

Creditors' Rights & Bankruptcy Section Newsletter

Greetings:

Each year brings with it new challenges and a re-examination of some recurring problems. One issue that is always at the forefront is delinquent student loan debt. This newsletter addresses a case in which a bankruptcy court attempts to apply some "tough love" to achieve an equitable result, although not the result the debtor would have preferred. We also address the strange concept of proffers of testimony in evidentiary hearings and provides some practice tips you may find helpful. Finally, we address a recent decision out of the Fifth Circuit which deals, yet again, with a trustee's attempt to stick his hands into a secured lenders collateral cookie jar and comes out wanting. Hope you enjoy this month's palate of articles! As always, let us know how we can assist you in your credit and collection needs. If you have any ideas for future article or questions that need addressing, give us a call.

Bruce W. Akerly

Chair, Creditors' Rights & Bankruptcy Practice Group
Cantey Hanger LLP, Dallas



Bruce W. Akerly leads the firm's Creditors' Rights & Bankruptcy Practice Group. He has extensive experience in commercial litigation, bankruptcy, financial restructuring, and creditors' rights.

Quote of the Month:

"Believe and act as if it were impossible to fail."

- Charles F. Kettering

Self-Deprecating Lawyer Joke of the Month:

A lawyer named Strange died, and his friend asked the tombstone maker to inscribe on his tombstone, "Here lies Strange, an honest man, and a lawyer." The inscriber insisted that such an inscription would be confusing, for passersby would tend to think that three men were buried under the stone. However he suggested an alternative: He would inscribe, "Here lies a man who was both honest and a lawyer. That way, whenever anyone walked by the tombstone and read it, they would be certain to remark: *"That's Strange!"*



What's On Your Mind?

If you have an issue or question you would like addressed in a subsequent e-newsletter, please let us know and we will attempt to do so.



Is It A Violation Of Fair Credit Reporting Act (FCRA) For A Debt Collector To Access A Credit Report Post-Discharge?

Authored by Bruce W. Akerly, Partner

Yes, according to a recent decision out of the United States District Court in Indiana. The FCRA prohibits obtaining a credit report on a debtor unless it is "for a purpose for which the [credit] report is authorized." Debt collection has been held to be a permissible reason for obtaining a credit report. Generally, a debt collector can obtain a consumer's credit report if the debt collector has "reason to believe" that the consumer owes the debt. In *Buckley v. Afni*, the court held that once discharge in bankruptcy has occurred there is no legal purpose – i.e., reasonable belief that a debt existed – for accessing a debtor's credit report. The question of reasonableness of the belief that the debt existed is a question of fact. In *Buckley*, the collector maintained it did not know that the debtor's DIRECTV account debt had been discharged because of the address on the account and the debtor's address were different. The court did not buy this argument because there was other information associated with the account – e.g., social security number, debtor's name, and her DIRECTV account number – that would easily have provided the collector the requisite notice that the debt had been discharged.



The Failure To Disclose An Asset In Bankruptcy May Preclude A Debtor From Seeking To Recover The Asset At A Later Date

Authored by Bruce W. Akerly, Partner

In *Allen v. C&H Distributors LLC*, the debtors filed chapter 13. They filed a chapter 13 plan. After 5 years of making payments the bankruptcy court closed the case without discharging the debtors because they failed to file documents showing they had complete an instructional course on personal financial management. The debtors then filed a personal injury lawsuit against C&H. The personal injury lawsuit was not disclosed in the debtor's bankruptcy. C&H moved to dismiss the case under the doctrine of judicial estoppel. The doctrine of "judicial estoppel" has three elements: (1) the party against whom the doctrine is sought has asserted a legal position that is plainly inconsistent with a prior position taken in a legal proceeding, (2) a court accepted the prior position as being correct, and (3) the party did not act inadvertently. In this situation, the Fifth Circuit held that all three elements were met. First, the court held that the Allens had an affirmative duty to disclose the personal injury action in their bankruptcy. They failed to do so. As such, they impliedly represented they had no such claim. The omission was an admission in their case that no such claim existed which was clearly inconsistent with the position they were taking when they brought their personal injury lawsuit. Second, the court held that acceptance by a court of the prior position as being correct does not require a judgment to have been issued. Instead, as in this case, all that is required is that the first court – the bankruptcy court – have adopted a position urged by the Allens, i.e., that they had no personal injury action against C&H. Finally, the court held that the Allens did not act inadvertently in failing to disclose the personal injury lawsuit because they knew of the facts of the personal injury lawsuit during the pendency of their bankruptcy case and, therefore, had knowledge of its existence.



Is A Judgment Lien Extinguished When The Personal Debt In Issue Is Discharge In Bankruptcy?

Authored by Bruce W. Akerly, Partner

In Texas, recordation of an abstract of judgment in the real property records of the county in which a debtor has real property creates a lien in favor of the creditor against such property. Texas law further provides, that a "judgment is discharged and any abstract of judgment or judgment lien is cancelled and released without further action in any court and may not be enforced if: (1) the lien is against real property owned by the debtor before a petition for relief is filed under federal bankruptcy law and (2) the debt or obligation evidenced by the judgment is discharged in bankruptcy." Tex. Prop. Code § 52.042. The Texas Property Code further adds that a "judgment lien is not affected by this subchapter and may be enforced if the lien is against real property owned by the debtor before a petition for relief was filed under federal bankruptcy law and (1) the debt or obligation evidenced by the judgment is not discharged in bankruptcy; or (2) the property is not exempted in the bankruptcy and is abandoned during the bankruptcy." *Id.* § 52.043. Discharge of a debt in bankruptcy is "the release of a debtor from all of his debts which are provable in bankruptcy." Black's Law Dictionary 463 (6th ed. 1991). Importantly, discharge in bankruptcy does not extinguish the debt; rather it removes and remedy that may be had against the person of the debtor (*in personam*) which the creditor had prior to the filing of the bankruptcy case and leaves in place the remedies which the creditor has against the property of the debtor (*in rem*). Stated another way, properly perfected liens pass through bankruptcy. But personal liability claims against the individual do not. So, what impact does this have on section 52.042 of the Texas Property Code? No Texas state court has ruled on the issue. In *Moser v. Schachar (In re Thaw)*, the Fifth Circuit held that section 52.042 acts on the status of any liens against the land or assets held by the debtor after the bankruptcy process has come to a close. The statute reads that a lien is discharged "without further action in any court" once the debt is discharged in bankruptcy. The judgment lienholders status is not affected during the bankruptcy but only after the bankruptcy. Section 52.042 was enacted to assist debtors, post-bankruptcy, with regard to real property burdened by liens in county records, and not to affect lien rights in bankruptcy. The statute is not permitted to be used by a chapter 7 debtor as a basis for challenging secured creditor status.

If you enjoyed this E-Newsletter or found the information helpful, please let us know and feel free to pass it along to your colleagues and friends.

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