AMERICAN BANKRUPTCY INSTITUTE

2019 Winter Leadership Conference

Judges' Round-and-Round

PLENARY SESSION

2019

American Bankruptcy Institute
Winter Leadership Conference
Judicial Roundtables
Saturday Dec. 7, 2019
8:30 am - 9:30 am

TABLE	JUDGE/PROFESSOR	TOPIC
1	Hon. Kevin Carey (Ret.) Dist. Of Delaware	The Small Business Reorganization Act of 2019
2	Hon. Barbara Houser N.D. Texas (Dallas)	Ask a Judge What You Really Want to Know!* *all rights reserved
3	Hon. Janet Baer N. D. Ill (Chicago)	Ask a Judge What You Really Want to Know!* *all rights reserved
4	Hon. Eugene Wedoff (Ret.) N.D. Ill (Chicago)	The Coming Supreme Court Fight over §362(a)(3)
5	Hon. Robert Drain (Ret.) S.D.N.Y. (White Plains)	
6	Hon. Michael Fagone Dist. of Maine (Bangor)	
7	Prof. Dalie Jimenez Univ of California - Irvine School of Law	
8	Hon. Catherine Bauer C.D. Ca (Santa Ana)	College Tuition Payments as Fraudulent Transfers
9	Hon. Dan Collins Dist. of Az. (Phoenix)	Violations of Injunctive Provisions in Consumer Cases
10	Hon. Laurel Isicoff S.D. FL (Miami)	Reaffirmation Issues for Creditors & Debtors - Not as Simple as They Look
11	Prof. Lois Lupica Univ. of Maine School of Law	Fee Issues & Working with Fee Examiners
12	Prof. Nancy Rapoport UNLV William S. Boyd School of Law	Fee Issues & Working with Fee Examiners
13	Hon. Elizabeth Stong E.D.N.Y. (Brooklyn)	
14	Bill Rochelle ABI Editor-at-Large	Can Bankruptcy Judges issue Final Orders in Fraudulent Transfer and Preference Suits when the Defendant Has Not Filed a Claim and Has Not Consented?

Issue for discussion:

A creditor in possession of a debtor's collateral must surrender it to avoid a stay violation.

The answer is very important to thousands of Chapter 13 debtors whose cars were repossessed before they filed their cases.

Hundreds of towed vehicles are parked at an auto pound owned by the city of Chicago. | Sun-Times file photo

If the creditor has no obligation to return the car when the case is filed, then the debtor has to—

- file an adversary proceeding to recover property under Bankruptcy Rule 7001(1),
- seek emergency relief in the adversary,
- respond to any objection,
- attend any scheduled hearing, and
- wait for entry of a turnover order.

And if the creditor has no obligation to return the car when the case is filed, then

- The cost of filing bankruptcy increases with the additional legal work required for the debtor.
- The delay in obtaining the car imposes additional costs for alternate transportation.
- If alternate transportation is not available, the debtor may need to pay whatever the creditor demands to obtain the car's immediate return.

But the creditor *does* have an obligation to return the car when the case is filed.

§ 542(a):

[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Two critical features of § 542(a):

First, in Chapter 13, it requires delivery of property to the debtor, because the debtor has the property rights of a trustee.

- § 1306(b): "Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."
- § 1303: "[T]he debtor shall have, exclusive of the trustee, the rights and powers of a trustee sections 363(b), 363(d), 363(e), 363(f), and 363(I) of this title."

Second, the requirement of delivery to the trustee is automatic on filing, requiring no court order to become effective.

The text of § 542(a) contains no reference to a court order, as a prerequisite for delivery or otherwise.

Compare the text of § 333(a)(2)(A): "If the court orders the appointment of an ombudsman . . . the United States trustee shall appoint 1 disinterested person (other than the United States trustee) to serve as such ombudsman."

- The legislative history is consistent with the text.
- S. Rep. No. 95-989, 95th Cong., 2d Sess. 84 (1978:

"Subsection (a) of this section [§ 542] requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee."

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- This effect of § 542(a) was recognized by the Supreme Court in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

Whiting Pools: issue

- The IRS seized property of Whiting Pools for nonpayment of withholding taxes.
- Whiting Pools then filed a Chapter 11 case.
- The Government sought a declaration that the automatic stay did not apply to its sale of the property or that the stay be terminated.
- Whiting Pools counterclaimed for return of the property under § 542.

Whiting Pools: rulings

- Rights of possession under nonbankruptcy law are altered. 462 U.S. at 203:

"Although Congress might have safeguarded the interests of secured creditors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with 'adequate protection' for their interests. § 363(e) . . . ."

Whiting Pools: rulings

- Creditors are obligated to take action to obtain adequate protection. 462 U.S. at 203:

"At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor. The creditor with a secured interest in property included in the estate must look to this provision for protection, rather than to the nonbankruptcy remedy of possession."

Whiting Pools: rulings

- Creditor must turn over property under § 542(a). 462 U.S. at 207, 208:

"§ 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings."

". . . § 542 simply requires [a creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize."

The issue half addressed

Section 542(a) answers the first part of the issue for discussion: Does a creditor have the obligation to "surrender" collateral to a debtor in possession?

Yes; §542(a) requires the creditor to deliver property that a debtor in possession can use.

That leads to the second part of the issue: Does the failure of the creditor to deliver the property violate the automatic stay?

Again, the answer is yes.

Enforcement of §542(a) apart from the automatic stay

Section 542(a) itself sets out no enforcement mechanism.

In that situation, courts may apply § 105(a), which allows a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

- *See Fitzgerald v. IRS (In re Larimer)*, 27 B.R. 514, 516 (Bankr. D. Idaho 1983):

"There is no requirement in the Code that the trustee make demand, obtain a court order, or take any further action in order to obtain a turnover of the estate's property. Failure of an entity to do so, after notice of the estate's interest in property held by it, is probably contumacious."

