BANKRUPTCY UPDATE[1]

Drake University Law School
General Practice Seminar
December 8, 2017

The Honorable Anita L. Shodeen
U.S. Bankruptcy Court Southern District of Iowa

1. Legislation

2 National Chapter 13 Plan

3. Horizontal Consolidation Project

4. Upcoming CMECF changes

5. Trends

CASE LAW UPDATE[2]

SUPREME COURT OF THE UNITED STATES

***Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 197 L. Ed. 2d 398 (March 22, 2017) (Breyer, J.)**

Structured dismissals which provide for distributions to creditors outside of the mandated priority scheme set forth in the bankruptcy code are not permitted absent consent of the affected creditors.

***Midland Funding, LLC v. Johnson,* 137 S. Ct. 1407 (2017) (Breyer, J.)**

Filing a proof of claim on a stale debt does not constitute a violation of the FDCPA as a false, misleading, unfair or unconscionable debt collection practice.

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[1] Acknowledgement and appreciation to my law Clerk, Alexandria Quinn, for her assistance in producing these materials. Some of these materials were sourced from an outline prepared for the 2017 Minnesota Bankruptcy Institute Program with the permission of Judge Michael Ridgway.

[2] The outline contains selected cases from the Eighth Circuit and the Northern/Southern District bankruptcy courts. The outline does not include all decisions rendered by these judicial bodies. Practitioners should independently research any specific legal issue to obtain all relevant opinions.

Dissent argues that knowingly attempting to collect an unenforceable debt is both unfair and unconscionable in the context of filing a proof of claim to obtain payment from a distribution in a bankruptcy case.

***Henson v. Santander Consumer USA, Inc.*, 137 S.Ct. 1718 (2017) (Gorsuch, J.)**

In an unanimous opinion, the Supreme Court affirms that a party that purchases a debt and attempts to collect the debt for its own account is not a "debt collector" subject to the FDCPA. The Court opined that the plain text of the FDCPA defined debt collectors as those who collected debts owed to another and therefore focused on debt collection agents collecting on behalf of a debt owner. A debt owner who was collecting debts for his own profit was not subject to the FDCPA.

AUTOMATIC STAY and DISCHARGE INJUNCTION

1. *Mo. Dep't of Soc. Servs. v. Spencer (In re Spencer),* Nos. 16-3182, 16-3183, 2017 U.S. App. LEXIS 15926 (8th Cir. Aug. 22, 2017)

Debtors' filed for Chapter 13 bankruptcy protection. The Missouri Department of Social Services (MDSS) filed a proof of claim in the amount of $36,026.27 for spousal support and child support arrears for the Debtor's prior marriage. MDSS then determined the number was improperly calculated and filed an amended proof of claim three months later for $88,026.27. Despite the Debtors objecting to the proof of claim, the bankruptcy court confirmed a chapter 13 plan including $600 per month payments to MDSS. Following the completion of their bankruptcy plan, MDSS garnished the Debtor's wages to collect the $52,000 pas due domestic support obligation plus interest. The Debtors sought sanctions arguing that the collection violated the discharge injunction. The bankruptcy court ordered MDSS to cease their collection efforts and to pay Debtors' attorney fees. MDSS appealed to the B.A.P.

The B.A.P revered conclusion the discharge injunction does not apply to nondischargeable domestic support obligations, even the disallowed portions, and therefore MDSS did not willfully violate the injunction. The Debtors' then appealed the B.A.P. decision. The 8th Circuit then held that the agency had a reasonable basis to believe the disallowed portion of the support arrears would survive the plan, therefore affirming the decision of the B.A.P.

2. *In re Ingles,* No. 17-00018, 2017 Bankr. LEXIS 2193 (U.S. Bankr. N.D. Iowa 2017)

Debtor executed a mortgage on his home with U.S. Bank. The mortgage legal description had an error. The word "feet" was omitted; therefore instead of saying "West 60 feet of Lot 8" it said "West 60 of Lot 8." U.S. Bank asked the Court to lift the stay so it could

reform and foreclose on the mortgage. Debtor resisted. Debtor argued the error made the mortgage invalid as well as U.S. Bank unsecured and discharged. U.S Bank argues that the mortgage remains valid and asks the Court to reform the mortgage. The Court determined that an erroneous description in the mortgage did not invalidate the mortgage, as there was no dispute about what the correct legal description should be, and therefore the bank's motion for relief from stay was granted.

DISCHARGE

3. *Hernandez v. Gen. Mills Fed. Credit Union (In re Hernandez),* 860 F.3d 591 (8th Cir. 2017)

The bankruptcy court properly held that a debt was nondischargeable because, in obtaining the loan, the debtor made a false representation that he had a power of attorney (POA) for his grandparents. Testimony established that the POA signatures were not those of the grandparents and that notarization of the POA's was false. Additionally, the debtor's representation that he had a valid POA established that he intended to deceive the bank so as to obtain credit under § 523(a)(2)(A).

