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From: Morgan King's Law Letter # 14 <morgan@morganking.com>
To: <milavetz@bankruptcybooks.com>
Cc:
Subject: Case: 9th Circuit addresses late-filed return issue
Date: 7/18/2016
Time: 08:08 AM

Attachments: None

News for Tax, Bankruptcy, and Consumer Professionals

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& CONSUMER PROTECTION ATTORNEYS

LAW LETTER NO. 14 July 18 2016

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EXCERPT FROM

King's

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In Consumer Bankruptcy Cases
Book Release 2016 # 2
KingLawPublishing.com

BOOK: Discharging Taxes in Consumer Bankruptcy CasesPART 2: DISCHARGE IN CHAPTER 7¶ 2.4 Discharging Personal Income Taxes¶ 2.4(f) The Two-year rule (2) Was it a "return"?(iii) The Late-filed return issue

Addressing whether a late-filed tax return is valid for purposes or discharge, several 2016 circuit-level opinions have clearly not found the *McCoy* rule persuasive, but have avoided rejecting it outright, instead finding the returns invalid based on the *Beard* 4-prong criteria.The 11th Circuit found post-assessment filed returns failed the 4th prong of the *Beard* rule, to wit, filing after the tax has already been assessed may not be a reasonable and honest attempt to comply with the tax laws. *Justice v. IRS* (11th Cir. 2016).The 9th Circuit found post-assessment returns to have failed the same prong, where the debtor filed his returns more than 3 years after the taxes were assessed. *Smith v. IRS* (see also comment on this case, below, in Law & Case Hotwire). In *Smith* the court reached back to a pre-BAPCPA (and hence pre - McCoy) doctrine adopted by the 9th Circuit in *In re Hatton*, 220 F.3d 1057 (9th Cir. 2016), which employed the *Beard* test. The court also cited *In re Ciotti*, and *Justice v. IRS*. The court also referred to the U.S. Tax Courts' consistently following Beard, not McCoy, citing *Estate of Sanders v. Comm'r IRS* 144 T.C. 63 (2015). The Smith court alluded to the late-filed-return problem without specifically mentioning McCoy, saying, as did the 11th Circuit, that it was not necessary to address whether merely filing late, without more, rendered the return invalid, because they were holding that the returns were not valid based on the Beard test. The court said:

"We need not decide the close question of whether *any* post-assessment filing could be "honest and reasonable" because these are not close facts; the IRS communicated with Smith for years before assessing, and Smith waited several more years before responding ..."

The Smith court went a step further, holding that they were not adopting a litmus-test rule that any post-assessment return could not, by definition, be a valid return.Hence, both Justice and Smith give the debtor an opportunity to present a case that their post-assessment - filed returns satisfied the 4th prong of Beard. The opinions ultimately stand for the rule that the matter should be addressed on a case-by-case examination of the circumstances surrounding the late filings.The Smith opinion is one of the few that have explicitly pointed out that both parties (the debtor and the IRS) were in agreement that merely filing late, without more, did not mean the returns could never be valid returns; this, in other words, means that a return filed late, but before the tax liabilities are assessed, would ordinarily be deemed a valid return. The IRS argues that only returns filed *following an assessment* should not be deemed valid returns. The courts are split on that question.**CAVEAT:** These two opinions were able to tiptoe past the McCoy rule; since they found the returns invalid based on other grounds, they did not have to consider the notion that a return filed late was not a "return" within the meaning of 11 U.S.C. § 523(a)(1)(B). Both opinions left the door open for a debtor to argue that his/her late-filed return satisfied the "good faith" prong of the Beard test, based on circumstances. HOWEVER, where the court is confronted with circumstances demonstrating that the late-filed returns did satisfy the Beard criteria, the court won't be able to find the returns valid without first addressing the validity or

invalidity of the McCoy rule. Even where both the debtor and the IRS agree that a return filed late is not, by definition, invalid, the court may have to take a stand. Some of the courts that have adopted the McCoy rule do so notwithstanding the IRS did not argue in support of that rule.*This issue is inevitably heading for the U.S. Supreme Court for resolution of the split among the circuits in connection with the McCoy rule*. See Morgan King's LateFiledReturn.com.

