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cdcbaa

Central District Consumer Bankruptcy Attorney Association

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Undisclosed Lawsuits (and Other Assets) In Bankruptcy

By David A. Tilem[1]
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The Ninth Circuit's decision in Sadlowski v. Michaels Stores, Inc., 2016 US. App. Lexis 23349, (9th Cir. Dec. 28, 2016) brings up for renewed discussion the all-too-common situation where a debtor fails to disclose a pending or impending lawsuit or some other asset in bankruptcy schedules.

Ms. Sadlowski filed a chapter 13 case in March 2009. During her chapter 13 she realized that she had wage and hour claims against her employer Michaels. She retained counsel and filed suit in the United States District Court in September 2011. The chapter 13 bankruptcy case was dismissed one month later in October 2011. (Continued on page 2)

From the President

By: Peter M. Lively
peter@petermlively.com

cdcbaa's board of directors has been working hard during the first quarter of 2017. Among other things, the board has coordinated MCLE programs on January 28th (the 11th Annual Review of 9th Circuit Decisions), February 11th (Mediation for Consumer Bankruptcy Cases), and March 18th (Bankruptcy Appeals), donated $2,500 to the 6th Annual Leslie Cohen Law 5K benefitting Public Counsel's Debtor Assistance Project, started planning the 2017 Calvin Ashland Awards Dinner (which will be held on November 9th) and selected the honorable Judge Meredith A. Jury to receive this year's award, and published this newsletter! Our intention is to publish newsletters quarterly.

The 2017 Calvin Ashland Award Recipient, Honorable Meredith A. Jury

Our goal of offering remote live streaming video conferencing of cdcbaa's MCLE programs to members has come to fruition and the initial feedback from participants has been positive. Future MCLE programs will take place on April 29th (Bankruptcy Clerk's Office Presents) and June 24th (Midland Funding v. Johnson; case review) and others with dates yet to be determined. Many thanks to cdcbaa's board members for their dedication and hard work!

cdcbaa Upcoming Calendar

March 18, 2017
Bankruptcy Appeals: It's Not as Hard as it Looks*

April 29, 2017
Meet the Court Clerk: What Goes on Behind the Clerk's Window?*

June 24, 2017
Midland Funding v. Johnson, Case Review*

November 9, 2017
Annual Calvin Ashland Awards Dinner, Honoring Judge Meredith A. Jury

L.A. Hotel Pacific Ballroom
333 S. Figueroa Street,
Los Angeles, CA 90071

*Meetings to be held at Southwestern Law School. Please check www.bklawyers.org for up to date MCLE meeting information.

Michaels moved for summary judgment arguing that Ms. Sadlowski was judicially estopped from asserting the claim because she had failed to schedule the claim as an asset in her chapter 13 case. The District Court granted the motion and Ms. Sadlowski appealed.

The Ninth Circuit Court of Appeals relied on a long line of cases, including Ah Quin v. County of Kauai Dept. of Transp., 733 F.3d 267 (9th Cir. 2013), all of which resolve this issue of the unscheduled asset by utilizing the doctrine of judicial estoppel. The bulk of the Circuit Court's opinion is spent discussing the elements and application of judicial estoppel. The Panel held that the District Court abused its discretion by misapplying the 3-part test for equitable estoppel enunciated in New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001).

Perhaps one of the reasons this issue continues to arise is the reliance upon the doctrine of judicial estoppel, an equitable doctrine which, by definition will never, and can never, yield a clear rule. The application of any equitable doctrine is necessarily fact dependent and even more dependent on the discretion of the particular judicial officer or officers hearing the case. As observed by John Selden some 350 years ago:

> Equity is a Roguish thing, for Law we have a measure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. Tis all one as if they should make the Standard for the measure we call a foot, to be the Chancellors foot; what an uncertain measure would this be; One Chancellor has a long foot another a short foot a third an indifferent foot; tis the same thing in the Chancellors Conscience.[2]

Put simply, litigants in these cases cannot be certain whether their trial court judge or the appellate judges will have a longer or shorter foot. The result,when the stakes are high enough,is persistent litigation. Instead of relying on judicial estoppel, the outcome of these unlisted asset cases could be resolved with greater certainty and far less litigation under the much more straightforward doctrine of standing.