4. *Fern v. FedLoan Servicing (In re Fern),* 563 B.R. 1 (B.A.P. 8th Cir. 2017)

Fern ("Debtor") obtained $14,980.00 in student loans to participate in classes to become and accounting clerk. After being unable to finish the program, Debtor obtained an additional student loan of $5,300.00 for training to become an esthetician. Upon working in this field of study, Debtor was unable to build up the clientele necessary to support her family, and had to leave this job. Debtor has never made a payment on her student loan obligations, and they exceed $27,000 in the aggregate. Debtor sought to discharge her student loans under 11 U.S.C. § 523(a)(8), which allows discharge if it can be shown that repayment would constitute an undue hardship on the debtor or the debtor's dependents. Debtor was successful, and the opinion was appealed to the Bankruptcy Appellate Panel. In determining whether undue hardship exists, the Bankruptcy Appellate Panel considered the totality of the circumstances. Based on the Debtors consistent income that was unlikely to improve and her reasonable monthly expenses for her family of four, the Bankruptcy Appellate Court determined that Bankruptcy Court's determination that Debtor's student loans were dischargeable as undue hardship was not in error.

5. *United States DOL v. Harris (In re Harris),* 561 B.R. 726 (B.A.P. 8th Cir. 2017)

The Department of Labor obtained a pre-bankruptcy judgment against the Debtor in the United States District Court, which found that, under ERISA, the Debtor breached his fiduciary duty when the company of which he was CEO failed to remit funds withheld

from its employees' paychecks for their health insurance plan. The DOL sought to have that judgment debt declared nondischargeable as a debt for defalcation while acting in a fiduciary capacity under 11 U.S.C. § 523(a)(4). In granting summary judgment in favor of the DOL on its nondischargeability action, the Bankruptcy Court was required to determine that the Debtor committed defalcation, while acting in a fiduciary capacity, within the meaning of § 523(a)(4) of the Bankruptcy Code. The Bankruptcy Court concluded: (1) that the health insurance premiums withheld from employee wages were held in trust by the employer until they were paid into the health plan (in other words, that there was a trust res); (2) that the Debtor himself was a fiduciary of that trust within the meaning of § 523(a)(4); and (3) that the Debtor's decision not to remit withheld wages to the health plan constituted defalcation within the meaning of that statute. The Bankruptcy Appellate Court affirmed.

6. *County of Dakota v. Milan (In re Milan),* 556 B.R. 922 (B.A.P. 8th Cir. 2016)

Dakota County, Minnesota, appealed the bankruptcy court's order that discharged a debt that was owed to Dakota County for costs related to the pre-petition incarceration of the debtor. Minnesota law permits sheriff offices to impose a portion of the costs of incarceration on the convicted inmates at the rate of $25 a day. The debtor was incarcerated for 179 days for various offenses prior to filing his chapter 7 case and owed the county approximately $3500 for the stay. The county argued that the debt was non-dischargeable under 11 U.S.C. § 523(a)(7) as a fine, penalty, or forfeiture owing to a governmental agency.

The B.A.P. held that for § 523(a)(7) to apply, the debt must be penal in nature and must serve some punitive or rehabilitative governmental aim. The Minnesota statute that allows sheriff offices to impose a portion of their costs on the incarcerated appears in the state's administrative code, not in the criminal code. The B.A.P. found that the "pay-to-stay" charge was pecuniary in nature and § 523(a)(7) cannot be imposed as compensation for actual pecuniary loss.

7. *Charles Gabus Motors, Inc. v. Tirrell (In re Tirrell),* No. 17-6009, 2017 Bankr. LEXIS 2520 (B.A.P. 8th Cir. 2017)

Charles Gabus Motors filed an adversary complaint asking the bankruptcy court to determine the dischargeability of its claim against the Debtor and to deny the Debtor a discharge in his chapter 7 case. Before trial, the Debtor and Gabus Motors entered into a settlement agreement by which Debtor was to pay Gabus Motors $45,000.00 in five installments, the first of which was due January 3, 2017. Upon receipt of these payments, Gabus would dismiss the adversary proceedings. Debtor failed to make the first payment after traveling by airplane and experiencing delayed connections in order to acquire the funds. Upon his delayed return, Debtor attempted to pay the installment, however Gabus filed an affidavit of default. The Debtor objected, claiming that he was prevented from making the payment by circumstances beyond his control, asking the bankruptcy court

and Gabus to accept the late payment. The Bankruptcy court denied his objection, and the Debtor appealed. The Bankruptcy Appellate Court held that the Bankruptcy Court did not err in their application of the doctrine of temporary impracticability based on its finding that the Debtor's procrastination, and not the weather, were to blame for the failure to make a required payment.