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THE LAW & CASE HOTWIRE

HELD: TAX RETURN FILED AFTER THE TAXES WERE ALREADY ASSESSED WERE NOT VALID RETURNS FOR PURPOSES OF THE TWO-YEAR RULE
Smith v. IRS U.S. Ninth Circuit Docket: 14-15857Date: July 13, 2016
Plaintiff failed to timely file his 2001 tax forms and filed a Form 1040 seven years after it was due, and three years after the IRS assessed a deficiency against him. Plaintiff later filed for bankruptcy and sought to discharge his 2001 tax liability. The bankruptcy court permitted the discharge, but the district court reversed. In *In re Hatton*, the court adopted the Tax Court's widely-accepted definition of "return." The court held that plaintiff's tax liabilities are nondischargeable under 11 U.S.C. 523(a)(1)(B)(i). The court also held that *Hatton* applies to the bankruptcy code as amended, and that plaintiff's tax filing, made seven years late and three years after the IRS assessed a deficiency against him, was not an "honest and reasonable" attempt to comply with the tax code. Accordingly, the court affirmed the district court's judgment.
CLICK FOR FULL TEXTSee further remarks at "Excerpts" above._____
HELD: False Representation Now Unnecessary to Find Consumer Bankruptcy Fraud
By Richard E. Weltman and Melissa A. Guseynov*Husky Inter. Elect., Inc. v. Ritz*, 136 S.Ct. 1581 (2016).
We previously reported on the split among the federal circuit courts of appeal concerning circumstances under which a debtor's discharge with regard to a particular debt may be denied based on actual fraud if, prior to filing, the debtor transferred assets away from creditors without directly misleading them. In Husky International Electronics, Inc. v. Ritz, the United States Supreme Court settled the split of opinion among the lower courts, holding that debtor's actual misrepresentation is not a necessary prerequisite to demonstrate "actual fraud" under section 523(a)(2)(A).
CLICK FOR FULL TEXT
_____**HELD: BANKRUPTCY COURT HAS JURISDICTION TO ADJUDICATE IRS INNOCENT SPOUSE DENIAL**
Rejecting IRS arguments and considerable cases that only the U.S. Tax Court has jurisdiction under 11 U.S.C. § 505 to address the debtor/taxpayer's objection to the tax claim based on innocent spouse per 26 U.S.C. § 6015(b) or (c), and what the court called the "wildcard" provision at § 6015(f) , the court in *Wily* held that the assignment of jurisdiction to address the issue is not reserved exclusively to the Tax Court; the U.S. District Courts have jurisdiction, and hence the bankruptcy courts, as wellIn a 400 page opinion the court found Dee, the debtor's spouse, eligible for relief from liability for the taxes. The non-objecting spouse was found guilty of tax fraud, but that finding did not inculpate Dee:"Dee is innocent of any wrongdoing. That she did not know the details of what Sam and Charles had done offshore is clear. And, there was nothing that should have 'tipped her off that something was amiss."
_____**HELD: CASEY ANTHONY NOT GUILTY OF WILLFUL HARM TO ZENAIDA GONZALEZ**

In re Casey Anthony **(Gonzalez v. Anthony 538 B.R. 145 (Bankr.M.D.Fla. 2015)**

During the messy lead-up to her trial for the murder of her daughter, Casey Anthony made up a fictitious "nanny" who she said had made off with Casey's daughter. She even gave this apparition a name, Zenaida Gonzalez, and claimed she was in Kissimmee.Subsequently it became apparent that while there was no actual nanny connected in any way with Anthony or her daughter, there was an actual person named Zenaida Gonzalez. Ms. Gonzalez sued Anthony in an adversary proceeding based on a claim arising from 11 U.S.C. § 523(a)(6)
a willful and malicious injury and therefore excepted from discharge
Casey moved for summary judgment, asking the Court to find that the statement was not made with the intent or purpose to injure Plaintiff, as is required by § 523(a)(6).
By itself, this remark by Casey Anthony ("Debtor"), made to her parents nine days after being arrested in connection with the disappearance of her two-year old daughter, would appear to harm no one. But, Zenadia Gonzalez ("Plaintiff") alleges in this adversary proceeding that she was the only person identifiable as the "girl down in Kissimmee," and that, when considered with surrounding circumstances, Debtor's statement implicated Plaintiff as being involved in the child's disappearance. Plaintiff's defamation lawsuit was pending in Orange County Circuit Court ("State Court Case") when Debtor filed her Chapter 7 petition.
After reviewing the record 4 and carefully considering arguments of counsel, the
Court concludes that the content and context of the Statement do not support Plaintiff's allegation that the Statement was uttered with the intent or purpose to injure her. The Statement was made only to the Debtor's parents. It was not a false statement about Plaintiff's person, character or conduct. The Statement was not targeted at Plaintiff. It was a statement, either false or mistaken, about the Orange County Sheriff's Office investigators failing to pursue Debtor's story about a babysitter with whom Debtor claimed to have last seen her daughter.
Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.' Restatement (Section) of Torts § 8A, comment a, p. 15 (1964)."
Thus, the injury itself must be intentional or deliberate; injuries that arise from accident, inadvertence, negligence or recklessness are not considered "willful" for the § 523(a)(6) exception to discharge.