- *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 950 (10th Cir. 2017):

"Bankruptcy courts have 'broad equitable powers' under 11 U.S.C. § 105(a) . . and can provide equitable relief as 'necessary or appropriate to carry out the provisions of' § 542(a) . . . [S]*ee also Skinner*, 917 F.2d at 447 (holding that 'section 105(a) empowers bankruptcy courts to enter civil contempt orders,' including for monetary damages)."

The automatic stay of § 362(a)(3): text

- Original, 1978:

"[A] petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of— (3) any act to obtain possession of property of the estate or of property from the estate;"

The automatic stay of § 362(a)(3): text

- Amended, 1984:

"[A] petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of— (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;"

- The added phrase must expand the stay beyond prohibiting the creditor from taking estate property after the bankruptcy case.

The meaning of "exercise control"

- Dictionary definitions of "control" include excluding others from using the property:
  - *Merriam-Webster*: "to exercise restraining or directing influence over
  - *Random House*: "to exercise restraint or direction over"
  - *Black's Law Dictionary*: "power or authority to . . . restrict"

- The "most relevant" synonyms for "exercise control" in *Thesaurus.com* include excluding others:

"Synonyms for *exercise control*

absorb

exclude

possess

take over

utilize"

Excluding others is an "act" to exercise control.

- Creditors who have repossessed collateral do not fail to take action to preserve their control over the collateral.
- Hypothetical question: What would happen if a debtor, with car keys, appeared at the creditor's auto pound or garage and asked to drive away in the debtor's repossessed car?

This reading of §§ 362(a)(3) and 542(a) has been accepted by the great majority of appellate decisions.

Most recent: *In re Fulton*, 926 F.3d 916, 925 (7th Cir. 2019)(quoting *Whiting Pools,* 462 U.S. at 203, for the rule that "to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate"):

"This is why § 542 compels the return of property to the estate, including 'property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.' *Whiting Pools,* 462 U.S. at 205. . . ."

"[T]he status quo in bankruptcy is the return of the debtor's property to the estate. In refusing to return the vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but actively resisting § 542(a) to exercise control over debtors' vehicles."

Accord:

- *In re Weber*, 719 F.3d 72, 81 (2d Cir. 2013).
- *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996).
- *In re Knaus*, 889 F.2d 773, 775 (8th Cir. 1989).
- *In re Rozier*, 376 F.3d 1323, 1324 (11th Cir. 2004).

- *See also United States v. Inslaw, Inc.,* 932 F.2d 1467, 1472 (D.C. Cir. 1991).
- Though cited as contradicting the majority, *Inslaw* actually holds only that intangible causes of action are excluded from the "property" covered by §362(a)(3), and includes the following citation, without noting disagreement: "*In re Knaus,* 889 F.2d 773, 775 (8th Cir. 1989) (turnover of property admitted to belong to the debtor is required)."

The alternative reading

- The only circuit decisions holding that § 362(a)(3) does not prohibit excluding debtors from their collateral are *In re Cowen*, 849 F.3d 943 (10th Cir. 2017) and *In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019).
- *Cowen* is based completely on an interpretation of the language of § 362(a)(3).

- *In re Cowen*, 849 F.3d at 949:
- "[Section] 362(a)(3) prohibits 'any act to obtain possession of property' or 'any act to exercise control over property.' 'Act' commonly means to 'take action' or 'do something.' New Oxford American Dictionary 15 . . . . This section, then, stays entities from doing something to obtain possession of or to exercise control over the estate's property. It does not . . . impose an affirmative obligation to turnover property to the estate."

- This reading is mistaken.
  - It fails to address §542(a), which does impose the turnover requirement.
  - It fails to recognize that preventing the debtor from obtaining collateral is a prohibited action.

- *Denby-Peterson* sets out the same incorrect reading of "action" in § 362(a)(3), but also gives a reading of § 542(a) that imposes a duty on the debtor to obtain a court order, contrary to the actual language of the provision.

Supreme Court resolution?

The City of Chicago has petitioned for a grant of certiorari in *Fulton*, and it is likely that the debtor will file a cert petition in *Denby-Peterson*. If cert is granted, there should be a definitive resolution of the turnover issue.

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Feature

BY PROFS. LOIS R. LUPICA AND NANCY B. RAPOPORT[1]

Best Practices for Working with Fee Examiners

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Prof. Lois Lupica is the Maine Law Foundation professor of law at the University of Maine School of Law in Portland, Maine, and special counsel with Thompson & Knight LLP. Prof. Nancy Rapoport is the interim dean and Gordon Silver professor of law of the William S. Boyd School of Law at the University of Nevada at Las Vegas. Both served as reporters of ABI's National Ethics Task Force, and Prof. Rapoport is ABI's Vice President-Research/Grants.

Editor's Note: *The authors presented their final report for the National Ethics Task Force during ABI's Annual Spring Meeting in April 2013. Funded by ABI's Anthony H.N. Schnelling Endowment Fund, the Task Force provided recommendations for both consumer and business practitioners for uniform ethical standards in bankruptcy practice. A PDF copy of the final report can be found at go.abi.org/FinalEthicsReport.*

Courts have been using fee examiners in many major bankruptcy cases,[2] and given the promulgation of the U.S. Trustee Program's (USTP) Updated Proposed Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (the "proposed guidelines"), which become effective on July 1, 2013,[3] the authors believe that a discussion of the issues that trigger fee examiners' questions would be useful.[4]

The term "fee examiner" actually covers a wide range of activities. There are fee auditors, who tend to use computer programs to analyze time and expense entries. There are fee examiners, who go beyond an audit to a qualitative review of the reasonableness of the work billed and the cost of that work. There are fee review committees, which are appointed by a bankruptcy court to review estate-paid professional fees and are often comprised of representative stakeholders in the case. In many committees, an actual fee examiner may serve as the chair of the fee review committee. For the purposes of this article, the authors consider a fee examiner to be a person charged with assisting the court with its analysis of the reasonableness of the fees and expenses of estate-paid professionals in a case.[5]

When a court appoints a fee examiner, fee auditor or fee review committee, it can do so pursuant to a local rule or pursuant to 11 U.S.C. § 105.[6] The purpose of the fee examiner is to assist the bankruptcy court in fulfilling its statutory duty to review the reasonableness of fees and expenses under 11 U.S.C. § 330. Fee examiners review interim and final fees, work with the professionals applying for payment of fees and expenses to resolve any issues that their fee applications might raise in terms of reasonableness, and provide regular reports to the court evaluating the reasonableness of those fee applications. When a dispute about a fee application cannot be resolved informally, the fee examiner may file an objection to the application so that the court has the ability to focus more efficiently on the dispute. Regardless of whether fee examiners save the estate money, they most certainly save bankruptcy courts hundreds (or

1 The authors are grateful to a number of people, especially **Andy Vara** (Office of the U.S. Trustee; Cleveland), **Robert Keach** (Bernstein Shur; Portland, Maine) and **Brady Williamson** (Godfrey & Kahn SC; Madison, Wis.), for their valuable suggestions. The authors are also grateful to the members of the ABI National Ethics Task Force, who also provided very helpful comments.

