Dennis LeVine & Associates

Secured Creditor & Bankruptcy News

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HOUSE PASSES BANKRUPTCY BILL (AGAIN), WITH SENATE ACTION PENDING

On March 19, the House of Representatives passed, for the seventh time in recent years, an omnibus bankruptcy reform measure. The vote was 315-113, with 90 Democrats supporting the bill. The bill (H.R. 975) is virtually identical to last year's conference report.

The House agreed to only three amendments: (1) to increase the wage and benefit priority claim to $10,000, (2) to increase the look-back period on fraudulent transfers from one to two years, and (3) to permit the rescinding of certain corporate retention bonuses, and require courts to reinstate certain employee health benefits that were modified by a corporate debtor within 180 days of filing. These provisions were inspired by large corporate cases such as Enron, WorldCom and Global Crossing.

The bill is now pending in the Senate, where it again faces an uncertain future – it has been put with a long list of priority items to consider this summer. Senate Judiciary Committee Chairman Orrin Hatch (R-Utah) wants to bring the House-passed bill to the floor without any further hearings by the Judiciary Committee, a move resisted by Senate Democrats. Stay tuned for further developments.

Dennis LeVine is Board Certified in both Business and Consumer Bankruptcy law by the American Board of Certification. Mr. LeVine was admitted to the Florida Bar in 1983, and practices in the federal courts of all three Florida districts. He has concentrated his practice in bankruptcy and collection law for 18 years.

"IN REM" ORDERS – A REMEDY TO THE PROBLEM OF SERIAL FILERS

In the consumer bankruptcy context, an in rem order may refer to any order entered by a bankruptcy court that either restricts a consumer debtor's access to the court in terms of the filing of a voluntary petition, or affects the interest of the debtor or third parties in property in which the consumer debtor has an ownership interest. These orders have been created by bankruptcy courts in response to the problem of the "serial filer."

Serial filers are debtors who abuse the bankruptcy process by filing successive petitions after earlier petitions are dismissed, repeatedly using the automatic stay to forestall creditors. The Second Circuit Court of Appeals had this to say about serial filers:

> 'The filing of a bankruptcy petition merely to prevent foreclosure, without the ability or intention to reorganize, is an abuse of the Bankruptcy Code. Serial filers are a badge of bad faith, as are petitions filed to forestall creditors.' [quoting Bankruptcy Judge Adlai S. Hardin's decision in In re Felberman, 196 B.R, 678, 681 (Bankr. S.D.N.Y. 1995)]. If the [debtors] fit this profile of serial filers, they are to be found not in the ranks of the nation's honest debtors, but among the Hannibal Lechters of current bankruptcy litigation.

Casse v. Key Bank, N.A. (In re Casse), 198 F3d 327, 332 (2d Cir. 1999). See also In re Nash, 765 F.2d 1410, 1414 (9th Cir. 1985).

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Serial Filers
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INITIAL JUDICIAL RESPONSE TO SERIAL FILERS

The Supreme Court addressed the issue of serial filing in Johnson v. Home State Bank, 501 U.S. 78 (1991). The Supreme Court found that under Chapter 7 and Chapter 13, serial filings are not improper in and of themselves, unless they fall within one of the prohibited categories of serial filings, such as 11 U.S.C. 109(g) (i.e. no filings within 180 days of dismissal). The Court declined to address the issue of good faith, but noted that bankruptcy courts retain the broad equitable power to "issue any order, process or judgement that is necessary or appropriate to carry out the provisions of [the Code.]" Id. at 88.

When confronted with individuals whose multiple filings constitute an abuse of the bankruptcy process, bankruptcy courts have entered orders under sections 105(a) and 349(a), prohibiting individual debtors from filing subsequent bankruptcy petitions for periods beyond the 180-day prohibition contained in §109(g). In re Tomlin, 105 F.3d 933 (4th Cir. 1997), ("the Code permits longer prohibitions against future filing than does 109(g),"); In Re: Casse, 198 F.3d at 337 ("[i]n all circuits but the Tenth, bankruptcy courts and district courts invariably derive from 105(a) or 349(a) of the Code, or from both sections in some cases, the power to sanction bad-faith serial filers. . . by prohibiting further bankruptcy filings for longer periods of time than [180 days].").

ORDERS GRANTING PROSPECTIVE RELIEF FROM THE AUTOMATIC STAY IN SUBSEQUENT BANKRUPTCY CASES

Another solution to the serial filer problem is the entry of an order in the serial filer's pending bankruptcy case which modifies the automatic stay in any subsequent cases filed by that debtor. Such an order permits a secured party (generally a mortgagee) to proceed to foreclosure without the necessity of an additional order lifting the stay in the subsequent cases. These so called "in rem" orders do not restrict the debtor's access to the bankruptcy courts, unlike the orders discussed above. The serial filer's subsequent bankruptcy case may still proceed, but the mortgage or other security interest may be foreclosed free of the automatic stay's restrictions.

The leading case in this area is In re Abdul-Hasan, 104 B.R. 263 (Bankr. C.D. Cal. 1989). In Abdul-Hasan, the owner of the encumbered real estate filed a joint Chapter 13 case in 1987 with her husband. The mortgagee filed a motion for relief from the automatic stay to foreclose. This motion was granted, and the order lifting the stay contained the following language:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent(s)/Debtor(s) shall be bound by this Order in any conversion of this bankruptcy proceeding or in any subsequently filed bankruptcy proceedings of any nature whatsoever, and as to any automatic stays issued relating to the interest of Secured Creditor, its assignees and/or successors in interest, and any such future automatic stay shall be null and void as to the interest in the property of the Secured Creditor, its assignees and/or successors in interest.