8. *Sterling v. Lanum (In re Lanum),* No. 15-01807, 2017 Bankr. LEXIS 1493 (U.S. Bankr. S.D. Iowa 2017)

Rebecca Sterling ("Sterling") was employed as a sales representative for Russell Communications, LLC. Following her termination, Sterling filed suit in state court and Russell Communications and Jeffrey Lanum ("Lanum") were held jointly liable for damages and attorney fees. Lanum filed bankruptcy and Sterling sought to have the amount of her state court judgments and attorney fees excepted from Lanum's discharge. Sterling argued that her award is nondischargeable under 11 U.S.C. § 523(a)(6), however the Court found this injury was founded in a breach of contract and therefore did not meet the burden necessary for willful and malicious injury. Additionally, Sterling contended the debt was nondischargeable based on false pretenses, however the Court dismissed this 11 U.S.C. § 523(a)(2)(A) claim as well as there was no evidence of misrepresentation. Lastly, Sterling argued that her debt was subject to 11 U.S.C. § 523(a)(4), which excepts discharge of a debt arising from larceny. The Court dismissed this argument as well, as the wages were the original property of the debtor, and therefore could not be obtained by larceny. No separate arguments were made to except the attorney fees and therefore the request to except them from discharge was also dismissed.

9. *Am. Nat'l Bank v. Lewis (In re Lewis),* No. 15-02519-als7, 2017 Bankr. LEXIS 1423 (U.S. Bankr. S.D. Iowa 2017)

Craig and Mary Lewis ("Debtors") established a $1,000.00 "Ready Reserve" unsecured line of credit ("line of credit") at People's National Bank, now ANB ("ANB"). Mary met with a personal banker to open a new deposit account, to be attached to the line of credit. Craig was later joined as an account owner. A month after opening this new account, ANB mailed the Debtors a statement which indicated the line of credit was $101,091.00. This mistake by ANB was due to decimal point misplacement, and went unnoticed by ANB. Mary, aware of the mistake transferred $62,340.00 from the line of credit into her checking account over 15 months. Craig used the account as normal, unaware of the increase. Two years later, ANB noticed the error, and discontinued the line of credit. After failing to set up a payment plan with ANB, the Debtors filed bankruptcy.

ANB sought to have its debt excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A), and (a)(6) and to deny the Debtors discharge pursuant to 11 U.S.C. § 727(a)(2). The Court dismissed the causes of action under 11 U.S.C. §§ 727(a)(2) and 523(a)(6) as to both debtors. The 11 U.S.C. § 523(a)(2)(A) claim as to Craig Lewis was also dismissed. In its analysis of the 523(a)(2)(A) claim as to Mary Lewis however, the Court determined that Mary had knowledge of the inaccuracy and yet continued to

exploit the banks error to her benefit. Because ANB reasonably relied on the representation of the Debtor's entitlement to the funds, the Court found the debt owed by Mary Lewis to ANB excepted from her discharge.

EXEMPTIONS

10. *Helming v. Reed (In re Helming)*, 567 B.R. 357 (B.A.P. 8th Cir. 2017)

Debtor's late husband owned a tavern, and the Debtor was jointly obligated for the debt incurred by two deeds of trust on the tavern property. The commercial property was placed on the market in 2010, but no offers were received. In 2013, the Debtor purchased a single premium annuity, and then missed a payment on the secured note on the commercial property. The Debtor then closed her bank account and closed the tavern. In late 2013, the lienholder foreclosed on the commercial property and received no proceeds from the sale. The lienholder then filed suit against the Debtor. The Debtor filed bankruptcy in March 2016 claiming her annuity payments as exempt. The Trustee objected, and the bankruptcy court held that the monthly annuity payments did not qualify for exemption under Missouri state laws. The B. A. P. affirmed the bankruptcy court opinion determining that the payments were not "on account" of the Debtor's husband's death, but instead were started because she chose to begin receiving payments.

11. *Hanson v. Seaver* (*In re Hanson*), 562 B.R. 363 (B.A.P. 8th Cir. 2016)

A debtor in a chapter 7 case chose a Minnesota exemption provision to claim an exemption in a portion of a $1,500 property tax refund as government assistance based on need under Minn. Stat. §550.37 Subdiv. 14. The bankruptcy court sustained the trustee's objection to the exemption. The debtor appealed arguing that a previous BAP decision in *Manty v. Johnson* (*In re Johnson*), 509 B.R. 213 (B.A.P. 8th Cir. 2014), on same issue was implicitly overruled by the Eighth Circuit in *Hardy v. Fink* (*In re Hardy*), 787 F.3d 1189 (8th Cir. 2015), a case about Missouri exemption rule on the federal child tax credit.