2 For a discussion of issues associated with fees in large chapter 11 cases, *see, e.g.*, Stephen J. Lubben, "The Chapter 11 Attorneys," 86 *Am. Bankr. L. J.* 447 (2012); Nancy B. Rapoport, "The Case for Value Billing in Chapter 11," 7 *J. Bus. L. & Tech. L.* 117 (2012) (hereinafter "Value Billing"); Stephen J. Lubben, "The Chapter 11 Financial Advisors," 28 *Emory Bankr. Dev. J.* 11 (2011); Lynn M. LoPucki and Joseph W. Doherty, "The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases," 1 *J. Emp. L. Stud.* 111 (2004); Stephen J. Lubben, "The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases," 74 *Am. Bankr. L. J.* 509 (2000); Stephen J. Lubben, "Corporate Reorganization and Professional Fees," 82 *Am. Bankr. L. J.* 77 (2008); Lynn M. LoPucki and Joseph W. Doherty, "Rise of the Financial Advisors: An Empirical Study of the Division of Professional Fees in Large Bankruptcies," 82 *Am. Bankr. L. J.* 141 (2008); Nancy B. Rapoport, "Rethinking Fees in Chapter 11 Bankruptcy Cases," 5 *J. Bus. & Tech. L.* 263 (2010); and Lynn M. LoPucki and Joseph W. Doherty, *Professional Fees in Corporate Bankruptcies: Data, Analysis and Evaluation* (2011).

3 *See* www.justice.gov/ust/eo/rules_regulations/guidelines/docs/proposed/AppendixB_Fee_Guidelines_Exhibits_Comments.pdf. Those proposed guidelines will apply in the larger chapter 11 cases, defined as cases with $50 million or more in assets and $50 million or more in liabilities, aggregated for jointly administered cases and excluding single-asset real estate cases as defined in 11 U.S.C. § 101(51B).

4 As fiscal constraints on bankruptcy courts and the Office of the U.S. Trustee continue to tighten, the authors expect that fee examiners may be used more often, even in relatively smaller cases.

5 For a good discussion of the types of fee-reviewing entities, *see* Proposed Guidelines, § F, at 19-20.

6 For example, Rule 2016-2 of the Local Rules of the U.S. Bankruptcy Court for the District of Delaware provides, in subsection (i), that "[t]he Court may, in its discretion or on motion of any party, appoint a fee examiner to review fee applications and make recommendations for approval." Other courts appoint the examiner under 11 U.S.C. § 105.

thousands) of hours of time in conducting the initial reviews of the fee applications.[7]

Compensation of fee examiners can vary from hourly rates to flat fees. Because the goal of good fee examiners is to help the bankruptcy court determine reasonableness, the authors recommend that the fee examiner's compensation not be based on a percentage of fees and expenses reduced. Compensation that takes this form can create the incentive for a review of the fees to maximize the fee examiner's recovery rather than a review of the fees for reasonableness.

Fee examiners approach their reviews in a variety of ways. They may use computer programs to help them compare various time entries, or they may analyze the fee applications using staff members who have been trained to look for specific types of "red flag" triggers. To make their reviews more meaningful, many fee examiners ask that professionals seeking payment from the estate submit copies of their bills in searchable PDF and Excel formats. Likewise, the proposed guidelines plan to request the submission of bills in searchable electronic formats.[8] A thorough fee report of a fee examiner may use the following process:[9]

1. Compare the order authorizing the employment of the professional to the scope of work done during the period of the fee application.
2. Compare the time billed for preparing the fee application to the total fees sought in that application.
3. Create a grid showing the time billed by each professional (including the professional's name, professional status and hourly rate) for every project category task, including the preparation of the fee application.
4. Identify any amounts billed to conflicts checks.
5. If possible, for every project category task that took more than 20 hours to perform, provide a copy of the work product so that the fee examiner can compare it with the time billed to creating it.
6. Identify any write-down of any billed time or expenses.
7. Identify any unusual patterns of descriptions (*e.g.*, billing 0.1 for reviewing each docket entry on a particular day).
8. Identify whether there was duplication of effort or services both within a professional's staffing or across different professionals.
9. Identify whether the professional's seniority or skill level was commensurate with the complexity, importance and nature of the issue or task.
10. Identify whether any of the professionals billed only a few hours on a project category with insufficient evidence of benefit to the estate.
11. Itemize and quantify the amount billed for responding to, contesting or litigating fee objections.
12. Identify any increases in billing rates.
13. Identify the billed use of summer associates.
14. Group expenses into categories, such as airfare, hotel, transportation (*e.g.*, cabs home after a certain hour, rental cars, etc.), meals, copying, etc., then calculate the per-category total cost and the per-person total cost.
15. For expenses, identify (a) whether travel time was billed at full- or half-time rates, (b) the average hotel room bill per trip; (c) the average food bill per trip; (d) whether any of the professionals charged for normally noncompensable items, such as dry cleaning, in-room movies or mini-bar charges; (e) whether the airfare, car rental, meal or other expenses seemed unusually high (such as very high room service charges or airfare charges); and (f) whether anything else on the expense side looked unusual.

