has still not been filed with the court.

What should the court do with this motion?

What else can counsel do to deal with this situation for his client?

3. Tell Me, Where Did All the Money Go?

Debtor filed a pro se Chapter 7 bankruptcy petition. In his Statement of Financial Affairs, he disclosed that he had received \$235,000 in proceeds from a lawsuit in the 2 years before filing the petition, but otherwise disclosed no information about the current status of those funds.

At the meeting of creditors, Debtor testified the lawsuit proceeds had been deposited into his wife's bank account, to which he had access but claimed not to be the owner.

The Trustee obviously needed to look into all of this, so he asked the court for an extension to object to Debtor's discharge to "sixty days beyond....the conclusion of the 341 meeting." The extension was granted. The Trustee then scheduled the meeting of creditors to reconvene at a later date because he did not think Debtor had provided adequate information. But Debtor did not attend the meeting and was held in contempt. The meeting was rescheduled again. This time the Debtor appeared by telephone, with the frustrated Trustee ending the meeting saying officially that "the meeting is continued," with no new date set.

The Trustee filed his complaint objecting to Debtor's discharge 69 days after the telephone meeting.

Does Debtor have a procedural defense to the complaint?

4. Whose Privilege Is It Anyway?

Debtor, who was represented by counsel, filed a Chapter 7 petition. She had for years been engaged in state court litigation with Big Bank, now stayed, involving a business loan she had guaranteed. Separate counsel represented her in the stayed state court litigation. Her prior lawyer was now an unsecured creditor in the Chapter 7 case, owed substantial amounts for unpaid legal fees and costs.

The Debtor was asked at the meeting of creditors whether she thought she had any claims against Big Bank. She said emphatically that she did not.

Debtor received her discharge in the ordinary course, discharging both the Big Bank debt and the fees owed to her state court lawyer.

Shortly after a hearing at the bankruptcy court that her state court lawyer also attended, and after speaking with the state court lawyer in the hall, Debtor amended her Schedule B to, among other new assets, disclose a potential claim against Big Bank.

Big Bank and the Trustee sought Rule 2004 exams of Debtor and her state court lawyer. The deadline for seeking discharge revocation was looming. At the Rule 2004 exam, Debtor claimed attorney client privilege in response to many of the Trustee's questions about the newly disclosed claim and her post-bankruptcy discussions about it with the state court lawyer, or said you need to talk to the state court lawyer about that. And the state court lawyer claimed work product protection when asked about the legal theories underpinning the newly disclosed claim.

The Trustee and Big Bank filed motions with the bankruptcy court asking it to compel Debtor and the state court lawyer to answer their questions about the newly disclosed claim and other assets, either finding no attorney client privilege or allowing the Trustee to waive it on Debtor's behalf.

How does the motion to compel come out?

Can the Trustee waive any attorney client privilege Debtor has?

Does it make a difference if the Trustee has already filed suit to revoke the discharge?

What about communications as to amendment of the schedules with bankruptcy counsel?

Are they privileged?

5. Is This Debtor Eligible for Relief?

Debtor filed a Chapter 13 case. This wasn't her first time in Chapter 13. Or even her second. The most recent case was filed 150 days after the prior case was dismissed, on the eve of a state court judicial foreclosure sale of her home.

In the prior Chapter 13 case, Debtor's first mortgage lender had filed a motion for relief from the automatic stay. However, the motion was satisfactorily resolved by an Agreed Order among Debtor, the lender and the Chapter 13 Trustee. The Agreed Order was still in place two years later when Debtor voluntarily dismissed the case. No motion to dismiss had been filed by the Chapter 13 Trustee, Debtor's plan was in good standing when the voluntary dismissal occurred and she was in full compliance with the Agreed Order.

Is Debtor eligible for relief in the new Chapter 13 case?