The BAP disagreed with the debtor and held that the *Johnson* decision is still binding on it and *Hardy* did not overrule *Johnson* because a review of the history of Minnesota legislature shows the refund was never tailored to low-income homeowners, unlike the federal child tax credit. It affirmed the bankruptcy court and held that Minnesota property tax refund act does not provide government assistance based on need.

12. *McDermott v. Crabtree* (*In re Crabtree*), 562 B.R. 749 (B.A.P. 8th Cir. 2017)

Prepetition, the debtors began making improvements to the real property they claimed as a homestead. Within the two years prior to filing, the debtors paid for improvements totaling in excess of $74,000 from various sources. When they filed their petition, the debtors claimed the equity in their homestead–$66,000–exempt under Minnesota's

homestead exemption. The trustee objected to the exemption and argued that under § 522(o), the homestead exemption should be reduced by the value of the nonexempt assets that were converted into the homestead. The United States Trustee filed a separate complaint to deny the debtors' discharge based on the debtors' intent to hinder, delay, or defraud creditors. The bankruptcy court entered an order denying the debtors' discharge and sustained the trustee's objection, reducing the debtors' claimed homestead exemption by $74,000. The debtors appealed only the reduction of the homestead exemption.

The B.A.P. recognized that § 522(o) addresses the *value* of the debtors' interest in the homestead that was increased, not the value of the assets that went into the homestead, as the trustee argues. This recognition requires a bankruptcy court to determine both the value of the debtors' interest with the improvements and the value of the debtors' interest without the improvements. The difference would likely be attributable to the improvements that were made with the nonexempt assets within the 10-year prepetition period. The B.A.P. therefore reversed and remanded the case.

13. *In re Chambers*, No. 16-00552, 2017 Bankr. LEXIS 2390 (U.S. Bankr. N.D. Iowa 2017)

Debtors received a $29,964 personal injury award from a motorcycle accident. Debtors deposited $13,000 of the award into Roth IRAs and used the balance for living expenses. A month later, the Debtors filed chapter 7 bankruptcy. Later that day, the Debtors withdrew the funds from the IRA, and used them as a down payment on a house and first month's mortgage payment. Two weeks later, Debtors filed their bankruptcy schedules, claiming the $13,000 value of the IRAs as exempt, despite having liquidated and transferred the funds. The Trustee objected to the exemption noting that even if the IRAs were fully exempt when the Debtors filed, the funds where property of the estate when the Debtors' transferred them. Conversely, the Debtors argued that the exemptions were determined as of the petition date, and subsequent actions are irrelevant.

Ultimately, the bankruptcy court held that the Debtors did not lose their exemption when they transferred the IRA post-petition, and at most the transfer violated a technicality. Based on the harmlessness of the Debtor's use of fully exempt property, the Court overruled the Trustee's exemption and granted the Debtors retroactive authorization to use, Transfer and/or dispose exempt assets.

14. *In re Schantz*, Nos. 16-0400, 16-09016, 2017 Bankr. LEXIS 2952 (U.S. Bankr. N.D. Iowa 2017)

Farm Credit held a first priority interest in Debtors' homestead and in the proceeds from the sale of Debtors' farm equipment. Growmark held a second priority interest in only the equipment proceeds. Growmark contends that the Court should direct Farm Credit under the equitable doctrine of marshaling to collect from Debtors' homestead, thereby allowing Growmark to collect the proceeds of the equipment sale. Debtors and Farm Credit argue that Iowa law does not allow for marshaling because it would diminish Debtors'

homestead exemption. The Court agreed with the Debtor and granted summary judgment based on the interference with the value of the Debtors' homestead exemption.

LIENS

15. *CRP Holdings v. O'Sullivan* (*In re O'Sullivan*), 841 F.3d 786 (8th Cir. 2016)

The Eighth Circuit held that because property was held as entireties, neither spouse arguably has a separate interest in the property and a judgment filed against only one spouse could not constitute an enforceable lien on the entireties property. However, the existence of the entireties interest created a sufficient interest that could be avoided.

When a judgment gives rise to an unenforceable lien, a debtor may move to avoid that lien under §522(f). However, picking up on the BAP's footnote, the Eighth Circuit held when a judgment fails to give rise to a judgment lien, including an unenforceable lien, §522(f)(1) is without application. The court remanded the case to the bankruptcy court to address this issue.

