

READ MORE - Mistakes to avoid in tax discharge cases

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LAW LETTER NO. 7 May 15 2016

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IMPORTANT PRODUCTS & EVENTS



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NACBA NEWS



National Association of Consumer Bankruptcy Attorneys

NACBA's Summit at Sea - Members Only

October 7-10, 2016

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VIDEO PRESENTATION FOR YOUR CLIENTS

By Ken Sanders

A New Twist On "The Sign-Off": For the last 5 years, several firms have been using a Power Point presentation developed by Leading Edge Consulting called "The Sign-Off". This 10-minute audio-visual presentation is shown to the Debtors in their attorney's office just before meeting with the firm's attorney to sign the Bankruptcy petition and getting the case filed. The presentation (available both in English and Spanish versions) provides a great deal of generalized information about what the Debtor can expect before and after the case is filed: everything from the need to ask important questions to the §341 Meeting of Creditors to Reaffirmation of Secured Debts to Non-Dischargeability of certain types of Debts.

I was intrigued to learn that one of my clients was trying to send the Power Point to the Debtors as an e-mail attachment; unfortunately, the file is too large for some e-mail servers and, try as I might, I couldn't get the audio portion of the presentation to attach to an e-mail. I have hit upon a happy alternative. I have converted the 'Sign-Off' to an MP4 file and the file is now burned onto a CD-Rom. The law firm then mails the CD-Rom to the Debtors to watch at their own time and as often as they choose. The Debtors are provided with valuable basic knowledge about their Bankruptcy and the attorney gets some very low-cost advertising and goodwill.

Bottom-Line #1: If your firm is interested in seeing what this presentation looks like, drop me an e-mail. I will be happy to send you a demo copy of the presentation (note that only the first screen has an audio track).

Bottom-Line #2: This Power Point is 'brand-able' and your firm's photos, logos and/or icons can be inserted into the production to personalize the Debtor's experience.

FOR MORE INFORMATION OR TO ORDER www.leadingedgeconsulting.net - or call Phone: 916.952.8172 - ask for Ken Sanders.

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EXCERPT FROM
King's
DISCHARGING TAXES
In Consumer Bankruptcy Cases
By Morgan D. King, Esq.
Of the California Bar

BOOK: KING'S DISCHARGING TAXES IN CONSUMER BANKRUPTCY CASES

RELEASE 2016 # 1

SOME MISTAKES TO AVOID HANDLING TAX DISCHARGE CASES

¶ 2.4(f) Overlooking Tolling Events

In determining whether the time periods for discharging taxes have been satisfied, failing to address events that may stop the clock, i.e., toll or suspend, the running of one or more of the time periods may result in a premature filing, which will leave the taxes undischarged. The most frequently found events in the tax history for the year in question include prior bankruptcy, IRS Collection Due Process appeals, offers-in-compromise, and appeal of proposed assessments. See 11 U.S.C. 507(a)(8)(G).

¶ 2.21, ¶ 4.4(f) Treating Tax Debts as Consumer Debts

Tax debts are not consumer debts. Hence, where the larger portion of the client's debts are taxes (at least 51% of total debt), the means test does not apply and need not be addressed in planning the bankruptcy.

¶ 6.7(h)(4) Tax Lien filed in Wrong County

A tax lien on the client's property is treated as a secured claim as long as it was properly filed. If it is not properly filed, the lien is a nullity for bankruptcy purposes, and the tax is deemed an unsecured debt.

For example, a tax lien attaches to the client's real property only if it is filed (i.e., recorded) in the county in which the real property exists. Hence, in the case of a rather nomadic client, it's possible the taxing entity failed to file the lien where the client's home is situated.



¶ 5.9(h), ¶ 5.16 Failure to Satisfy Administrative Remedies

In the event of a taxing entity violating the automatic stay, or the final discharge by, for example, trying to collect a discharged debt, the debtor may seek sanctions. However, the weight of authority is that before a bankruptcy court can award sanctions, including damages and attorney's fees and costs, the taxpayer must first have "exhausted administrative remedies." Some cases draw fine distinctions between the automatic stay and final discharge, and damages or attorney's fees, in ruling on if, or when, the administrative remedies rule must be applied.