Bankruptcy Code section 554(d) (11 U.S.C. section 554) states as follows:

> Abandonment of Property of the Estate
>
> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
> (c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
> (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

Sub-section (c) instructs that only "property scheduled" and "not otherwise administered" is abandoned back to the debtor when a case is closed. An unscheduled asset, such as a claim reflected in a pending lawsuit, is therefore not abandoned when the case is closed. We are further instructed by sub-section (d) that such property "remains property of the estate". Finally, Bankruptcy Code section 323 tells us that it is the bankruptcy trustee who represents the estate and who has the capacity to sue or be sued. In short, a debtor who fails to include an asset in the bankruptcy schedules, even if that asset is disclosed at a meeting of creditors conducted under 11 U.S.C. section 341(a), does not own the asset when the case is closed. Instead, it remains property of the bankruptcy estate under the control of the bankruptcy trustee. The debtor doesn't own it and, in the context of a legal claim,lacks standing to pursue that claim.

The facts in the Ah Quin case are somewhat different. Ms. Ah Quin filed an employment discrimination case against her employer, the County of Kauai Department of Transportation ("DOT") in the United States District Court. While the employment discrimination case was pending, Ms. Ah Quin filed a chapter 7 Petition. She failed to include her claims against DOT in her bankruptcy schedules and subsequently received a bankruptcy discharge. DOT learned about the bankruptcy case and advised the District Court. The following day, Ms. Ah Quin moved to reopen her bankruptcy case and amended her bankruptcy schedules to include the claim against DOT. Approximately one month later, DOT moved for summary judgment. The motion was granted, the discrimination case was dismissed and Ms. Ah Quin appealed. Shortly thereafter the bankruptcy trustee filed a report abandoning the now scheduled DOT claims and the bankruptcy case was then again closed. The Circuit Court's 25 page opinion (which includes a vigorous dissent) spills a lot of ink over whether Ms. Ah Quin had the requisite intent to justify applying the doctrine of equitable estoppel, i.e. whether she intended to conceal the claim from her bankruptcy creditors. The majority held that she did not, and the decision of the District Court was reversed. As Selden might have put it, two of the three appellate judges had feet of one size, while the dissenting judge's foot was of a different length.

Using a standing analysis, the outcome in the Ah Quin case is much more predictable and unlikely to require appellate review. Ms. Ah Quin moved to reopen her bankruptcy case. Then she amended her schedules to include the omitted asset. After due consideration, the bankruptcy trustee abandoned the "asset" back to the debtor. Pursuant to Bankruptcy Code section 554, Ms. Ah Quin thus reacquired standing to pursue the claim against DOT.

The District Court dismissed Ms. Ah Quin's civil action on estoppel grounds. The dismissal prejudiced not only Ms. Ah Quin (whose hands may, or may not have been clean), but more importantly her creditors, represented by Ms. Ah Quin's bankruptcy trustee, who clearly had clean hands. Alternatively, perhaps the District Court should have continued the matter to give the real party in interest, the bankruptcy trustee, the opportunity to appear and substitute into the case.

Turning back to the decision in Sadlowski, while correctly decided, it misses the mark for a completely different reason. Sadlowski's chapter 13 case was dismissed. Bankruptcy Code section 349(b)(3) provides that in a dismissed case, property of the estate "revests… in the entity in which such property was vested immediately before the commencement of the case under this title" – the debtor. Ms. Sadlowski had standing and Michael's motion should be denied.

Footnotes:
1. David A. Tilem, Law Offices of David A. Tilem,
206 N. Jackson St,. #201, Glendale, CA 91206,
Telephone 1-888-BkPro4U, 818-507-6000,
Email: DavidTilem@TilemLaw.com.
2. Fry, Edward, "Life of John Selden, in Table Talk of John Selden 177 (Frederick Pollock ed.27).

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You do not have to be a Board Member to join a committee. If you are interested in joining a committee, please contact the Chairman. Your participation will be welcome.

MEDIATORS: *CERTIFICATES OF SPECIAL PRIVILEGES*

Scott Bovitz

From the February 11, 2017 Mediation Seminar

The Mediation Program allows litigants to resolve disputes in bankruptcy and adversary proceedings promptly and at less cost than formal litigation.

Mediators serve on a pro bono basis for at least one mediation per quarter, so Scott Bovitz has compiled a list of Certificates of Special Privileges as a reward for serving (in lieu of monetary compensation). For example...