To the extent that the fee examiner uses staff members to review and analyze these issues, the fee examiner should then review each of the staff members' reports, edit them and send them to the professionals themselves so that the process is transparent. If appropriate, the report should include further requests for information and any questions about the reasonableness of the fees or expenses. Depending on the professionals' responses to the questions or requests, the fee examiner either accepts the explanations as reasonable or raises the possibility of possible reductions of fees or expenses, either through negotiation or by filing a formal objection to fees. Operating on the presumption that professionals do not intend to charge unreasonable fees and expenses to the estate, the authors recommend that professionals submitting fee applications carefully review their fee applications prior to submission for the following "red flags" that are likely to generate a further inquiry by the fee examiner:

1. a failure to comply with local rules, including any local rules that have adopted the USTP's fee guidelines;
2. billing for activities that fall outside of the scope of the order authorizing employment;
3. requests for success fees or fee enhancements that were not contemplated by the order authorizing employment;
4. expenses that a nonbankruptcy client would not approve, such as clothing, in-room movies and the like;[10]
5. increases in billing rates a few months after the order authorizing employment;[11]
6. block-billing, when it is possible to segregate each task with a separate time entry;
7. vague entries, such as "review file" or "attention to case;"
8. charges that should be considered "overhead;"[12]

7 *See* "Value Billing," *supra* n.2, at 148-49. As the Court said in *Lehman*, in referring to the successful performance of the fee review committee:

> I'm just going to repeat what I said last time more by incorporation by reference than complete repetition of what I said, but I am gratified at the success of the fee committee under your leadership in working out consensual resolutions of potential disputes with certain of the professionals and developing a transparency as to the process that is admirable.
>
> ...
>
> One of the aspects of this case that I think is truly admirable and remarkable is the role played by the fee committee throughout this process, and ... I commend you and your counsel and the other members of the fee committee for the work that you have performed, not only on an application-by-application basis, but holistically as it relates to all of the retained professionals and for purposes of providing enhanced credibility with respect to the fee process in this highly visible environment, and so, I thank you for your work.

Transcript of a hearing on Nov. 29, 2012, in *Matter of Lehman Brothers Holdings Inc.*, Case No. 08-13555-jmp (Bankr. S.D.N.Y. 2012) at 9-10. To give readers a sense of the magnitude of the time that fee examiners might save, when one of us (Rapoport) was a fee examiner in the *Station Casino* cases, she reported that her team billed more than 2,000 hours for a fee examiner appointment that lasted less than one year. Those are more than 2,000 hours that the court itself did not have to spend reviewing the fee applications on a line-by-line basis. *See* "Value Billing," *supra* n.2, at 149-50.

8 *See* Proposed Guidelines, *supra* n.3, at 14.

9 Nancy Rapoport has served as a fee examiner in the various *Station Casino* bankruptcy cases (Case Nos. BK-09-52477 through BK-11-51219 (Bankr. D. Nev. 2011) (served from 2011-12)); in *In re Pilgrim's Pride Corp.* (Case No. 08-45664 (DML) (Bankr. N.D. Tex 2008) (served from 2009-10)); and in *In re Mirant Corp.* (Case No. 03-46590 (Bankr. N.D. Tex 2003) (2003-06; reappointed for a limited purpose in 2011-12)). She has also served as a testifying expert on fees for the reorganized debtor in *In re ASARCO LLC* (Case No. 05-21207 (Bankr. S.D. Tex. (2010)). This list of tasks that a fee examiner should perform comes from her experience in those cases.

10 One of us (again, Rapoport) has seen each of these examples during her work as a fee examiner.

11 Even if the firm generally increases its billing rates at a particular time each year, if the firm's employment is approved near the time for yearly increases, the application for an order authorizing employment should specify when the firm expects to seek rate increases—and the court should have an opportunity to address that issue before it issues an order approving the employment.

12 *Cf.* n.5, *supra*, at 7.

9. duplicative services or gross discrepancies in time billed among professionals working on the same task;
10. overstaffing and mis-staffing (partners doing work that associates or paralegals could do just as well); and
11. billing substantial hours for straightforward or routine work (*e.g.*, one-page motions that take eight hours to prepare).

From a fee examiner's perspective, context matters, and the authors recommend that professionals with unusual time entries or expenses address those issues directly in the fee application itself (*e.g.*, by explaining why a particular task took significant time, why a partner performed a task that an associate would normally perform or why a particular expense was appropriate). The responsibility for proving the reasonableness of fees and expenses ultimately lies with the professional submitting the fee application. The authors' recommendations are drafted with an eye toward assisting in that process. abi

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KeyCite Red Flag - Severe Negative Treatment
Reversed and Remanded by In re Palladino, 1st Cir.(Mass.), November 12, 2019

556 B.R. 10
United States Bankruptcy Court, D. Massachusetts, Eastern Division.

IN RE: Steven PALLADINO and Lori Palladino, et al, Debtors.
Mark G. DeGiacomo, Chapter 7 Trustee of Steven and Lori Palladino, Plaintiff,
v.
Sacred Heart University, Inc., Defendant.

Case No. 14–11482–MSH
(Substantively Consolidated)
|
Adversary Proceeding No. 15–01126
|
Signed August 10, 2016

Synopsis

Background: Chapter 7 trustee brought adversary proceeding against university, seeking to set aside, as actual or constructive fraudulent transfers under both the Bankruptcy Code and the Massachusetts Uniform Fraudulent Transfer Act (UFTA), the $64,696.22 in payments made by debtors for their adult child's education at a time when they were operating a Ponzi scheme through their company, and to recover that sum for the benefit of the bankruptcy estate. The parties filed cross-motions for summary judgment.

Holdings: The Bankruptcy Court, Melvin S. Hoffman, J., held that:

pursuant to the Ponzi scheme presumption, only those transfers in furtherance of the scheme are presumed fraudulent, for purposes of establishing an actual fraudulent transfer, and

debtors, who paid university because they believed that a financially self-sufficient child offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency, received "reasonably equivalent value" for their payments.

Summary judgment for defendant.