15(A) *CRP Holdings, A-1, LLC v. O'Sullivan (In re O'Sullivan),* No. 17-6012 (B.A.P 8th Cir. Sept. 22, 2017)

The creditor held a judicial lien against the debtor's real property. The sole issue before the BAP was whether the judicial lien on the debtor's real property was enforceable–for purposes of avoidance of that lien under § 522(f). Earlier, the bankruptcy court had granted the debtor's § 522(f)(1) motion, concluding that "[the creditor]'s judgment lien - although perhaps not enforceable - certainly affixed upon the Debtor's home upon [the creditor]'s recording of its judgment in Barton County." The creditor appealed and the BAP affirmed, but the Eighth Circuit then reversed and remanded the matter to the bankruptcy court. [CRP Holdings, A–1, LLC v. O'Sullivan (In re O'Sullivan), 841 F.3d 786 (8th Cir. 2016) (Murphy, J.).] It stated that the lower courts assumed that the creditor had a judicial lien. The circuit court expressed doubt regarding whether the creditor had a lien that affixed to the property, but it recognized a distinction between unenforceable liens and nonexistent liens, stating that an unenforceable lien is avoidable under §522(f)(1). On remand, the bankruptcy court held that the creditor held an unenforceable judgment lien; the court then granted the debtor's motion to avoid that lien under § 522(f)(1). On appeal, the BAP affirmed, reasoning that the creditor did not have a lien under the definition provided by Missouri law. The property held by the debtor did not qualify as "real estate" under the Missouri definition, having been held as a tenancy by the entirety. Thus, the BAP found that recording of the creditor's judgment "fastened an existing, but presently unenforceable lien" on the property.

The BAP agreed with the bankruptcy court that the "Eighth Circuit's instruction was simple and the scope of its remand was narrow: it remanded the matter for a determination of 'whether CRP has a judicial lien on the property (either enforceable or unenforceable).' . . . The bankruptcy court correctly stated that the only two choices for proceeding upon remand by the Eighth Circuit were to: (1) determine that there was no judicial lien and, accordingly, no lien to avoid, and that the underlying debt was discharged; or (2) find that there was an enforceable or unenforceable lien and that § 522(f)(1) applies. That is exactly what the bankruptcy court did," the BAP found.In affirming, the BAP found its decision "consistent with the purpose of § 522(f), which favors protecting exemptions at the cost of judicial lienholders as a part of a debtor's fresh start. The legislative history of § 522(f) 'suggests that a principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts.' . . . In addition, it is apparent that [the creditor] targeted this specific piece of the Debtor's Property with the belief that it held a lien against the Property. Otherwise, [the creditor] would not have gone to the trouble to record its judgment in Barton County. It would be unfair to allow [the creditor] to defeat the Debtor's fresh start because it has now devised a scheme whereby it believes it may avoid the protections afforded to the Debtor by § 522(f) and still reap the benefit of its lien upon the death of the Debtor's spouse.

16. *Sweetwater Cattle Co., L.L.C. v. Murphy (In re Leonard),* 565 B.R. 137 (B.A.P. 8th Cir. 2017)

Murphy Cattle Company sold cattle to the Debtor, who delivered them to Sweetwater Cattle Company for care and feeding. Sweetwater also financed the purchase of the cattle through a line of credit and asserted a lien against the cattle. Despite receiving the funds from Sweetwater, the Debtor only payed Murphy a partial payment. Murphy sought to reclaim the cattle under the UCC for nonpayment. Sweetwater claimed a security interest in the cattle which attached at the moment Debtor became the owner. The bankruptcy court concluded on cross motions for summary judgment that Sweetwater's lien was valid and that they were entitled to the proceeds of the cattle. Murphy appealed.

The B.A.P. determined that defects in the bill of sale did not affect the obvious; that the seller signed a document transferring ownership of the cattle to the Debtor and therefore others could rely on the Debtor's claim of ownership. Based on this, the Court did not err in turning to UCC art.2, and the bankruptcy court's order is affirmed.

JURISDICTION/STANDING/APPEALS

17. ***Gretter v. Gretter Autoland, Inc. (In re Gretter Autoland, Inc.),*** 864 F.3d 888 (8th Cir. 2017)

The Eighth Circuit dismissed as moot James Gretter's appeal of the district court's dismissal of his appeal from a bankruptcy court decision denying debtors' motion to assume and assign certain car-dealership agreements. The court held that the case was moot because no court, in reversing the bankruptcy court's order denying the motions to assume and assign, would order the sale of property of the estate to proceed.

18. ***Situm v. Coppess (In re Coppess),*** **567 B.R. 543 (B.A.P. 8th Cir.), reh'g denied, 567 B.R. 893 (B.A.P. 8th Cir. 2017)**

A creditor appealed to the BAP the bankruptcy court's confirmation of the debtor's chapter 13 plan following an evidentiary hearing. The bankruptcy court did not enter a written opinion setting forth findings of fact and conclusions of law related to confirmation of the debtor's plan. Instead, that court entered a short order referencing "the reasons set forth by the court on the record at the conclusion of the evidentiary hearing."

The BAP affirmed the bankruptcy court because the creditor failed to provide a transcript of the evidentiary hearing. This meant the BAP had "no basis upon which [it] could say the bankruptcy court erred" because the bankruptcy court exclusively stated its findings on the oral record during the confirmation hearing. Accordingly, the BAP affirmed the bankruptcy court without addressing the merits of the creditor's arguments.

