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Northeast Bankruptcy Conference & Consumer Forum 2021

Consumer Track

Consumer Practice Legislative Potpourri

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CARES Act and COVID-19 Bankruptcy Relief Extension Act

- CARES Act originally signed into law on March 27, 2020, and included several bankruptcy provisions to assist struggling debtors.
- Provisions were originally slated to expire one year from passage of CARES Act.
- On March 29, 2021, the COVID-19 Bankruptcy Relief Extension Act was signed into law, which extended the bankruptcy-related provisions of the CARES Act for another year. These provisions will now expire (absent further legislation) on March 27, 2022.

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Exclusions to CMI and Disposable Income under the CARES Act

- CARES Act amends the definition of “current monthly income” found in 11 U.S.C. § 101(10A) to add subsection (B)(ii)(V), which excludes from current monthly income “payments made under Federal law relating to the national emergency…with respect to the coronavirus disease 2019 (COVID-19);
  - Excludes stimulus checks and extended unemployment benefits from means test calculations.
- Also amends 11 U.S.C. § 1325(b)(2) to exclude from “disposable income” Federal payments due to COVID-19.

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Chapter 13 Plan Modifications under CARES Act

- CARES Act amended 11 U.S.C. § 1329 to add sub-section (d)(1), which allows Debtors to extend the term of their Chapter 13 Plans to seven (7) years, if:
  - The Plan was originally confirmed before March 27, 2020 (now March 27, 2021 under COVID-19 Bankruptcy Relief Extension Act);
  - The debtor had a material financial hardship due to COVID-19 pandemic; and
  - The modification is approved after notice and a hearing.

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Chapter 13 Plan Modifications (cont.)

- *In re Fowler*, 2020 Bankr. LEXIS 3198 (Middle District of Alabama, Nov. 13, 2020): Court granted the Debtor's request over the Trustee's Objection to modification pursuant to 11 U.S.C. § 1329(d). Court refused to add additional requirement that debtors be current on Plan obligations prior to seeking hardship modification.
- *In re Winnegrad*, 2021 Bankr. LEXIS 159 (D. N.J.): Court held that good-faith and feasibility requirements were still necessary in a modification under 11 U.S.C. § 1329(d), as it explicitly states the requirements of 11 U.S.C. § 1325(a) still apply.
- *In re Dunkes*, 2020 Bankr. LEXIS 3230 (D. Md.): Creditor's motion for relief from automatic stay was moot as creditor did not object to Debtor's COVID-hardship modification, which sought to cure the default to creditor.

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Consolidated Appropriations Act ("CAA")

- Signed into law on December 27, 2020, and includes many important bankruptcy provisions for debtors.

- Most of these provisions expire after either one or two years.

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Important CAA Provisions

- <u>1328(i) Discharge:</u> Temporary addition to 11 U.S.C. 1328 to allow judges discretion to grant a discharge to debtors even if they have default on plan obligations after 3/13/2020. Debtors must either be: 1) behind 3 months on a residential mortgage due to a COVID-19 related hardship; or 2) Debtor's confirmed plan calls for the cure of a pre-petition mortgage default, and the Debtor enters into a qualifying forbearance agreement or mortgage modification. Expires on 12/27/2021.
    - *In re Ritter*, 626 B.R. 35 (C.D. of Cal., March 5, 2021): Debtor's Request for Immediate Discharge denied by the bankruptcy court, citing that other requirements of 11 U.S.C. § 1328 must still be met. Court considered all sections of § 1328 in determining, in its discretion, that an immediate discharge under §1328(i) was unwarranted.

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CAA Provisions (cont.)

- CARES Act Forbearance Claims: CARES Act allows debtors to request mortgage forbearances for up to 12 months. CAA allows certain servicers to file a proof of claim for the payments skipped, and then the Debtor may file a motion to modify plan to include those payments. This will expire on December 27, 2021.
- Discrimination: The CAA amends 11 U.S.C. § 525 to protect debtors from being denied certain CARES Act related relief due to their bankrupt status, namely for: 1) right to request a CARES Act modification; 2) right to request forbearance on multi-family properties; and 3) the temporary eviction moratorium that was in effect. Set to expire on December 27, 2021.

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CAA Provisions (cont.)