As a general rule, the phrase "administrative remedies" means attempting to resolve the matter within the appeals structure of the taxing entity.

Hence, it is prudent to file whatever appeals or claims available under the taxing entity's rules or statutes, before commencing proceedings in bankruptcy court.

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THE LAW & CASE HOTWIRE

NOTE: The following citations and summaries to recent cases were written and provided by Consumer Bankruptcy Abstracts & Research (CBAR.pro)

ACTUAL FRAUD MAY EXIST WITHOUT EXPLICIT REPRESENTATION

[CLICK FOR FULL OPINION](#)

Reversing *In re Ritz*, 787 F.3d 312 (5th Cir., May 22, 2015) and resolving a circuit split, the Supreme Court today, in *Husky International Electronics, Inc. v. Ritz*, 2016 WL 2842452 (May 16, 2016) (case no. 15-145), held that the term "actual fraud" in Code § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation. The Court said that anything that counts as "fraud" and is done with wrongful intent is "actual fraud," although "the term is difficult to define more precisely." However, there was "no need to adopt a definition for all times and all circumstances here because, from the beginning of English bankruptcy practice, courts and legislatures have used the term 'fraud' to describe a debtor's transfer of assets that, like [the debtor's] scheme, impairs a creditor's ability to collect the debt."

The Court's 7-1 decision, with only Justice Thomas dissenting, is consistent with *In re Lawson*, 791 F.3d 214 (1st Cir., July 1, 2015); *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *In re Vitanovich*, 259 B.R. 873 (6th Cir. B.A.P. 2001) and *In re Vickery*, 488 B.R. 680 (10th Cir. B.A.P., March 13, 2013), all of which held that "actual fraud" under § 523(a)(2)(A) does not require a misrepresentation.



LOAN TO PAY FOR BAR EXAM IS NOT A STUDENT LOAN

Dischargeability of debt-Student loan debt under Code § 523(a)(8)-Status of obligation as educational loan: A loan from a commercial lender to allow the debtor to study for the bar exam was not an "educational benefit" under Code § 523(a)(8)(A)(ii), nor was the loan encompassed by § 523(a)(8)(A)(i) or 523(a)(8) (B), so that the debt arising from the loan was dischargeable under § 523(a)(8). *In re Campbell*, 547 B.R. 49 (Bankr. E.D. N.Y. , March 24, 2016) (text of opinion).

CREDITOR USED CHAPTER 13 PAYMENTS FOR WRONG PURPOSE

Proof of claim-Secured claim-Postpetition charges: The mortgage creditor's claim for postpetition fees and expenses would be disallowed, and the creditor's claim declared to have been paid in full, where over the term of the debtor's confirmed Chapter 13 plan the trustee paid the original amount of the creditor's claim, but the creditor applied the trustee's payments to pay property taxes before the principal of the debt, in violation of the debtor's confirmed plan, resulting in an unexpected balance remaining on the debt. *In re Tavares*, 547 B.R. 204 (Bankr. S.D. Tex., March 11, 2016)

POST-PETITION PROPERTY MAY BE PROPERTY OF THE ESTATE

Property of the estate-Exemptions-Property acquired postpetition: When a debtor's interest in property constitutes property of the estate as of the petition date, it is well established that exemptions are determined as of the petition date. However, when property enters the estate postpetition, exemptions are determined when the property interest becomes property of the estate. Thus, here, the Chapter 7 debtor could claim a homestead exemption in her one-third interest in her residence, where the property interest became property of the estate when the debtor inherited it less than 180 days after the petition date. In re Walz, 546 B.R. 836 (Bankr. D. Minn. , March 15, 2016) (text of opinion).