Certificate #1 0-DARK THIRTY PASS:
A one-time use certificate awarding an elastic "second call" on the morning calendar, along with the personal cell phone of each judge's law clerk. This would allow the holder to leave the house for a morning court appearance at a reasonable hour (say 8:00 a.m.) instead of "0-dark-thirty".

Certificate #2 EARLY CALL:
A one-time use certificate awarding an "early call." This will permit the holder to ask the court to call a matter up to 30 minutes before the time of the scheduled hearing -- preferably before the other lawyer has checked in with the court clerk. (This happened to me once in district court. I was super early that day; that fact saved my bacon for sure.)

Certificate #3 FAST PASS:
A monthly "fast pass" to advance the holder to the front of the line at the public entrance of the Edward R. Roybal Federal Building at 255 E. Temple Street. This has been tried and tested at Disneyland.

Certificate #4 BELT AND SUSPENDERS PASS:
A two week pass permitting the holder to keep his or her belt (and pants) on through the metal detector.

Certificate #5 CONFERENCE WITH JONATHAN BOROFSKY:
A certificate awarding a personal meeting with the installation artist behind Molecule Man (aka "Bullet Hole Man") outside the public entrance of the Roybal Federal Building. This will permit the holder to ask this famous artist, "What were you THINKING anyway?" and "Why does this look so much like floating art I saw in Berlin a few years ago?"

Certificate #6 U.S. MARSHALL AS THE MESSENGER:
A certificate delegating the U.S. Marshall to pass along a short oral message on the holder's behalf. (I can imagine it clearly. The receptionist buzzes. Attorney David Lally picks up the intercom. "Mr. Lally, there is a U.S. Marshall here to see you. He says that Mr. Bovitz has a message for you.")

Certificate #7 EXTENSION OF FEDERAL RULE OF EVIDENCE 615:
This certificate would permit the judge to clear the courtroom just before the certificate holder makes a feeble argument and embarrasses himself in front of his lawyer friends and client.

Certificate #8 SANCTIONS BENEFICIARY:
This certificate would authorize the holder the right to nominate a beneficiary for all sanctions awarded in a given calendar month for the failure of bankruptcy litigators to file timely status conference statements in adversary proceedings. ("This month, J. Scott Bovitz has directed that your $150.00 sanctions are payable to the Monday Night Lawyer Movie Club Unless It's On Tuesday (as advertised on bankruptcydog.com).

Special thank you to David B. Lally, The Hon. Barry Russell and Scott Bovitz for serving on the panel of the Mediation Seminar

Riverside Chapter 13 - Navigating the Rapids

By: Todd Turoci
Todd@theturocifirm.com

For over 24 years I have been a bankruptcy attorney practicing in the Riverside bankruptcy court. I frequently hear non-Riverside attorneys complain about the treacherous waters of the chapter 13 confirmation process in Riverside, but confirming a case in Riverside can be simple and efficient. The biggest difference between other divisions and Riverside is our "same day" 341a and confirmation hearings. Quite literally, this means that the 341(a) Meeting of Creditors is in the morning and the Confirmation Hearing is later that same day. This can cause havoc if you are not used to it or if you are not prepared. But if you are prepared, the procedure greatly improves the efficiency -- and profitability -- of chapter 13 cases. Here are a few tips from the Riverside chapter 13 trustee and staff to help those who wish to shoot those rapids.

1. Discover any Special Procedures

As is true with any type of case in any courtroom, it is always important to know your judge. The Central District website (www.cacb.uscourts.gov) has a Judges section, and every judge has their own tab where they post special procedures, forms and instructions.

It is always important to review these tabs, but never more so that if your case is assigned to the Hon. Wayne Johnson. He is happy to tell you what it takes to get a case confirmed in his court. "It is very simple: read my Standing Order. The Order has everything an attorney needs to know to get a case confirmed in my Court. Since I adopted the Standing Order the confirmation rate in my Court has doubled." It is called the "Standing Order Regarding Procedure For Chapter 13 Cases Procedures For Chapter 13 Cases Assigned To Judge Johnson" and can be found on Judge Johnson's tab on the court's website. In addition, you will find other forms he requires and other procedures he follows. Practice Pointer: The Standing Order itself is over 40 pages; take the time to read it carefully and learn it.