- Preferences: CAA amends 11 U.S.C. § 547 to add sub-section (j) to prohibit the Trustee or Debtor from avoiding certain payments made in preference period if for rental arrearages (in certain circumstances). Expires on December 27, 2021.
- PPP Loans: CAA tries to address widespread confusion as to whether active Debtors could be recipients of a PPP loan under CARES Act. CAA makes clear that certain Debtors (in sub-chapter V, Chapter 12, and Chapter 13 cases) can obtain PPP loans if the SBA sends a letter to the United States Trustee's Office indicating their assent. Expires on December 27, 2022.
- Utilities: Amends 11 U.S.C. § 366 to provide additional protection to Debtors from interruptions in their utility services. Expires on December 27, 2021.

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Other Recent Legislative Changes

- HAVEN Act: The Honoring American Veterans in Extreme Need Act (HAVEN Act) signed into law on August 23, 2019. Excludes from definition of "current monthly income" most VA benefits received by Debtors.
  - *In re Gresham*, 616 B.R. 505 (Bankr. E.D. Mich. 2020).

- American Rescue Plan/Student Loans: The American Rescue Plan of 2021 includes an amendment that allowed student loans to be forgiven tax-free from 2021 to 2025, inclusive. Applies to public and private loans.

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Changes to the FDCPA

October and December 2020 – CFPB issued two new final rules that amend Regulation F (12 CFR part 1006), which implements the FDCPA. *See* 85 FR 76734 (Published Nov. 30, 2020); 86 FR 5766 (Published Jan. 19, 2021).

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Changes to the FDCPA

The October Rule addresses, among other issues, "communications in connection with debt collection and prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection," as well as the use of newer forms of communication technologies and record retention requirements.

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Changes to the FDCPA

October Rule

Adds "attempt to communicate" as a covered action under the FDCPA, which includes "limited-content message."

Requires debt collectors to include only specific information in limited content messages:

- Business name; request for reply; name of person Debtor may contact; phone number.
- Optional content: salutation, date/time of call, suggested date/time for Debtor's reply, and statement that if the Debtor replies, Debtor may speak with any representative or associate of the debt collector.

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Changes to the FDCPA

October Rule

Clarifies that a Debtor need not use the "magic word" (inconvenient) to have a time/place/method of communication deemed inconvenient.

Subjects cell phones and other electronic communications to prohibition on communications at unusual/inconvenient time/place.

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Changes to the FDCPA

October Rule

Debt collectors may not communicate through a specific method if Debtor has stated such method may not be used. Debt collectors cannot send communications to work-provided email (if debt collector has knowledge it was provided by employer).

Requires debt collectors to include, in each communication or attempt, a reasonable and simple method to opt out of additional communications or attempts.

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Changes to the FDCPA

October Rule

Clarifies that prohibition of harassing, oppressive and abusive conduct applies to telephone calls and email/texting.

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Changes to the FDCPA

October Rule

Creates rebuttable presumption of compliance with violation of prohibition of call frequency.

- Compliance presumed if debt collector makes seven or fewer calls within seven consecutive days and not within seven consecutive days after having conversation about the debt.
- Violation presumed if debt collector makes more than seven calls within seven consecutive days, or within seven consecutive days of having conversation about the debt.

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Changes to the FDCPA

October Rule

Clarifies that debt collectors may not make or use false, deceptive or misleading representations or means through social media in communications with Debtor or in attempt to obtain information about Debtor's location.

- Debt collectors may not post messages on a public area of Debtor's social media (even if the Debtor has limited such area to their contacts).

- It is a violation to communicate with the wrong person on social media about a debt.

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Changes to the FDCPA

October Rule

Provides debt collectors with a method to assert a bona fide defense to civil liability for unintentional violations of prohibitions against third party disclosures.

The October Rule also places, with some exceptions, bans on transfers of debt that a debt collector knows or should have known has been paid, settled or discharged in bankruptcy.

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Changes to the FDCPA

December Rule

The December Rule focuses on debt collection disclosures, as well as information that must be provided to consumers at the start of collections communications. The December Rule prohibits debt collectors from bringing or threatening to bring collection actions to collect time-barred debt or providing information about a debt to a reporting agency before taking certain actions to contact the Debtor about the debt.

Requires debt collectors to provide debt validation information, consumer right information.

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Changes to the FDCPA

December Rule

Debt collectors may opt to use a safe harbor form of notice that includes additional information.