Attorneys and Law Firms

***12** Mark G. DeGiacomo, Esq., Ashley S. Whyman, Esq., Murtha Cullina LLP, Boston, MA, for the plaintiff Chapter 7 Trustee

Elizabeth J. Austin, Esq., Pullman & Comley, LLC, Bridgeport, CT, for the defendant, Sacred Heart University, Inc.

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Melvin S. Hoffman, U.S. Bankruptcy Judge

This is a lawsuit over the meaning of value. It raises the question, when parents pay for the college education of their adult child, do they receive anything of value? To complicate the question, does it matter if the parents happen to be convicted Ponzi scheme felons who, at the time they paid the tuition, had been engaged in perpetrating the Ponzi scheme? The parties in this adversary proceeding, plaintiff, Mark G. DeGiacomo, the chapter 7 trustee of the bankruptcy estate of Steven and Lori Palladino, and defendant, Sacred Heart University (SHU), offer diametrically opposite answers to these questions. They each believe their answers are so clear that I must grant one of them summary judgment.

Here are the undisputed facts and background surrounding this dispute. At all times relevant to this proceeding, Nicole Palladino was enrolled as an undergraduate accounting major at SHU in Fairfield, Connecticut. She began her freshman year in the fall of 2012 with an expected graduation date in the spring of 2016. While Nicole was an undergraduate she spent summers and other time away from school living at home with one or both of the Palladinos. [1] During her time as a student at SHU Nicole was at least 18 years of age. Even though Nicole was considered an adult under Massachusetts law, she was a dependent student for college financial aid purposes. This meant that whenever Nicole sought financial aid from SHU, the Palladinos were required to submit financial aid forms and other personal financial information as part of the school's evaluation of Nicole's eligibility. The Palladinos did so on multiple occasions. In addition, the Palladinos consistently declared Nicole as a dependent on their income tax returns. The Palladinos also

submitted multiple applications for parental loans to help fund Nicole's college costs. In addition to attempting to assist Nicole through scholarships and loans, the Palladinos paid a portion of her tuition and charges directly to SHU. Between March 1, 2012 and March 31, 2014, the Palladinos paid SHU a total of $64,696.22 to cover these costs. This figure does not include additional expenditures by the Palladinos to support Nicole during her college years such as feeding her whenever she spent time at home.

On July 21, 2014, Steven and Lori Palladino each pled guilty to charges of investment fraud for operating a Ponzi scheme through their company, Viking Financial Group, Inc. Steven was sentenced to ten years in state prison and Lori to five years' probation. On April 1, 2014, the Palladinos filed joint voluntary petitions ***13** for relief under chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) commencing the main case. [2] Mr. DeGiacomo was appointed chapter 7 trustee.

Mr. DeGiacomo initiated this adversary proceeding with a four count complaint against SHU seeking to set aside as fraudulent transfers the $64,696.22 in payments made by the Palladinos on theories of actual and constructive fraud under both Bankruptcy Code § 548 and the Massachusetts Uniform Fraudulent Transfer Act (UFTA), Mass. Gen. Laws ch. 109A, and to recover that sum from SHU for the benefit of the bankruptcy estate.

Mr. DeGiacomo maintains that during the period between 2012 and 2014, the Palladinos were actively engaged in the Ponzi scheme for which they were ultimately convicted. As a result, he invokes the so-called "Ponzi scheme presumption" that all payments by the Palladinos to SHU were made with actual intent to hinder, delay, or defraud creditors. In the alternative, Mr. DeGiacomo urges that the payments were constructively fraudulent because the Palladinos received no reasonably equivalent value from SHU in exchange for the payments and the Palladinos were insolvent at the time the payments were made.

SHU retorts that the Ponzi scheme presumption is inapplicable to the payments in question, and in any event, SHU believes it has rebutted that presumption with undisputed evidence of its good faith and lack of knowledge as to the Palladinos' fraudulent conduct. As for Mr. DeGiacomo's assertion of constructive fraud, SHU acknowledges the Palladinos' insolvency but maintains that the Palladinos did receive reasonably equivalent value in return for their payments.

Claiming there are no material facts in dispute here, each party seeks summary judgment in its favor. Fed.R.Civ.P. 56 governs motions for summary judgment in bankruptcy proceedings, per Fed. R. Bank. P. 7056. *McCrory v. Spigel (In re Spigel)*, 260 F.3d 27, 31 (1st Cir.2001). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

In counts I and III of his complaint, Mr. DeGiacomo asserts that the payments to SHU were actually (as opposed to constructively) fraudulent under Bankruptcy Code § 548(a)(1)(A) and Mass. Gen. Laws ch. 109A § 5(a)(1). He bases his assertion on the Ponzi scheme presumption. This legal construct stands for the proposition that "the existence of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay and defraud creditors." *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC),* 440 B.R. 243, 255 (Bankr.S.D.N.Y.2010).

Mr. DeGiacomo urges the broadest possible application of the Ponzi scheme presumption so that every transfer of property by a Ponzi scheme perpetrator ***14** regardless of its purpose would be presumed fraudulent. SHU advocates a narrower application of the presumption, limiting it to transfers in furtherance of the scheme, which it asserts would eliminate the Palladinos' college payments on Nicole's behalf from the presumption.

I adopt SHU's interpretation of the Ponzi scheme presumption as more reflective of the policies and objectives the presumption is intended to address. "All transfers made *in furtherance of that Ponzi scheme* are presumed to have been made with fraudulent intent." *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 531 B.R. 439, 471 (Bankr.S.D.N.Y.2015) (emphasis added). "[A] generalized intent to defraud," while certainly present in a Ponzi scheme case, "is not sufficient, by itself, to show that the transfers in question were made with fraudulent intent." *Welt v. Publix Super Markets, Inc. (In re Phoenix Diversified Inv. Corp.),*

Adversary No. 10–03005–EPK, 2011 WL 2182881, at *3 (Bankr.S.D.Fla. June 2, 2011). Transfers that "perpetuate" or "are necessary to the continuance of the fraudulent scheme" are subject to the presumption because they relate directly to the intent to defraud. *Id.* Extending the scope of the Ponzi scheme presumption as broadly as Mr. DeGiacomo advocates would ensnare transferees indiscriminately when the scheme inevitably implodes:

> By definition, a Ponzi scheme is driven further into insolvency with each transaction. Therefore, by the trustee's reasoning, no one who in any way dealt with, worked for, or provided services to the debtors could prevent avoidance of any transfers they received. The debtors' landlord, salaried employees, accountants and attorneys, and utility companies that provided services to the debtors all assisted the debtors in the furtherance of their fraudulent scheme. In spite of this fact, we do not think that the goods and services that these persons and entities provided were without value or that transfers to them could be set aside as fraudulent conveyances. We see no material distinction between such persons or entities and appellants. All were necessary to the success of the debtors' scheme.