_____

HELD: DEBTOR'S CHAPTER 13 WAS FILED WITH THE SOLE PURPOSE TO STALL A PENDING CIVIL COURT ADJUDICATION OF A LAWSUIT, HENCE WAS FILED IN BAD FAITH.

Brown v. Gorman **(E.D. Va., 2016)**As the bankruptcy court correctly found, Brown's Plan was filed in bad faith because "[i]n reality, the debtor simply s[ought] to obtain the benefit of the automatic stay while she litigate[d] or negotiate[d] with the lender." This conclusion is supported by Brown listing one debt, the HSBC mortgage, in her Chapter 13 petition, and by proposing to make insufficient monthly payments of $3,000 to the Trustee, who was to hold these payments until Brown concluded her litigation with HSBC. Id. It was not error for the bankruptcy court to conclude that Brown's Plan did not provide for tender of the appropriate mortgage payments and failed to propose an appropriate 60-month schedule to repay the arrearage and keep up with current mortgage payments. _____

HELD: VALUE OF SOCIAL MEDIA IN CONNECTION WITH A BUSINESS HAS VALUE AND IS PROPERTY OF THE ESTATE

In re Ctli, LLC, 528 B.R. 359 (Bankr. S.D. Tex., 2015)

This Court recognizes that the landscape of social media is yet mostly uncharted in bankruptcy. However, to ignore the value of social media assets would do injustice to debtors

and creditors alike. At least with regard to a business's social media accounts, this Court finds that the principles that have been developed to deal with the myriad forms of property passing through bankruptcy provide clear guidance as to how to treat such assets. Many more questions have yet to be addressed, such as the proper method of valuing such assets. For today though, this Court is confident that at the core of this dispute is a familiar story of a disgruntled former business partner attempting to stymie his former associate by seizing control of assets that do not belong to him.

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IN OTHER NEWS

Bankruptcy - Taxes - Consumer Protection

No Attorneys' Fees for Litigation Over Bankruptcy Stay

From Bankruptcy Law Reporter (also available on Bloomberg Law)

By Daniel Gill

June 22 - A debtor was not entitled to an award of attorneys' fees for successfully opposing a motion for relief from the Bankruptcy Code's automatic stay brought to exercise foreclosure rights, a district court ruled on June 20 (Green Tree Servicing LLC v. Giusto, 2016 BL 196785, N.D. Cal., No. 15-cv-02105-HSG, 6/20/16).

Judge Haywood S. Gilliam, Jr. of the U.S. District Court for the Northern District of California reversed the decision of a bankruptcy court which had found that the Supreme Court in its 2007 Travelers decision had overruled the Ninth Circuit's 1985 In re Johnson opinion.**CLICK FOR MORE STORY**

_____

National Taxpayer Advocate Reviews Filing Season and Identifies Priority Areas and Challenges in Mid Year Report to Congress IR-2016-97, July 7, 2016 - National Taxpayer Advocate Nina E. Olson today released her statutorily mandated mid-year report to Congress that contains extended excerpts from her ongoing Public Forums on Taxpayer Needs and Preferences, presents a review of the 2016 filing season, and identifies the priority issues the TAS will address during the upcoming fiscal year.