Just as it important to know your judge, know your chapter 13 trustee. Rod Danielson is the standing chapter 13 trustee for the Riverside Division of the Central District. His website is www.rodan13.com. He has many forms available for download. If you are new to Riverside, call the trustee's office and speak to either Mr. Danielson or one of his staff attorneys.

2. Fast Track

A big advantage in the Riverside is that the meeting of creditors is held on the same day as the confirmation hearing. Because of this fast track system it is imperative to get all your documents to the trustee at least seven days before the hearing. Staff Attorney Bridgette Kelly said her biggest pet peeve was "getting documents late." She was recently on a Judge Jury Monday calendar and the chapter 13 trustee was still receiving items on Sunday. She warns that she cannot review the required documents with such short notice and this alone can lead to dismissal of your case. Practice Pointer: Send all required documents to the chapter 13 trustee no less than 21 days before the 341(a). You can then call the Staff Attorney that will be handling the calendar the day before the hearing to determine if there are any problems with the case.

3. Do Not Stack the Debts

"Debt stacking" is a unique Riverside twist in chapter 13 plans. According to Staff Attorney Joey DeLeon "when the chapter 13 plan has the various debts paid over various time frames this causes the individual debts to be paid at the beginning of the case and makes the case infeasible." Looking at it logically, if the plan says the mortgage arrears are to be paid after 36 months and the tax debt is to be paid over 24 months, there is no way to know who gets paid when, so the trustee has to "stack" the debt payments on top of each other. This problem is usually caused by the software used, and there is a simple fix. Ms. DeLeon suggests that "in order to prevent the problem, have all the debts paid over the life of the plan." This will allow even monthly payments and will prevent "stacking" issues.

4. Use the Chapter 13 Trustee's Checklist

On Mr. Danielson's website there is a copy of the checklist he sends to debtors prior to the meeting of creditors. This list is handy to have as you prepare the documents to send to the trustee and what to tell your client to bring to the hearing.

a. Photo Identification: Debtors must present a valid government issued photo ID.

b. Social Security Number: Debtors must present valid proof of their Social Security numbers. Acceptable forms of proof are Social Security cards, original W-2 or 1099 forms, or a letter from the IRS. Originals are required.

c. Plan Payments: The first plan payment is due 30 days after the petition is filed and subsequent payments are due on the same day of the month thereafter. Payments must be in the form of certified check or money order only. No cash or personal checks are accepted. Payments must be made payable to "Chapter 13 Trustee." The debtor's last name and case number must be on each certified check or money order. Bring all payments to the 341(a) meeting. Do not mail your payments to the trustee.

d. Post-Petition Mortgage Payments: Attorneys are officers of the court, and as such, Mr. Danielson and most of the judges are willing to accept an attorney's representation that all post-petition mortgage and HOA payments has been made. In Riverside, you do not have to complete or file the Declaration Setting Forth Post-Petition and Pre-confirmation Trust Deed Payments; your representation that you either sent the payment yourself or obtained proof of the payment is sufficient. Practice Pointer: Have your client bring you the payment and mail it yourself. Otherwise do the form. Do not jeopardize your reputation by making a representation that you have not independently verified. Practice Pointer 2: Be aware of each judge's rules. Judge Johnson has his own requirements.

e. Proof of Income: Make sure to send legible copies of all sources of income so that is received by the trustee at least 7 days before the 341(a) meeting. Be prepared to explain your calculations and payroll deductions.

f. Debtor Engaged in Business: If the debtor is self-employed or an independent contractor, you must submit the following documents: (1) Chapter 13 Business Report, (2) complete copies of past 2 years of tax returns, (3) six months of bank statements, and (4) six months of individual profit & loss statements, signed under penalty of perjury. See Local Bankruptcy Rule 3015-1(c)(4) for additional requirements.

g. Income from Rental Property: If the debtor receives rental income, you must complete a Real Property Questionnaire and submit copies of lease agreements and recent rent receipts.

h. Proof of Service of the Plan: The chapter 13 plan must be served on all creditors at least 28 days prior to the 341(a) meeting. There is a mandatory form that must be sent with the plan. Make sure to use that form and its proof of service and file it with the court immediately after you serve the plan. Include the trustee on the service list, and send an extra copy to the trustee at least 10 days prior to the 341(a) meeting.

i. Auto Insurance: Send the declarations page from the debtor's vehicle insurance policy to the trustee along with proof of income. Practice Pointer: Verify that the insurance is current, that all vehicles listed on Schedule A/B are listed, and that there are no additional vehicles are listed that are not on Schedule A/B. If there are additional vehicles listed, verify with a copy of the vehicle registration that they do not belong to the debtor.

j. Most Recent Income Tax Returns. Send the most recent year's federal tax return to the trustee with the other documentation at least 21 days before the 341(a). If it is after April 15th and the debtor has an extension to file, provide the extension and the prior year's tax return.

