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RECOVERY RIGHTS OF POST PETITION

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A CLE Presentation

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I. Applicable Code Sections.

§ 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

...

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) they stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

§ 1306. Property of the Estate.

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(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.

§ 1327. Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

II. Post-Petition Rights.

Pre petition creditors are bound by the terms of the plan with respect to the debtor's property, the estate's property, and post petition creditors are stayed with respect to property of the estate but not property of the Debtor.

Since §1327 provides that at confirmation all property of the estate vests in the debtor unless otherwise provided, logically, to avoid vesting of all property of the estate in the Debtor at Confirmation

and therefore the lifting of the stay per § 362(c)(1) as to property of the Debtor with respect to post petition creditors one should seek to have placed in the Confirmation Order a provision that the property of the estate does not vest in the Debtor at Confirmation. The § 362(a) stay would then remain in effect regarding efforts by post petition creditors to recover from the property of the estate.

Many cases have developed regarding the interpretation of the interaction of the §§ 362, 1306 and 1327(b). They have generally fallen into 3 categories which are as follows:

1. At Confirmation pursuant to § 1327(b), the estate ceases to exist and all property of the estate whether acquired before or after Confirmation becomes property of the Debtor;
2. At Confirmation, estate property becomes property of the Debtor; but, the estate continues to exist to accept (some or all) property acquired after Confirmation;
3. Vesting at Confirmation under § 1327(b) does not remove any property from the estate and effects no change in property of the estate.

The Chicago v. Fisher, 203 B.R. 958 (N.D.Ill. 1997), case followed approach # 2 above found that the debtor's car vested in the Debtor at the Confirmation. Therefore, the court found that the automatic stay was lifted at Confirmation and the city of Chicago did not violate the stay when it ticketed, booted, towed and crushed the Debtor's car.

In Fisher, it was determined that § 1306(a)(2) means that property of the Estate vests in the Debtor at Confirmation but the estate continues to exist to accept property including the debtor's wages without regard to whether such property is necessary to the fulfillment of the plan until the estate is closed. The stay would remain in effect with respect to property including wages earned after Confirmation.

After the Fisher case was decided, the 7th Circuit decided in Black v. United States Postal Service, 115 F.3d 521 (7th Cir.1997) that the Court had no jurisdiction over the Trustee's adversary proceeding to recover a 'take out fee' assessed by the Post Office in relation to a 'take out order' provided for in the Confirmation Order, because of the vesting effect of §1327(b). The Confirmation Order in that case also provided that: "the debtor's income and other assets including accounts receivable shall remain estate property to the extent necessary to fulfill the plan."

The Court found that the Plan as confirmed did not place all of the debtor's income in the estate, but only that income necessary to fulfillment of the Plan. It then found that the \$50.00 assessment by the Post Office against the debtor's wages for the take out fee was not a taking by the Post Office of wages necessary to the fulfillment of the Plan. The Court interpreted § 1306(a)(2) and §1327(b) to mean that confirmation returns so much that property to the debtor's control as is not necessary to the fulfillment of Plan. The Court said further that: "It would be an abuse of discretion for a Bankruptcy Court to confirm a Plan that overcame the vesting effect beyond property reasonably necessary to fulfill the Plan."

Black limits the jurisdiction of the Bankruptcy Court regarding post confirmation action taken by a post petition creditor for recovery of property not necessary to the fulfillment of the Plan. This decision limits Bankruptcy Court discretion to broadly limit vesting on confirmation and therefore the court's ability to protect against violation of the automatic stay by post petition creditors.

III. CONCLUSION.

In the 7th Circuit:

1. The Bankruptcy Court cannot provide a broad limitation to the vesting of a property in the Confirmation Order.
2. A post petition creditor is not stayed, post confirmation, from recovery of the debtor's property and earnings, not necessary to fulfillment of the Plan.
3. Counsel for a Debtor must:

- i. advise the client of the existence of the post confirmation exposure regarding post petition creditors.
 - ii. attempt to obtain the broadest possible limitation of the vesting of property in the Debtor at Confirmation by linking the Debtor's pre and post petition property including earnings to the fulfillment of the Plan.
 - iii.
4. A post petition creditor has no easy way to determine whether property targeted by it for recovery is necessary to fulfillment of the Plan.