19. ***Huonder v. Champion Milking Sys., LLC (In re Huonder),*** **558 B.R. 303 (B.A.P. 8th Cir. 2016)**

Debtors commenced an adversary proceeding against Champion, seeking compensatory damages, general damages, punitive damages, and attorney fees for Champion's alleged violations of the discharge injunction. The first order awarded Debtors general damages of $1,000.00 for Champion's violation of the discharge injunction and directed Debtors to file an itemized statement of their attorney fees and costs. The second order, entered after Debtors had complied with the first order, awarded Debtors attorney fees of $1,500.00 for Champion's violation of the discharge injunction and directed the entry of judgment in Debtors' favor for both the general damages awarded in the first order and the attorney fees awarded in the second order. The bankruptcy court did not award Debtors compensatory damages or punitive damages. Debtors appealed based on court error in not awarding them full attorney fees and not awarding punitive damages.

The B.A.P. was only provided a trial transcript, which ended at a court recess and did not contain any oral order or exhibits. Based on the inability to review the court's findings of fact or conclusions of law this judgment was affirmed.

20. *Wigley v. Wigley (In re Wigley),* 557 B.R. 678 (B.A.P. 8th Cir. 2016)

Barbara Wigley appeals from the bankruptcy court's : (1) order denying confirmation of Robert Wigley's (Debtor) second modified Chapter 11 plan, establishing deadlines for the Debtor to file a modified plan, and obtain confirmation of it, and denying Lariat Companies, Inc.'s (Lariat) request to dismiss the Debtor's Chapter 11 case or to convert the case to Chapter 7; (2) order confirming the Debtor's fourth modified Chapter 11 plan; and (3) order granting relief from the automatic stay to allow Lariat to exercise its rights and remedies against Barbara Wigley in state court litigation.

The B.A.P. determined the spouse of a bankruptcy debtor lacked standing to appeal the confirmation of the debtor's plan, which allowed litigation to proceed in state court against the spouse since judgment against the spouse was already entered in state court and the spouse suffered no direct pecuniary harm from the confirmation order. Also holding that approval of the settlement was properly denied since the settlement was an attempt by the debtor to control a creditor's state-court judgment against the spouse which would only benefit the spouse, provide no benefit to the estate and harm the creditor.

TRUSTEE POWERS

21. *In re Agriprocessors, Inc.,* 859 F.3d 599 (8th Cir. 2017)

In the 90 days before filing for bankruptcy, Debtor Agriprocessors, Inc., wired funds covering overdrafts at Luana Savings Bank. The bankruptcy trustee, Sarachek, argued the overdraft-covering deposits were avoidable transfers recoverable. The bankruptcy court found Sarachek could recover some deposits but not others. Sarachek and Luana cross-appealed. The district court affirmed. The parties again cross-appeal.

The Court of Appeals affirmed the district court opinion, finding that overdrafts in a debtor's bank account are debt within the meaning of the preferential statute because the bank extended funds to the debtor when it allowed the settlements of checks to be finalized. The Court also found that the contemporaneous exchange exception did not apply, and that the bankruptcy court did no err in finding that true overdrafts were not debts incurred in the ordinary course of business under § 547(c)(2).

22. *Seaver v. Glasser (In re Top Hat 430, Inc.),* 568 B.R. 314 (B.A.P. 8th Cir. 2017)

Randall L. Seaver, Chapter 7 Trustee in the bankruptcy case of Top Hat 430, Inc., filed suit against Pennie Glasser, seeking to recover from her, as a preference, a payment made

by the Debtor to her. Since the payment was made more than ninety days, but less than one year, prior to its filing bankruptcy, the Trustee can only prevail if Ms. Glasser is found to have been an insider of the Debtor at the time of payment. Ms. Glasser is the former wife of an insider of the Debtor, as well as a minor investor and employee of the Debtor at the time of payment. The Bankruptcy Court held that Ms. Glasser was not an insider of the Debtor. Therefore, the payment was not an avoidable preference pursuant to 11 U.S.C. § 547(b) and Minnesota Statute § 513.45(b). The Trustee appealed and Ms. Glasser cross-appealed the finding that, even though she was not an insider, the transaction between her and the Debtor was not at arm's length.

The B.A.P. held that an ex-wife of an insider of a debtor is not an insider herself. Additionally, although she was an employee and minor investor of the debtor, she did not have sufficient closeness to be treated as an insider. Because she was not an insider the payment to her was not an avoidable preference.