Merrill v. Allen (In re Universal Clearing House Co.), 60 B.R. 985, 999 (D.Utah 1986) (footnotes omitted). *See also Balaber–Strauss v. Sixty–Five Brokers (In re Churchill Mortgage Inv. Corp.)*, 256 B.R. 664, 681 (Bankr.S.D.N.Y.2000) (quoting *In re Universal Clearing House Co.* with approval), *aff'd sub nom. Balaber–Strauss v. Lawrence*, 264 B.R. 303 (S.D.N.Y.2001). Allowing Mr. DeGiacomo to prevail under an actual fraud theory here would mean ignoring the nature of the transactions engaged in by the Palladinos in their day to day affairs (morally culpable as they may have been in relation to the scheme itself), like buying groceries, paying medical bills, and supporting their child. "The Ponzi scheme presumption must have some limitations, lest it swallow every transfer made by a debtor, whether or not such transfer has anything to do with the debtor's Ponzi scheme." *Kapila v. Phillips Buick–Pontiac–GMC Truck, Inc. (In re ATM Fin. Servs., LLC)*, Adversary No. 6:10–ap–44, 2011 WL 2580763, at *5 (Bankr.M.D.Fla. June 24, 2011).

Absent the Ponzi scheme presumption, Mr. DeGiacomo does not press the argument that the Palladinos paid SHU with actual intent to defraud their creditors. He does not quarrel with SHU's position that it had no knowledge of the Palladinos' fraudulent activity and that it received their payments in good faith. The facts agreed to by the parties establish that the Palladinos made the payments for one reason only, to enable their daughter, Nicole, ***15** to receive a college education. Summary judgment shall enter in favor of SHU on counts I and III of the complaint.

As indicated at the outset, this litigation is really about value. Were the Palladinos' payments to SHU constructively fraudulent under Bankruptcy Code § 548(a)(1)(B) and Mass. Gen. Laws ch. 109A § 5(a)(2), as alleged in counts II and IV of Mr. DeGiacomo's complaint, because the Palladinos did not receive reasonably equivalent value from SHU in exchange for the payments? There is no dispute that but for the question of value, the Palladinos' payments would qualify as constructively fraudulent. The funds transferred belonged to the Palladinos, the transfers were made within the two and four year statutory lookback periods under the Bankruptcy Code and the UFTA, and the Palladinos were insolvent when the transfers were made.

This is not the first lawsuit brought by a bankruptcy trustee to recover college tuition payments made by a parent for a child. Prior decisions offer conflicting guidance. Courts that have rejected trustees' efforts to claw back tuition payments view such payments as essential to maintaining the family unit. *Sikirica v. Cohen (In re Cohen)*, Adversary No. 07–02517–JAD, 2012 WL 5360956 at *10 (Bankr.W.D.Pa. Oct. 31, 2012), *rev'd on other grounds*, 487 B.R. 615 (W.D.Pa.2013). "[T]here is something of a societal expectation that parents will assist with such expense if they are able to do so." *Trizechahn Gateway, LLC v. Oberdick (In re Oberdick)*, 490 B.R. 687, 712 (Bankr.W.D.Pa.2013). Other courts have found that tuition payments for children were avoidable because the benefits parents received in exchange were not "concrete" or "quantifiable." *Gold v. Marquette Univ. (In re Leonard)*, 454 B.R. 444, 457 (Bank.E.D.Mich.2011); *see also Banner v. Lindsay In re Lindsay*, Adversary No. 08–9091 (CGM), 2010 WL 1780065, at *9 (Bankr.S.D.N.Y. May 4, 2010) (holding

that college tuition payments were avoidable because the parents were under no legal obligation to pay).

Ethereal or emotional rewards, such as love and affection, do not qualify as value for purposes of defeating a constructive fraudulent conveyance claim. *Pereira v. Wells Fargo Bank, N.A. (In re Gonzalez),* 342 B.R. 165, 169 (Bankr.S.D.N.Y.2006); *see also Tavenner v. Smoot,* 257 F.3d 401, 408–09 (4th Cir.2001). Mr. DeGiacomo correctly points out that under Massachusetts law a parent has no legal obligation to support an adult child and so, he suggests, the only possible justification the Palladinos could have had for paying Nicole's college costs were of a recondite variety.

Like his position on the Ponzi scheme presumption, I find Mr. DeGiacomo's approach to valuing the Palladinos' payments to SHU overly rigid. In separate affidavits filed in support of SHU's motion for summary judgment the Palladinos offer consistent explanations as to why they made the payments to SHU. As stated by Lori Palladino, for example, in her affidavit, Docket Entry 40–3, at ¶¶ 16–17:

> As Nicole's mother, I feel obligated to pay Nicole's tuition because I am her mother and she shouldn't have to come out of SHU saddled with thousands of dollars in loans. Assisting Nicole with her loans gives her the best chance of graduating from SHU. Upon graduating, Nicole will be in the best position to go to graduate school, secure a job and become financially self-sufficient by finding her own place to live, paying her own bills and paying for her own food ...
>
> If Nicole is unable to graduate from SHU, she will either move back home with me, or she will obtain her own place to live in which case I will have to pay ***16** for her housing, bills and food costs. Either of these options result [sic] in a financial burden on me. The value to my husband and I[sic] in exchange for paying the tuition to SHU is a financially self-sufficient daughter resulting in an economic break to us.