Validation information must be provided with either (1) initial communication or (2) within five (5) calendar days of initial communication (excludes formal civil action pleadings).

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Changes to the FDCPA

December Rule

During 30-day validation period, if Debtor requests information or disputes debt, debt collector may not attempt to collect or engage in communications that “overshadow” Debtor’s right to dispute or request original creditor information.

If Debtor requests information or disputes debt, debt collector must halt any existing collection efforts and may not commence any collection efforts until after information is provided.

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Changes to the FDCPA

December Rule

Previously, debt collectors were permitted to submit information about a debt to a reporting agency before contacting Debtor. December Rule bans this practice.

Before reporting to an agency, a debt collector must do one of the following:

- Speak with Debtor (1) in person or (2) telephonically about the debt;
- Send (3) mail or (4) electronic communication to Debtor about the debt and wait a reasonable period of time to receive notice of undeliverability (14 calendar days is considered reasonable; if notice is received within 14 calendar days, must try to resend information via one of the other methods before submitting to agency)

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Changes to the FDCPA

December Rule

In sending the notice, a debt collector must comply with the October Rule requirements regarding methods of communication.

December Rule prohibits debt collectors from threatening to bring or commencing legal action to collect time-barred debts (but specifically excludes filing a proof of claim in a bankruptcy case).

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Changes to the FDCPA

Effective Date of Rules

Both the October and December Rules were set to become effective November 30, 2021, but the CFPB recently issued a new Final Rule delaying the effective date of both Rules to January 29, 2022.

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Consumer Bankruptcy Reform Act

Recent proposed legislation to eliminate Chapter 13 bankruptcies and consumer Chapter 7 bankruptcies and combine them into a new "Chapter 10" bankruptcy that would permit multiple repayment options (including a zero-dollar payment plan).

The Act would permit the U.S. Trustee to appoint a standing Chapter 10 trustee or to act as the trustee in a case.

Permits the Debtor to avoid transfers under Sections 544, 545, 547, 548, 549 or 1041 if the Trustee does not seek to avoid them, or if Section 1042 prohibits the Trustee from avoiding the transfers.

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Consumer Bankruptcy Reform Act

Discharge

If no plan payments are required, discharge will enter on the date for which filing plans expires; otherwise, as soon as practicable after the confirmation of a repayment plan.

Exceptions to Discharge:

- Previously received a discharge under Section 1142, 1192, 1128, 727 or 1328 within six (6) years of the filing of the Chapter 10 petition;
- Failed to tender property of the estate designated to be tendered under a repayment plan;

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Consumer Bankruptcy Reform Act

Exceptions to Discharge, cont.

- Executed a written waiver of discharge after order of relief and attends a hearing where Court determines Debtor understands effect of waiver; or
- Any of the other existing grounds for objection to discharge exists – false oath, transfer within 1 year with intent to defraud, failure to satisfactorily explain loss of assets, failed to provide records to trustee, refusal to obey lawful order of court, etc.

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Consumer Bankruptcy Reform Act

Limited Proceedings

Debtor may elect to conduct a limited proceeding that affects only claims secured by select items of property.

A general proceeding is the default, and a Debtor may not elect a limited proceeding after date of the order of relief. However, if a case is dismissed, a Debtor may refile and elect a limited proceeding. A Debtor may convert from a limited to a general proceeding without dismissing.

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Consumer Bankruptcy Reform Act

Limited Proceedings

A limited proceeding would exclude application of Sections 341, 365, 1001, 1002, 1005(a), 1005(b)(4), 1005(b)(7), 1005(c), 1008, 1021(a)(1), 1025, 1027(a), 1031, 1032, 1041 and 1042.

Under a limited proceeding, property of the estate will be limited to property elected by Debtor that is subject to the limited proceeding, and the automatic stay only applies to entities with interest in property listed in limited proceeding.

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Consumer Bankruptcy Reform Act

Limited Proceedings

Debtor is only required to file statement of current income and expense from list under 521(a)(1)(b).

Notice of relief only goes to affected creditors.

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Bankruptcy Venue Reform Bill

Introduced in the House on June 28, 2021 – H.R. 4193 – by Rep. Zoe Lofgren and Ken Buck.