Abdul-Hasan, 104 B.R. at 264. The debtors did not file any appeal from this order.

In 1988, Mrs. Abdul-Hasan filed two subsequent Chapter 13 cases in the same jurisdiction, the first of which was dismissed for her failure to file a Plan. She filed her second case shortly after this dismissal order was entered. In this case, she failed to reveal any prior bankruptcy cases, as required by the local bankruptcy rules. In her Plan, Mrs. Abdul-Hasan proposed to cure the monetary defaults under the deed of trust over 60 months. The mortgagee never received notice of the Chapter 13 filing prior to Plan confirmation. The debtor's Plan was confirmed "without objection or knowledge of the foreclosure sale."

Sometime after confirmation, the debtor commenced an adversary proceeding against the third-party purchaser and the mortgagee to avoid the sale. The Court concluded that the prospective relief language contained in the order lifting the stay entered in the debtor's first bankruptcy case would be enforced against the debtor on *res judicata* and collateral estoppel grounds:

> There is no way available to the Court to prevent multiple filings and their detrimental effect on creditors who have previously fully and fairly litigated the automatic stay issues. The 'prospective order' does not interfere with the right of the debtor to file a bankruptcy, but does protect the creditor from multiple delays and removes the incentive of the debtor to act in an abusive manner. Id. at 267.

A clear majority of reported decisions on this issue follow Abdul-Hasan, and enforce prospective relief orders entered in prior bankruptcy cases of serial filers. See, e.g., In re Fallon, 244 B.R. 589 (Bankr. E.D. Pa. 2000), order modified sub nom. In re Hamer, 2000 W.L. 1230496 (E.D. Pa. August 18, 2000) and the cases cited therein. Some courts, however, have refused to enter and enforce prospective relief orders. See, e.g., In re Norris, 39 B.R. 85 (Bankr. E.D. Pa. 1984). See also In re Desai, 282 B.R. 527 (Bankr. M.D. Ga. 2002) (successive Chapter 11 cases).

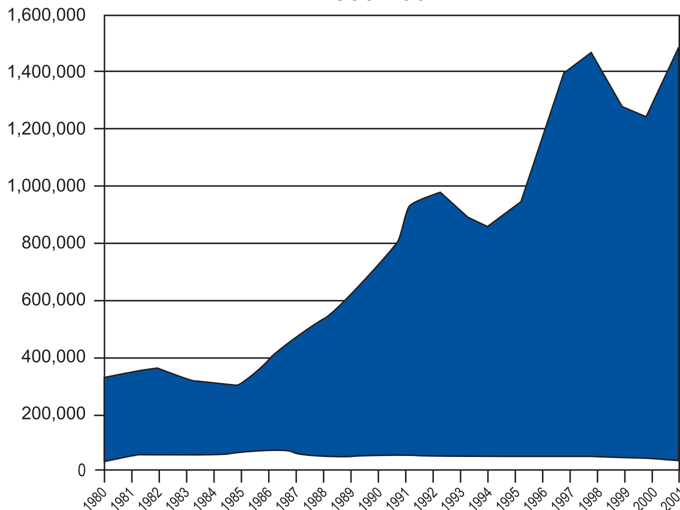
(Summarized from American Bankruptcy Institute's Spring 2003 Consumer Bankruptcy Committee presentation.)

BANKRUPTCY FILINGS BREAK RECORDS

More Americans filed bankruptcy during the first quarter of 2003 than in any other previous quarter in history, according to data released by the Administrative Office of the U.S. Courts. The 412,968 new cases filed during the first three months of 2003 are up 9.0 % from the same period in 2002.

Bankruptcy filings rose from 1,504,806 in the 12-month period ending March 2002 to 1,611,268 in the same 12-month time period ending March 2003, an increase of 7.1%. Non-business (i.e. consumer) filings continued to break historic records, totaling 1,573,720, up 7.4 % from the total non-business filings of 1,464,961 in the 12-month period ending March 2002. Business filings in the 12-month period ending March 2003 actually went down 5.8 % to 37,548, from the 39,845 business filings in the 12-month period ending March 2002.

U.S. Bankruptcy Filings
1980-2001



BABY UPDATE

And the girls have it! Walter Sanders and his wife, Jennifer, welcomed their first child, Alexis, on July 19. David Hicks and his wife Sue are expecting a daughter in November. We'll keep you posted!

JUDGEMENT LIENS AND PERSONAL PROPERTY – DEADLINE FOR FILING WITH FLORIDA SECRETARY OF STATE IS OCTOBER 1, 2003

In 2000, the Florida Legislature amended the statute setting out the procedure for the perfection of liens on personal property (a summary of these changes was included in the Firm's Winter, 2000 Newsletter). Effective on October 1, 2001, the law now requires judgment liens to be filed in one central location, with the Secretary of State's Division of Corporations. Writs of Execution are no longer docketed with the Sheriff's Office in each county.

Previously recorded judgment liens (i.e. where a Writ of Execution was docketed with the Sheriff's Office prior to October 1, 2001) must be **refiled** with the Department of State ***prior*** to October 1, 2003, or the lien on personal property will become ineffective. This would leave the judgment unperfected as to non-exempt personal property. Refiling the judgment lien with the Secretary of State will continue the lien's priority over other liens recorded after October 1, 2001.

The lawyers and staff of Dennis LeVine & Associates during the April 2003 sailing trip.

David Hicks (L) and Walter Sanders cook up ice cream sundaes for the staff during Staff Appreciation Week.

Things to Make You Think

- Borrow money from pessimists – they don't expect it back.
- A conscience is what hurts when all your other parts feel so good.
- If everything seems to be going well, you have obviously overlooked something.
- Everyone has a photographic memory, some just don't have film.

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