CHAPTER 13

24. ***Wojciechowski v. Wojciechowski (In re Wojciechowski*), 568 B.R. 682 (B.A.P. 8th Cir. 2017)**

Debtors filed for chapter 13 relief, listing the attorney for a pre-petition divorce proceeding on schedules E/F. The attorney filed numerous motions, objections and adversary proceedings. Ultimately, the attorney filed an amended motion to dismiss the Debtor's case and an amended objection to the Debtor's second amended plan. After hearing the arguments of counsel and considering the record, the bankruptcy court denied the motion to dismiss and overruled the objection to confirmation, confirming the second amended plan. The attorney then filed a motion to amend, inter alia, the bankruptcy court's order confirming the plan, and the bankruptcy court entered an order denying the motion. The attorney appealed, arguing that the bankruptcy court erred in not conducting an evidentiary hearing on Debtor's second amended plan. The Bankruptcy Appellate Panel determined that nothing in the statutes or case law require a hearing every time an issue of good faith is raised in a Chapter 13 hearing, and the bankruptcy court is in the best position to determine the necessity of an evidentiary hearing. Based on this reasoning, the Panel held the bankruptcy court did not abuse its discretion and the bankruptcy courts order was affirmed.

25. ***Hansmeier v. McDermott (In re Hansmeier),* 558 B.R. 299 (B.A.P. 8th Cir. 2016)**

Debtor filed a petition for relief under chapter 13 of the bankruptcy code. The United States Trustee filed a motion under 11 U.S.C. § 1307(c) to convert Debtor's case to chapter 7. The United States Trustee's motion was verified. Debtor objected to the United States Trustee's motion. Debtor's objection was unverified and was not supported by an affidavit. Debtor did not request and was thus not denied an evidentiary hearing. He did

not give the bankruptcy court any reason to suspect he wanted an evidentiary hearing. He did not support his objection to the United States Trustee's motion with an affidavit, as he was required by local rule to do if he believed facts were at issue. Debtor's remaining argument focused on his belief that his proposed "100 percent plan" demonstrated his good faith. This argument was without merit, as the U.S. Trustee's evidence called into serious doubt debtor's ability to confirm a plan. The B.A.P agreed with the bankruptcy court that there was sufficient cause to convert Debtor's chapter 13 case to chapter 7 and affirmed.

26. *In re Bennett,* No. 16-01254, 2017 Bankr. LEXIS 1087 (U.S. Bankr. N.D. Iowa Apr. 20, 2017)

Debtors live in a manufactured home in a neighborhood operated by Creditor The Paddock. Debtors rented the home from 2003-2007. In 2007, Debtors purchased the using The Paddock provided financing under a Manufactured Home Installment Contract with a security interest in the home. The Debtors also entered into a 990-year lease for the lot under the home. The Debtors filed Chapter 13 bankruptcy, and The Paddock claims it is partially secured by the Debtor's manufactured home. The Debtors proposed Chapter 13 plan bifurcated The Paddocks claim into secured and unsecured. The Paddock objected.

The Court held that under Iowa law, a manufactured home is generally treated as personal property and therefore the Debtors were not barred from bifurcating the Paddocks' claim. The objection was therefore overruled.

CHAPTER 11

27. *McCormick v. Starion Fin. (In re McCormick),* 567 B.R. 552 (B.A.P. 8th Cir. 2017

On March 10, 2014, the bankruptcy court denied Starion Financial's ("Starion") motion to compel payment of Starion's attorneys' fees and expenses in accordance with the confirmed Chapter 11 plan of reorganization and granted the Debtors' motion to disallow Starion's attorneys' fees and costs. Starion appealed to this panel, and the B.A.P. reversed the decision of the bankruptcy court and remanded the case for consideration of the issues as to timeliness and reasonableness of the requested fees and costs. The Debtors then appealed from the bankruptcy court's order granting in part and denying in part Starion's motion to compel payment of fees under the confirmed plan of reorganization, and granting in part and denying in part the Debtors' motion to disallow attorneys' fees and costs claimed by Starion.

Upon review, the B.A.P. held the bankruptcy court did not err on remand when it found a creditor that had loaned money to businesses owned by two individuals who declared Chapter 11 bankruptcy was entitled to recover $83,122 in attorneys' fees from the debtors under agreements the debtors signed which guaranteed payment of loans. Additionally,

the B.A.P. held the bankruptcy court did not abuse its discretion in finding the creditor was not barred from recovering when it submitted its claim for fees three days after the date in the confirmed plan. Based on this analysis, the B.A.P. affirmed the lower court opinion.

28. ***Lariat Cos. v. Wigley (In re Wigley),*** **557 B.R. 671 (B.A.P. 8th Cir. 2016)**

The main issue on appeal is whether the bankruptcy court properly denied Lariat's request to dismiss the Debtor's case or convert it to Chapter 7 for bad faith, resulting in the ultimate confirmation of the Debtor's fourth modified Chapter 11 plan. On appeal, Lariat focuses on certain factors assessed by the bankruptcy court, claiming that the bankruptcy court's decision was made in error. Lariat's main argument is that the bankruptcy court erred in finding that the Debtor's Chapter 11 case was filed in good faith because (according to Lariat) the Debtor was not in financial distress.