- Would require Chapter 11 proceedings to take place where principal place of business or principal assets of the corporation are located.
- Burden is on the Debtor to establish if challenge is raised (by clear and convincing evidence).
- If filed in incorrect venue, Court shall immediately dismiss the case or proceeding, or, if in interest of justice, immediately transfer to court where case should have been filed.

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Case Law Update

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City of Chicago, Illinois v. *Fulton*, 141 S.Ct. 585 (2021)

- Holding: Passive retention of property of the estate after the bankruptcy case is filed does not violate the automatic stay. *See* 11 U.S.C. § 362(a)(3).

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Roman Catholic Archdiocese of San Juan, Puerto Rico v. *Acevedo Feliciano*, 140 S.Ct. 696 (2020)

- Holding: Courts cannot enter a *nunc pro tunc* order unless they "reflect the reality of what has already occurred." (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990)) (cleaned up).

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Roman Catholic Archdiocese of San Juan, Puerto Rico v. *Acevedo Feliciano*, 140 S.Ct. 696 (2020)

- *In re Goldberg*, No. 18-03592-5-JNC, 2020 WL 1526923 (Bankr. E.D.N.C. Mar. 27, 2020) .
- *In re Prototype Eng'g & Mfg., Inc.*, No. 2:17-BK-21018-RK, 2020 WL 6937401 (Bankr. C.D. Cal. July 7, 2020).
- *In re Merriman*, 616 B.R. 381 (B.A.P. 9th Cir. 2020).
- *In re Telles*, No. 8-20-70325-REG, 2020 WL 2121254 (Bankr. E.D.N.Y. Apr. 30, 2020).

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Ritzen Group, Inc., v. *Jackson Masonry, LLC*, 140 S.Ct. 582 (2020).

- Holding: An order unreservedly granting or denying relief from the automatic stay is final and, therefore, appealable under 28 U.S.C. §158(a)(1).

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Kupperstein v. Schall et al. (In re Kupperstein), 994 F.3d 673 (1st Cir. 2021)

- Holding: The automatic stay did not apply to state probate court's civil contempt orders requiring the debtor, *inter alia*, to pay attorneys' fees and turn over rents collected from property he kept in violation of the court's judgment; the state court order fell under the "police power" exception to the automatic stay.

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Rockwell v. Hull (In re Rockwell), 968 F.3d 12 (1st Cir. 2020)

- Holding: A debtor may retain his homestead exemption even if he fails to reinvest the proceeds in another residence within six months as required by state law.

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Palladino v. *Sacred Heart University, Inc.*, 942 F.3d 55 (1st Cir. 2019)

- Holding: Making tuition payments towards an adult child's university while insolvent is a fraudulent transfer that can be clawed back by the trustee pursuant to 11 U.S.C. § 548(a)(1)(B)(i).

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Consumer Case Update

Supreme Court of the United States

- ***City of Chicago, Illinois* v. *Fulton*, 141 S.Ct. 585 (2021).** Holding: Passive retention of property of the estate after the bankruptcy case is filed does not violate the automatic stay. *See* 11 U.S.C. § 362(a)(3).

  The City of Chicago ("City") impounded debtor-respondents' cars for failure to pay fines for motor vehicle infractions. After their cars were impounded, each respondent filed a chapter 13 bankruptcy case and requested the City turnover the vehicles pursuant to § 542(a). The City refused. Each of the bankruptcy courts found that the City was in violation of the automatic stay. On appeal, the Seventh Circuit Court of Appeals concluded that City had acted to exercise control over property of the estate in violation of § 362(a)(3) and affirmed the bankruptcy courts' decisions.

  The Supreme Court vacated and remanded. According to Justice Alito, who authored the opinion, the more natural reading of the words "stay," "act," and "exercise control," as used in § 362(a)(3), prohibits creditors from taking "affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." Thus, mere retention of property after the filing of the bankruptcy case does not violate the stay.

  Justice Sotomayor's concurrence emphasizes that the Court's decision did not "decide[] whether and when § 362(a)'s other provisions may require a creditor to return a debtor's property." *See* 11 U.S.C. §§ 362(a)(4), (6). Nor did the Court address how bankruptcy courts should enforce the turnover of property under § 542(a). Justice Sotomayor notes that turnover proceedings under § 542(a) are slow and particularly problematic in consumer cases. Waiting 100 days for a creditor to return a debtor's car—the average pendency of a turnover proceeding—not only interferes "with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointment, and other necessities." Unfortunately, it is up to Congress and/or the Advisory Committee on Rules of Bankruptcy Procedure, not the bankruptcy courts, to consider amendments "that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtor's vehicles are concerned."