To this list I would add:

k. Bring an extra file-stamped copy of the Tax and DSO Declaration to the 341(a).

(See the trustee's website at www.rodan13.com for more information, including the Chapter 13 Handbook, proof of income forms, and other instructions.)

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Central District of California Bankruptcy Attorneys' Association

Newsletter Volume 9, Issue 20, March 2017

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Newsletter Editor

5. Actual Expenses

Riverside judges, as well as Mr. Danielson's office, look at actual expenses in reviewing the schedules in addition to the IRS standards. The actual expenses may be less than the IRS standards. This shortfall would then be added to the eventual plan payment in less than 100% chapter 13 cases. This practice appears to be different than that in other areas of the Central District. Practice Pointer: If the debtor's expenses are higher than the IRS standards, send proof to the trustee along with an explanation.

6. Proof of Income

When asked, Mr. Danielson said that besides documents not being sent timely, there is often a failure to provide adequate proof of income. "If you look on Schedule I and there are five different sources of income, we need to see proof of each source of income. We often don't receive any proof of income and the debtor's attorney is left scrambling between the morning hearing and the afternoon confirmation to try to find the evidence." He went on to say, "If a client has Social Security income, it is not hard to show a bank statement to show a deposit. Or if the client has child support income, another entry on the bank statement would show this income. And often we don't receive any proof for regular income."

Practice Pointer: Besides sending proof of all sources of income, include explanations for discrepancies and consider sending your own calculations and additional proof if needed. The trustee will default to a year to date calculation unless there is an explanation why that is not accurate.

7. Tax Returns Not Mailed to Trustee

According to Staff Attorney Elizabeth Schneider, the Riverside office uses hard copies of the tax returns for their files, so it is important that the debtor's tax returns are mailed in advance of the hearings. Practice Pointer: A case will be dismissed for failure to provide the tax return.

8. Electronic Filing Declarations

Ms. Schneider stated that "the Chapter 13 Trustee's office looks at the EFD declarations. A common problem is that a law office will use an EFD form for the filing of the main case documents and then later use the same EFD document for the filing of the RARA and the chapter 13 plan. The problem occurs when the box is not checked to show the declaration is used for the RARA or the chapter 13 plan." Practice Pointer: When filing all of the case commencement documents together using one EFD, make sure to check not only the "Petitions, Schedules" box, but also the "Other" box and specify what else is being filed. Most importantly, do not ever re-use an EFD.

With these eight tips, you should be well on your way to confirmation success in Riverside.

Todd Turoci is a Certified Specialist in Bankruptcy Law. He practices primarily in the Riverside Bankruptcy Court. His website is http://www.theturocifirm.com

Calvin Ashland Awards Ceremony

A small collection of photos from the Calvin Ashland Awards Ceremony, held on November 3, 2016 in the Grand Ballroom of the LA Hotel Downtown. Congratulations to David A. Gill, the 2016 Calvin Ashland Trustee of the year.

cdcbaa

Central District Consumer Bankruptcy Attorneys Association

Advancing the interests of Consumer Bankruptcy Practice in the Central District of California

2017 Membership

I hereby apply for membership in the *cdcbaa*, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for calendar year 2017. I understand the basic goals of the organization are to: address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California; and to provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors. As a condition of membership, I declare as follows:

1. I am a duly-licensed attorney presently authorized to practice law in the Central District of California; and
2. I am interested in consumer debtor practice; and
3. I support the basic goals of the *cdcbaa* as outlined above.

I understand the *cdcbaa* is incorporated as a 501(c)(6) nonprofit organization and that a portion of my dues will not be deductible as a business expense because *cdcbaa* advocates within California for legislation on behalf of consumer debtors.

The 2017 calendar year membership fee is $250.00, and includes one ticket to the Calvin Ashland Awards Dinner

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Join Online at http://bklawyers.org/become-a-member

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