\$ 50,000 DAMAGES AWARDED FOR STAY VIOLATION

Violation of stay-Damages: In two cases, district courts affirmed substantial damage awards for violation of the automatic stay. See Zokaites v. Lansaw, 2016 WL 1012597 (W.D. Pa., March 15, 2016), appeal filed, In re Lansaw, Case No. 16-1867 (3rd Cir., filed April 14, 2016) (the bankruptcy court did not err in awarding the debtors \$50,100 in damages, consisting of actual damages of \$2,600, emotional distress damages of \$7,500 and punitive damages of \$40,000, for the "egregious" violations of the automatic stay by the lessor of commercial space for the debtors' daycare business) (text of opinion); In re Ogden, 2016 WL 1077355 (D. Colo., March 18, 2016), appeal filed, Case No. 16-1132 (10th Cir., filed April 18, 2016) (the bankruptcy court did not err in awarding, for a mortgage creditor's violating the automatic stay by sending the Chapter 13 debtor two letters threatening foreclosure, damages of \$69,405, including \$10,000 for emotional distress, \$35,000 in punitive damages, and \$24,405 in attorney's fees) (text of opinion).

DEBTOR MAY AMEND CONFIRMED PLAN TO SURRENDER COLLATERAL

Chapter 13-Modification of confirmed plan: Addressing an issue as to which the courts disagree, the bankruptcy court held that a Chapter 13 debtor may modify a confirmed Chapter 13 plan by surrendering the collateral for a secured claim. And since the stated value of the debtors' home, which secured the creditor's claim, at the time of plan confirmation was significantly greater than the amount of the creditor's claim, and the creditor did not object, the debtors could surrender the home in full satisfaction of the claim. In re Dennett, --- B.R. ----, 2016 WL 1298394 (Bankr. N.D. Tex., March 31, 2016) (text of opinion).

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IN OTHER NEWS

Bankruptcy - Taxes - Consumer Protection

Auto and Credit Card Delinquencies Increase in First Quarter May 13, 2016

The delinquency rates remain historically low, while total credit card balances did reach a record to start this year, according to TransUnion.

First quarter serious delinquency rates for auto loans and credit cards increased to some record amounts in the first quarter this year, but the numbers overall remain historically low, according to TransUnion's first quarter Industry Insights Report released Wednesday.

The serious delinquency rates for auto loans (60 or more days past due) reached 1.12 percent in the first quarter, marking the first time the figure topped 1 percent in the first quarter since 2011,

according to a news release from TransUnion.

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California Bankruptcy Judge Rules that Bitcoin Is Property, Not Convertible Currency, For Valuation Purposes Under Fraudulent Transfer Laws

Manatt Phelps & Phillips LLP
USA March 24 2016

Why it matters: On February 19, 2016, a Northern District of California bankruptcy judge ruled in *In re Hashfast Technologies LLC* that, for purposes of valuation under the fraudulent transfer provisions of the U.S. Bankruptcy Code, Bitcoin is not the equivalent of U.S. dollars.

The ruling arose in the context of an attempt by a bankruptcy trustee to set aside the 2013 transfer from the estate of 3000 Bitcoin, then worth \$360,000, that had since appreciated to a present day value of \$1.2 million.

The interesting conundrum came down to the valuation of the 3,000 Bitcoin in the event the transfer were to be successfully avoided, with the trustee arguing that Bitcoin is property that can be recovered by the estate at its present day appreciated value, while the defendant transferee argued that Bitcoin are the equivalent of U.S. dollars and thus the 3,000 Bitcoin that were transferred retained their lower U.S. dollar value.

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Court Revives Suit Against U.S. Over Fraudulent Student Loans

Joel Stashenko
, New York Law Journal

Former beauty school students may pursue claims that the U.S. Department of Education defied federal law by collecting student loans it knew may have been obtained fraudulently, a federal appeals court determined.

The U.S. Court of Appeals for the Second Circuit revived a suit by former students of Wilfred Academy over the Department of Education's alleged failure to abide by two federal laws requiring student loan holders to be told that their loans could be discharged if issued under fraudulent premises.

Plaintiffs in *Salazar v. King*, 15-832-cv, said the agency had that very knowledge, as evidenced by its conclusion in 1996 that misconduct at Wilfred Academy was widespread and that students enrolled improperly. As early as 1988, the U.S. Justice Department had brought charges against Wilfred employees for misuse of federal funds and falsifying loan applications.

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The King Law Letter is published by King Law Publishing (KingLawPublishing.com - formerly Kings-Press). It has three formats - the Bulletin (product & event announcements), the Law Letter (news and updates), and The TaxGram. King Law Publishing Box 2952 Dublin, CA. Morgan@morganking.com. 925 829-6460.

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