- ***Roman Catholic Archdiocese of San Juan, Puerto Rico* v. *Acevedo Feliciano*, 140 S.Ct. 696 (2020).** Holding: Courts cannot enter a *nunc pro tunc* order unless they "reflect the reality of what has already occurred." (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990)) (cleaned up).

  In 1979, the Catholic Schools of the Archdiocese of San Juan created the Pension Plan for Employees of Catholic Schools Trust (the "Trust") to administer a pension plan for employees of Catholic schools. In 2016, the employees sued the Trust, Roman Catholic and Apostolic Church of Puerto Rico (the "Church"), the Archdiocese of San Juan, the Superintendent of the schools, and the respective schools in the Puerto Rico Court of First Instance alleging that the Trust terminated the employee pension plan and eliminated employees' pension benefits.[1] In early 2018, during the litigation, the Trust filed for bankruptcy in the United States Bankruptcy Court for the District of Puerto Rico (the "Bankruptcy Court"). Thereafter, the Archdiocese and Church argued that the pension claims proceeding was sufficiently related to the Trust's bankruptcy case and removed the pension claims proceeding to the United States District Court for the District of Puerto Rico (the "District Court"). On March 13, 2018, the Bankruptcy Court dismissed the Trust's bankruptcy case, but the District Court did not remand the pension claims proceeding back to the Court of First Instance at that time.

  Days after the bankruptcy case was dismissed, on March 16, 26, and 27, 2018, the Court of First Instance entered three orders: one requiring the Church to make payments to the pension plan, another directing it to deposit $4.7 million in a court account within 24 hours, and a third instructing the sheriff to seize the Church's assets and moneys. The

[1] One of the main issues in the Court of First Instance was: if the Trust does not have the funds to meet its obligations, which of the participating employers, if any, was obliged to make the payments. A determination of the legal personality of each entity was necessary. In review, the Puerto Rico Supreme Court, ignoring the Church's own structure, held that "each entity created that operates separately and with a certain degree of autonomy from the Catholic Church is in reality a fragment of" it. Accordingly, the Church was the only entity with separate legal personality that could be ordered to pay the employees' pensions.

District Court did not remand the pension claims proceeding to the Court of First Instance until August 20, 2018. The remand order, however, was a *nunc pro tunc* judgment stating that the effective date of the order was March 13, 2018, the day the Bankruptcy Court dismissed the Trust's bankruptcy case.

The Archdiocese filed a petition for *certiorari* to the Supreme Court of the United States arguing that the Puerto Rican courts disregarded the Church's own views regarding how to structure itself and, therefore, violated the Free Exercise and Establishment Clause of the First Amendment. The Court granted certiorari.

Avoiding the First Amendment issue, the Supreme Court held that the Court of First Instance lacked jurisdiction to enter the three orders. Removal of a proceeding divests a state (or local) court of "all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment are not simply erroneous, but absolutely void." (quoting *Kern v. Huidekoper*, 103 U.S. 485, 493 (1881)) (cleaned up).

The Supreme Court held that the District Court's *nunc pro tunc* order did not reflect the reality of what occurred on March 13, 2018 and could not restore the Court of First Instance's jurisdiction retroactively. *Nunc pro tunc* orders "presuppose" that a court has made a decree that was not entered due to "inadvertence of the court." But since nothing had occurred in the District Court on March 13, 2018, the *nunc pro tunc* order was inappropriate. A court "cannot make the record what it is not." *Jenkins*, 495 U.S. at 49.

- ***Ritzen Group, Inc.,* v. *Jackson Masonry, LLC*, 140 S.Ct. 582 (2020).** Holding: An order unreservedly granting or denying relief from the automatic stay is final and, therefore, appealable under 28 U.S.C. § 158(a)(1).