Mr. DeGiacomo does not dispute that the Palladinos' statements represent their views as to why they paid Nicole's college costs, but he asserts that those views are irrelevant because they do not establish "concrete" and "quantifiable" value.

I find that the Palladinos paid SHU because they believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency. I find that motivation to be concrete and quantifiable enough. The operative standard used in both the Bankruptcy Code and the UFTA is "reasonably equivalent value." The emphasis should be on "reasonably." Often a parent will not know at the time she pays a bill, whether for herself or for her child, if the medical procedure, the music lesson, or the college fee will turn out to have been "worth it." But future outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment. A parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent. This, it seems to me, constitutes a *quid pro quo* that is reasonable and reasonable equivalence is all that is required.

Summary judgment shall enter in favor of SHU on counts II and IV of the complaint.

All Citations

556 B.R. 10, 76 Collier Bankr.Cas.2d 89, 62 Bankr.Ct.Dec. 264

Footnotes

1 For ease of reference I will refer to Steven and Lori as the Palladinos and to their daughter as Nicole.

2 Viking too filed a chapter 7 petition, case no. 14–12116, and its case has been substantively consolidated with the Palladinos' case.

2019 WL 5883721
Only the Westlaw citation is currently available.
United States Court of Appeals, First Circuit.

IN RE: Steven **PALLADINO**;
Lori **Palladino**, Debtors.
Mark G. DeGiacomo, Chapter 7 Trustee
for the Estate of Steven **Palladino**
and Lori **Palladino**, et al., Appellant,
v.
Sacred Heart University, Inc., Appellee.

No. 17-1334
|
November 12, 2019

Synopsis

Background: Chapter 7 trustee brought adversary proceeding against university, seeking to set aside, as actual or constructive fraudulent transfers under both the Bankruptcy Code and the Massachusetts Uniform Fraudulent Transfer Act (UFTA), the $64,696.22 in payments made by debtors for their adult child's education at a time when they were operating a Ponzi scheme through their company, and to recover that sum for the benefit of the bankruptcy estate. The parties filed cross-motions for summary judgment. The United States Bankruptcy Court for the District of Massachusetts, Melvin S. Hoffman, Chief Judge, 556 B.R. 10, granted the university's motion and denied motion filed by trustee, and trustee appealed directly to the Court of Appeals.

The Court of Appeals, Howard, Chief Judge, held that debtors did not receive "reasonably equivalent value," as that term was used in constructive fraud provision of bankruptcy fraudulent transfer statute, for college tuition payments that they made, at time when they were allegedly insolvent, for benefit of their 18-year-old daughter.

Reversed and remanded.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge]

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Before Howard, Chief Judge, Torruella and Lynch, Circuit Judges.

Opinion

HOWARD, Chief Judge.

***1** Mark G. DeGiacomo, the Chapter 7 bankruptcy trustee for the bankruptcy estate of Steven and Lori **Palladino** ("the **Palladinos**") and Viking Financial Group, Inc., appeals from the bankruptcy court's grant of summary judgment in favor of appellee, Sacred Heart University. The summary judgment order allowed the university to retain tuition payments made by the **Palladinos** for their adult child's college education, payments that were tendered while the **Palladinos** were legally insolvent.

In the fall of 2012, Nicole **Palladino**, the **Palladinos**' 18-year-old daughter, enrolled as an undergraduate at Sacred Heart University in Fairfield, Connecticut. [1] Between March 2012, and March 2014, the **Palladinos** paid $64,656.22 in tuition to Sacred Heart. In January 2014, however, the **Palladinos** also pled guilty in a state court to fraud in connection with operating a multimillion-dollar Ponzi scheme through their closely held company, Viking Financial Group, Inc. ("Viking").

Following their fraud convictions, Steven was sentenced to serve ten years in prison and Lori to five years' probation. The Securities and Exchange Commission also obtained a $9.7 million civil judgment against the **Palladinos** for securities violations. In April 2014, the **Palladinos** filed a Chapter 7 bankruptcy petition. Viking filed its own Chapter 7 petition shortly thereafter. In May 2014, the bankruptcy court consolidated the two bankruptcy estates and appointed DeGiacomo to serve as the Chapter 7 trustee.

In July 2015, DeGiacomo filed a four-count adversary complaint against Sacred Heart in bankruptcy court seeking to avoid, and thus to claw back, the **Palladinos**' tuition payments to Sacred Heart. Two counts of the complaint claimed that the **Palladinos**' tuition payments constituted actual fraud under 11 U.S.C. § 548(a)(1)(A) and Mass. Gen. Laws ch. 109A, §§ 5(a)(1), 8, and 9. [2] The other two counts alleged that the **Palladinos**' payments were constructively fraudulent under 11 U.S.C. § 548(a)(1)(B) and Mass. Gen. Laws ch. 109A, §§ 5(a)(2), 8, and 9 because the **Palladinos** did not receive "reasonably equivalent value" in exchange for their tuition payments.

The concept underlying fraudulent transfer is easily grasped. Where a person cannot reasonably expect to pay his debts in due course, that person's transfer of his assets to another person, without receiving equivalent value in return, can if done with bad motive be viewed as a dishonest trick that ought to be civilly undone and perhaps criminally punished. The present case involved only the civil remedy, namely, the effort of the trustee to force the school to return the tuition payments.

***2** The statutes or doctrine extending the remedy to "constructive fraud" contemplates the same remedy where the insolvent transferor does not have a bad motive. This is a reasonable result on its own terms since the concern is with equity among claimants and not criminal punishment. "Constructive" means that, as only a civil remedy is involved, the court will treat the situation as if it were fraud and require that the tuition or other transfer be undone and the money returned to the estate. 5 Collier on Bankruptcy ¶ 548.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017) [hereinafter Collier].