The B.A.P. found no error and affirmed the bankruptcy court's ruling that determined that the Debtor was in financial distress, and that he filed his Chapter 11 petition to maximize the value of his assets and to obtain the benefits of the Bankruptcy Code.

MISCELLANEOUS

31. ***Melikian Enters., LLLP v. McCormick*****, 863 F.3d 802 (8th Cir. 2017)**

Debtors signed a promissory note in favor of creditor Melikian Enterprises, LLLP. After the Debtors defaulted on their payments and sought bankruptcy relief, Melikian filed a proof of claim in the bankruptcy proceeding seeking to recover a deficiency judgment. The bankruptcy court sustained the Debtors' objection to this proof of claim, and the district court affirmed. Upon review, the 8th Circuit ruled the objection to the proof of claim in the bankruptcy proceeding was properly sustained because the time period to seek a deficiency judgment under Ariz. Rev. Stat. § 33-814 had lapsed.

32. ***Combs v. Cordish Cos.,*** **862 F.3d 671 (8th Cir. 2017)**

Combs and his wife filed a Chapter 7 bankruptcy petition. Combs did not disclose any potential lawsuits he might have against any of the defendants for engaging in racial discrimination at bar and restaurant establishments. Combs and his wife received their discharge in August 2011, and the case was closed.

In March 2014, after hearing media reports of racial discrimination in the District, Combs brought a discrimination action for actions both pre-petition and post-petition. The defendants all filed motions for summary judgment on the merits. Defendants also asked the court to find Combs was judicially estopped from pursuing his claims because he did not disclose them in his bankruptcy proceeding. Combs then moved to reopen his

bankruptcy to amend his petition. Before the bankruptcy court ruled on Combs' motion to reopen, the district court granted summary judgment to all defendants concluding Combs was "judicially estopped from asserting claims that he had before he filed for bankruptcy." The day after the judgment, the bankruptcy court granted Comb's motion to reopen. The district court denied Comb's post-judgment motion to amend judgment, and Combs appealed.

The Eighth Circuit held that Combs was not judicially estopped from certain claims because they had not been listed as assets in his bankruptcy petition, and thus the district court abused its discretion by applying judicial estoppel to underlying claims that had not been yet occurred before the filing of the action.

33. ***May v. Nationstar Mortgage, LLC,*** **852 F.3d 806 (8th Cir. 2017)**

After completing her chapter 13 plan, May was contacted by Nationstar regarding amounts it claimed were in arrears. After multiple attempts to remedy the situation she sued asserting violations of her privacy and the Fair Credit Reporting Act. Based upon the evidence the Court of Appeals upheld the jury's verdict of $400,000 in punitive damages.

34. ***In re Meyer,*** **563 B.R. 708, 710 (Bankr. N.D. Iowa 2017)**

Debtor rented farmland from several trusts that Land Trustee administers with an oral lease. Debtor farmed the trust land from 2002-2012 before Debtor filed bankruptcy. Land Trustee filed a claim for 2012 rent and Debtor objected. Debtor argued that he had claims for improvements to trust-owned facilities and repairs to trust-owned equipment that will offset Land Trustee's claim. Land Trustee argues that the oral lease did not include the use of the equipment and facilities. The Court held that use of the farm equipment, facilities, and reimbursement for repairs and improvements to property was a part of the parties' oral lease, and because the land trustee did not dispute that the debtor made improvements and repairs to trust property the debtor was therefore entitled to setoff of his claims for repair and reimbursement.

35. ***Demarais v. Gurstel Chargo, P.A.,*** **869 F.3d 685 (8th Cir. 2017)**

RaZor obtained a debt owed to Citibank which had been charged off in 2010 and hired the defendant law firm to collect. Demarais did not respond to the filed suit. Rather than moving for a default judgment, the law firm allowed the matter to be set for trial. On the trial date counsel for RaZor appeared without evidence, witnesses or any client representative. Demarais appeared and argued that this was a routine collection practice of the firm. A continuance was requested and granted. Prior to the second trial date Demarais sent discovery to which was never answered. Counsel appeared for trial again was not prepared to go forward. The case was dismissed with prejudice. Gurstel Chargo then served discovery on Demarais' counsel.

Demarais filed a under the FDCPA alleging a number of grounds. The District Court dismissed his case under an argument that the statute of limitations had expired and any action taken by the law firm constituted “permissible litigation tactics”.

The Circuit Court reversed. It rejected the determination that the statute of limitations barred the claims. The law firm raised the issue of standing for lack of concrete injury which was also rejected. Finally, the opinion held that the conduct of Gurstel Chargo was in violation of the FDCPA for using “unfair or unconscionable means to collect or attempt to collect any debt.” and attempts to collect any amount” not owed.