Prior to Jackson Masonry's filing for bankruptcy protection, Ritzen had sued it in state court alleging breach of contract, a suit which was stayed once Jackson filed for bankruptcy. Ritzen, seeking to litigate the breach of contract lawsuit in the state court—its preferred forum—filed a motion for relief from stay. The bankruptcy court entered an

order unreservedly denying the motion. Thereafter, Ritzen filed a proof of claim that—after full adjudication in an adversary proceeding—was ultimately disallowed.
Shortly after its claim was disallowed—and almost two years after the order denying relief from stay was entered—Ritzen appealed the court's order denying relief from stay. The District Court dismissed the appeal as untimely; the notice of appeal was filed more than 14 days after the court entered the order. *See* 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8002(a). The Sixth Circuit affirmed and the Supreme Court granted certiorari.

Unlike typical litigation, some bankruptcy cases involve several distinct issues that "may be linked, one dependent on the outcome of the other." Accordingly, the ability to appeal final orders, judgments, and decrees "in cases and *proceedings*" (rather than just cases) avoids situations where "reversal of a decision made early on could require the bankruptcy court to unravel later adjudications rendered in reliance on an earlier decision." However, not every decision the bankruptcy court makes is appealable: the rules limit appeals to orders that "terminate[ ] a procedural unit separate from the remaining case."

The Supreme Court held that under § 158(a), adjudication of the motion for relief from stay is an immediate appealable "proceeding." Such an order, the Supreme Court held, is a "procedural unit" that "occurs before and apart from proceedings on the merits of creditor's claims," like an order dismissing a case for lack of personal jurisdiction or improper venue.

First Circuit

- ***Kupperstein* v. *Schall et al. (In re Kupperstein)*, 994 F.3d 673 (1st Cir. 2021):** Holding: The automatic stay did not apply to state probate court's civil contempt orders requiring the debtor, *inter alia*, to pay attorneys' fees and turn over rents collected from property he kept in violation of the court's judgment; the state court order fell under the "police power" exception to the automatic stay.

Before filing for bankruptcy, Kupperstein, the debtor, had illegally obtained control over property owned by a decedent's estate, in which Massachusetts Office Health and Human Services ("MassHealth") had a lien. Kupperstein had been held in contempt twice in state court for failure to turnover the rents unlawfully collected, the keys of the property, and documents related to the property. He filed for bankruptcy the day before a contempt hearing was scheduled to occur. After the bankruptcy case was filed, the state court ordered him to turnover more than $50,000 in rents plus $10,000 in attorneys' fees as sanctions for his continuing violation of the probate court's orders.
MassHealth and the decedent's estate representative, Schall, filed motions for relief from the automatic stay in the bankruptcy court. Kupperstein filed a motion to hold MassHealth in contempt and to impose sanctions for violating the automatic stay. MassHealth and the estate's motions were granted (except that the movants were not allowed to collect a separate state court judgment for almost $200,000 against the debtor, arising from the lien); and the bankruptcy court denied the motions for sanctions. The court reasoned that the probate court contempt proceedings fell under the police power exception and did not violate the automatic stay. Kupperstein appealed to the United States District Court for the District of Massachusetts and, subsequently, to the Court of Appeals for the First Circuit (the "First Circuit"). The bankruptcy court's decision was affirmed by the First Circuit.

"To determine if the police power exception applies," the First Circuit analyzed "whether the government's action is to effectuate a 'public policy'" (making it exempt from the stay) or instead "to further its own 'pecuniary interest'" (in which case, the stay would apply. *Citing Parkview Adventist Med. Ctr.* v. *United States*, 842 F.3d 757, 763 (1st Cir. 2016). The court explained that when a governmental action "contains various elements, some of which effectuate a public policy and other which could involve pecuniary interests," courts must consider the "totality of the circumstances" to determine its purpose. Turning to the case at hand, the First Circuit found that the probate court's orders sought to protect the public safety and welfare in requiring Kupperstein to turn over the keys and stop acting as the landlord of a property he does not own.

The First Circuit explained that requiring the debtor to turnover overdue rents and to pay sanctions does not serve a "pecuniary interest" simply because it requires the payment of money: there is a "distinction between a judgment prematurely awarding assets to creditors ahead of the process permitted by the bankruptcy court (exactly the sort of thing the automatic stay is intended to prevent) and an order commanding disgorgement of ill-gotten gains accumulated in direct violation of a court order." According to the First Circuit, the police power exception applies to the latter.

- ***Rockwell* v. *Hull (In re Rockwell)*, 968 F.3d 12 (1st Cir. 2020):** Holding: A debtor may retain his homestead exemption even if he fails to reinvest the proceeds in another residence within six months as required by state law.