In February 2016, DeGiacomo and Sacred Heart each moved for summary judgment. The bankruptcy court granted summary judgment in Sacred Heart's favor on all four counts of DeGiacomo's complaint. With respect to the constructive fraud claim -- the only issue on appeal -- the bankruptcy court found that the **Palladinos** paid their daughter's tuition because "they believed that a financially self-sufficient daughter offered them an economic benefit." DeGiacomo v. Sacred Heart Univ. (**In Re Palladino**), 556 B.R. 10, 16 (Bankr. D. Mass. 2016). This belief, the bankruptcy court reasoned, satisfied § 548(a)(1)(B)(i)'s reasonably equivalent value standard. The bankruptcy court then acted sua sponte to certify its decision for direct appeal to this court under 28 U.S.C. § 158(d)(2). Because the bankruptcy court's ruling presents a question of law, our review is de novo. Irving Tanning Co. v. Kaplan, 876 F.3d 384, 389 (1st Cir. 2017).

The law prohibiting fraudulent transfers protects creditors from transactions undertaken by the debtor prior to bankruptcy proceedings which deplete the pool of assets that will eventually be available to satisfy the creditors' claims. Collier ¶ 548.01. The origins date back to the Statute of 13 Elizabeth, which "made it fraudulent to hide assets from creditors by giving them to one's family, friends, or associates." Husky Int'l Elecs., Inc. v. Ritz, —— U.S. ——, 136 S. Ct. 1581, 1587, 194 L.Ed.2d 655 (2016). Such a transfer operates to prioritize the friend or family member over bona fide creditors, which in turn "violates the principle, 'be just before you are generous.' " Bos. Trading Grp., Inc. v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987) (Breyer, J.).

Section 548(a)(1)(B)(i) of the Bankruptcy Code provides that:

> The trustee may avoid any transfer ... of an interest of the debtor ... incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily ... received less than a reasonably equivalent value in exchange for such transfer or obligation.

11 U.S.C. § 548(a)(1)(B)(i). The term "reasonably equivalent value" is not defined in the statute, but it does not include intangible, emotional, and non-economic benefits. See, e.g., Tavenner v. Smoot, 257 F.3d 401, 408-09 (4th Cir. 2001).

Because fraudulent transfer law's purpose is to preserve the debtor's estate for the benefit of unsecured creditors, courts evaluate transfers from the creditors' perspective, Riley v. Countrywide Home Loans, Inc. (In re Duplication Mgmt., Inc.), 501 B.R. 462, 483 (Bankr. D. Mass. 2013), measuring value at the time of the transfer, BFP v. Resolution Tr. Corp., 511 U.S. 531, 545–46, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994); see also Cooper v. Ashley Commc'ns, Inc. (In re Morris Commc'ns NC, Inc.), 914 F.2d 458, 466 (4th Cir. 1990). Tuition payments made by insolvent parents have divided the courts, [3] although the recent cases have mostly ruled for trustees.

***3** To us, the answer is straightforward. The tuition payments here depleted the estate and furnished nothing of direct value to the creditors who are the central concern of the code provisions at issue. The code recognizes five classes of transactions that confer value: (1) the exchange of property; (2) the satisfaction of a present debt; (3) the satisfaction of an antecedent debt; (4) the securing or collateralizing of a present debt; and (5) the granting of security for the purpose of securing an antecedent debt. 11 U.S.C. § 548(d)(2)(A). None are present here, nor are parents under any legal obligation to pay for college tuition for their adult children. [4]

Payments not for value by insolvent debtors could in many situations go to worthy causes or, for example, to elderly parents or needful siblings. But such payments, absent one of the exceptions above, will be undone by the rules that allow bankruptcy trustees to claw back transfers. Congress enacted the fraudulent and constructively fraudulent claw back laws. The members of Congress were elected by the public and when they have made the trade-offs which are set forth in the statute, courts must enforce those statutes. Absent constitutional challenge, when confronted with a clear statutory command like the one in the bankruptcy code, that is the end of the matter. See TVA v. Hill, 437 U.S. 153, 194, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). [5]

The judgment of the bankruptcy court is **reversed** and the case **remanded** for further proceedings consistent with this decision. It is so ordered.

All Citations

--- F.3d ----, 2019 WL 5883721

Footnotes

1 The age of majority -- that is, the age below which parents are expected to provide financial support for their children -- is a question of state law. See Geltzer v. Oberlin Coll. (In Re Sterman), 594 B.R. 229, 236 n.8 (Bankr. S.D.N.Y 2018). In both Massachusetts and Connecticut, that age is eighteen. See Mass. Gen. Laws ch. 4, § 7; Conn. Gen. Stat. Ann. § 1-1d.

2 Under 11 U.S.C. § 544(a), commonly referred to as the strong-arm clause, the bankruptcy trustee may exercise the rights of creditors under state fraudulent transfer or preferential transfer laws. Because DeGiacomo is a bankruptcy trustee, the strong-arm clause allows him to avoid transfers that violate 11 U.S.C. § 548(a)(1) or Mass. Gen. Laws ch. 109A, §§ 5(a) and 6(a).

3 Compare Sikirica v. Cohen (In re Cohen), 2012 WL 5360956, 2012 Bankr. LEXIS 5097 (Bankr. W.D. Pa. 2012), and Shearer v. Oberdick (In re Oberdick), 490 B.R. 687, 711-12 (Bankr. W.D. Pa. 2013) (holding for parents and universities), with Roach v. Skidmore Coll. (In Re Dunston), 566 B.R. 624, 637 (Bankr. S.D. Ga. 2017), Boscarino v. Bd. of Trs. of Conn. State Univ. Sys. (In re Knight), 2017 WL 4410455, 2017 Bankr. LEXIS 3324 (Bankr. D. Conn. 2017), and Geltzer, 594 B.R. 229 (holding in favor of trustees).

4 One might argue for a different outcome in the case of a minor child if, for example, state law required the expenditure. Cf. Geltzer v. Xaverian High Sch. (In re Akanmu), 502 B.R. 124 (Bankr. E.D.N.Y. 2013). Here, however, no legal obligation exists in Massachusetts for parents to support adult children at all. Sacred Heart invokes a "societal expectation" that parents will pay college tuition for their adult children, but, and again, this does nothing for the creditors.

5 Because we find that DeGiacomo is entitled to avoid the tuition payments under § 548(a)(1)(B)(i), we do not reach his argument under Mass. Gen. Laws ch. 109A, § 5(a)(2).

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