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Bankruptcy Update: New Jersey Bankruptcy Judge Allows Debtor to Retain Inherited IRA

By Michael L. Moskowitz and Melissa A. Guseynov

In 2013 the Supreme Court held that funds held in an inherited non-spousal IRA were not exempt under Section 522 of the Bankruptcy Code. You can read our blog article on Clark v. Rameker here. However, in a New Jersey bankruptcy court decision handed down last month, Bankruptcy Judge Christine M. Gravelle held that an inherited IRA is not property of the debtor's bankruptcy estate, regardless of whether it would be characterized as an exempt asset under the Bankruptcy Code. In re Norris, 2016 WL 2989234 (Bankr. D.N.J. May 20, 2016).

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HELD: False Representation Unnecessary to Find Consumer Bankruptcy Fraud

By Richard E. Weltman and Melissa A. Guseynov*Husky Inter. Elect., Inc. v. Ritz,* 136 S.Ct. 1581 (2016).

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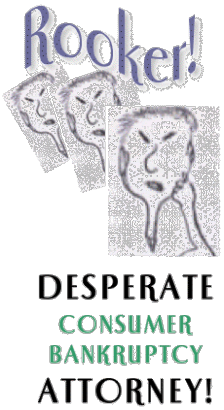
section 523(a)(2)(A). **CLICK FOR TEXT OF OPINION**

ROOKER FELDMAN - DESPERATE CONSUMER BANKRUPTCY ATTORNEY

When Rocky arrived at his office he couldn't help but notice, as he wooshed past the hot front-desk girl Bling's desk, that Bling seemed to be totally absorbed in her cell phone.He didn't stop there to suggest she get back to work, but a moment later as he slipped through the doorway to his office he suddenly realized he was annoyed. He stepped back into the open office and stared at Bling."Hgmnnph."



Blink did not look up."Hrumph grh=umppho!"Bling still focused entirely on her cell phone."Eh, Bling? Should we all get back to work now? Put our phones away?"Bling didn't look up, but replied:"Just a moment! I've got one in my sights!""Got what, exactly, in your sights?""The pokemon!"Rocky quickly scanned the office."The pokey what? I don't see him in the office."Bling finally looked up and, rolling her eyes, said -"Mr. Feldman, the pokemon! You know, a pokemon! I've hunted him down to this office."Rooker realized he had no idea what she was talking about."Well, I don't want him poking, or whatever, in the waiting room! Kick him out and let's get back to work!"Suddenly, a small crowd of people, strangers, poured in the front door, each holding a cell phone aimed somewhere into the air space of the waiting room."What the ...?""Sorry folks, this is a law office. Unless you're here for an appointment, you are welcome to leave."The group ignored him and paced around the office, aiming their phones here and there."You're all welcome to get out of here, NOW."Still no reaction."Bling, what the hell is going on here? Please clue me in!""We've all spotted the pokemons in our office.""How did they get in here?""No, Mr. Feldman, they aren't really here. They're in the virtual space of the office. They can only be seen if you have the app on your cell phone. Where have you been?"Being over 50 years old, Rooker Feldman had no clue, and would never have a clue, about what Bling, the crowd, and the pokemons were about. He just knew he wanted them all out of the office."Bling! Let me put it straight. If you don't collect your pokemons and get them out of the office, you will soon be in virtual employment and you will be free to hunt these pokey whatevers with your phone, while you wait in the unemployment office."At that point, Lew, the faithful paralegal, stuck his head out of his office. With a wide grin he announced -"Hey! There's one in my office!""Oh, criminy!" Rocky muttered.He reached for a phone and called the police. Presently a cop showed up and came into the office."I'm so happy to see you, officer! Can you please held me get rid of all these people?The officer came back with "Ok. Oh! Hold on here."He was studying his own cell phone with great interest."Wow!" blurted the cop. "I've found one right here!"With a great sigh, Rooker gave up, and turned around and went back into his office. As he went in he couldn't help but scan the office out of the corners of his eyes for signs of one of these pokemons. To be safe, he also stepped over to the open window, which as we know is a portal to the spirit world. He looked out the window, again searching for signs of anything strange.Seeing nothing unusual, he grumbled"Hmmph!" he murmered, "all just a lot of hokey-pokey! and lit up a cigar.

World without end. Amen.

Visit Morgan King

CONTACT

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