  When Rockwell filed his chapter 13 bankruptcy case, he claimed a homestead exemption of $47,500 under the Maine law exemptions, 14 M.R.S. § 4422. *See* 11 U.S.C. § 522(b)(3) (a debtor may exempt from the bankruptcy estate any property permitted by his state of residence). Although Rockwell had originally decided to keep the property, his plans changed during the course of the case; he later moved to sell the property for $160,000. After paying closing costs and the secured lender, he kept $47,500 of the proceeds of the sale for his homestead exemption and paid the nonexempt proceeds to the chapter 13 trustee. For property to remain exempt under Maine's homestead statute, the claimant must reinvest the proceeds of a sale in another residence within "6 months from the date of receipt of such proceeds." 14 M.R.S. § 4422. Rockwell, however, did not do so.

  Shortly after the property was sold, Rockwell converted his chapter 13 to a chapter 7 case. The chapter 7 trustee objected to Rockwell's use of the homestead exemption, stating that the proceeds were no longer exempt under Maine law. The bankruptcy court denied the trustee's objection. The United States District Court for the District of Maine and the First Circuit affirmed.

The First Circuit held that exemptions are analyzed on the date the debtor files for bankruptcy, not on the date of conversion. *Cf.* 11 U.S.C. § 348(a). "Property that is properly exempted under § 522 is immunized against liability for prebankruptcy debts, subject only to a few exceptions." *In re Cunningham*, 513 F.3d 318, 323 (1st Cir. 2008). Absent those exceptions, courts should use "the complete snapshot rule." The snapshot rule freezes the debtor's financial situation in time; it "cannot be altered by circumstances that change later." Thus, even though Rockwell did not later invest the proceeds as required under Maine law, the complete snapshot rule froze Rockwell financial status in time as of the petition date, and his claimed homestead exemption could not be altered by the subsequent events. The First Circuit held that under these circumstances, Maine's sixth month rule would not apply. "To interpret § 522(c) as conferring merely an ephemeral exemption, subject to post-termination events, would undermine that basic principle and its relationship to the fresh start policy of the Bankruptcy Code." *Id.* at 324. Thus, in accordance with *Harris* v. *Viegelahn*, 135 S. Ct. 1829 (2015), and *Law* v. *Siegel*, 571 U.S. 415 (2014), the First Circuit held that without federal statutory authority—not present in this case—a debtor's exemptions cannot be denied or invaded by the courts and preempt inconsistent state law.

- ***Palladino* v. *Sacred Heart University, Inc.*, 942 F.3d 55 (1st Cir. 2019).** Holding: Making tuition payments towards an adult child's university while insolvent is a fraudulent transfer that can be clawed back by the trustee pursuant to 11 U.S.C. § 548(a)(1)(B)(i).

  In 2012, the Palladinos' daughter enrolled in Sacred Heart University. Between March 2012 and March 2014, the Palladinos paid Sacred Heart University $64,656.22 in tuition for their daughter. In January 2014, the Palladinos pled guilty in a state court to fraud in connection with operating a Ponzi scheme through their closely held company. In April 2014, the Palladinos filed a chapter 7 bankruptcy petition.

  The chapter 7 trustee brough an adversary proceeding to avoid the payments to Sacred Heart University as fraudulent conveyances under both the Bankruptcy Code and the

Massachusetts Uniform Fraudulent Transfer Act. The trustee and Sacred Heart University filed cross-motions for summary judgment. The United States Bankruptcy Court for the District of Massachusetts granted Sacred Heart University's motion and denied the motion filed by the trustee. The trustee appealed directly to the First Circuit.

Under the Code, the trustee may avoid a transfer "that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor… received less than a reasonably equivalent value in exchange for such transfer." 11 U.S.C. § 548(a)(1)(B)(i). "Reasonably equivalent value," the First Circuit observed, "does not include intangible, emotional, and non-economic benefits." Paying college tuition for an adult child in exchange for "having a financially self-sufficient daughter," is a non-economic benefit. Therefore, the debtors did not receive "reasonably equivalent value" in exchange for the tuition payments. In addition, evaluating the transfer from the creditors' perspective, paying for college tuition for an adult child "deplete[s] the estate and furnish[es] nothing of direct value to the creditors." Therefore, a trustee may avoid payments made for an adult child's college tuition while the debtor was insolvent.

Faculty

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