6. This Claim is Stale

Debtor filed a Chapter 13 case. He proposed a 10% distribution to unsecured creditors. Claim Service and Funding, Inc. (“CSFI”) timely filed a proof of claim for \$2,500 in the Chapter 13 case on behalf of the holder of the claim. In fact the claim was filed even before plan confirmation. The credit card debt CSFI asserted was more than 8 years old. The state statute of limitations on breach of contract actions was 6 years, and no judgment had ever been taken on the account.

After the confirmation order was entered, Debtor’s counsel filed an adversary complaint against CSFI in the bankruptcy court. In it, he asserted a cause of action seeking disallowance of the CSFI claim based on the state statute of limitations. Counsel also asserted a second cause of action for damages for violation of the federal Fair Debt Collection Practices Act, asserting that the filing of the proof of claim after the statute of limitations had expired was an abusive, deceptive and unfair collection practice of a debt collector prohibited by the statute.

Who wins on each of the two causes of action?

7. The Blacklist

Debtor had several large pre-petition credit card debts. They were all discharged. But one of the debts is still showing up on the Debtor's post-bankruptcy credit report. Now, that debt is preventing Debtor from getting a new loan to buy a car, even three years after his discharge and his case was closed.

What options does Debtor have for dealing with this problem?

Has the creditor violated the discharge injunction by not updating the credit report?

8. Is It Open Season For Exemption Fraud After *Law v. Siegel*?

Debtor had a pending personal injury claim at the time she filed her Chapter 7 case. But she did not tell her lawyer about it and it was never listed on her Schedule B. After the personal injury defendant filed a motion to dismiss in state court, Debtor decided she had better fess up and tell her bankruptcy lawyer about the lawsuit.

Bankruptcy counsel immediately reopened the case and filed amended Schedule B to disclose the claim. But he also filed an Amended Schedule C to assert that the lawsuit proceeds would be exempt in any event. If she had originally claimed the exemption, there would not have been any basis for objection to the exemption.

After *Law v. Siegel*, is there anything the Chapter 7 Trustee can do about this conduct, including with respect to the exemption?

9. I Want to Keep This Piece of Junk Car By Whatever Means Possible

Debtor filed a Chapter 7 case. He still had his car in his possession when he filed the case. Debtor first tried to reaffirm on the car loan, but the lender refused. So Debtor filed a motion to redeem the car from the loan under Section 722. The motion was filed on the 47th calendar day after the meeting of creditors, with the 45th day having fallen on the weekend. The creditor argued that the motion was untimely.

Is the lender right based on Sections 521(a)(2), 521(a)(6) and 362(h)?

10. Let's Go Right to the Source

A creditor in a Chapter 13 case also owed the Internal Revenue Service money. Under the confirmed Chapter 13 plan, the creditor was scheduled to get paid 100% of its claim against the Debtor. Tired of getting toolled around by the debtor's creditor, Internal Revenue Service issued a levy to the Chapter 13 Trustee against the funds in the Chapter 13 Trustee's control to seize them directly and prevent their distribution to the creditor.

What should the Chapter 13 Trustee do in response to the levy?

11. But This Is My Money

Three years after filing a Chapter 13 case, Debtors voluntarily converted their case to Chapter

7. One debtor had been named pre-petition as trustee of his mother's irrevocable trust. He was also a beneficiary of her trust upon her death. Debtor's mother died after the Chapter 13 case was filed. Debtor received a substantial distribution from the trust's sale of real property, but never notified the Chapter 13 Trustee. He admitted that part of the reason for the conversion "was the inheritance," with the proceeds from the inheritance and other post-petition assets not having been disclosed in the documents and schedules filed after conversion.

Who gets the property from the inheritance in Debtor's possession as of conversion and why?

12. For Whose Benefit is Child Support Paid?

Debtor is a single mother of two minor children. She calculated her current monthly income as \$6,214 in wages and \$400 in monthly child support payments, which were paid by the children's father and awarded by a state court. Debtor was above the median income. However, in calculating her disposable income, she excluded the child support payments from the calculation. The Chapter 13 Trustee objected to her plan, arguing that she had miscalculated her disposable income in excluding the child support payments.

Should the court sustain the Chapter 13 Trustee's objection?