DELAWARE STATE BAR ASSOCIATION

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WHAT NON-BANKRUPTCY ATTORNEYS NEED TO KNOW ABOUT BANKRUPTCY 2022

DSBA WEBINAR VIA ZOOM

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION

THURSDAY, APRIL 28, 2022 | 12:00 P.M. – 1:00 P.M.

1.0 Hours CLE credit for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

No matter what practice area you are in, finding yourself working with a client considering bankruptcy or in the middle of bankruptcy proceedings is more common than you think. How will bankruptcy proceeding impact their existing legal matter such as if they are in the middle of filing for divorce, facing criminal charges, or in business litigation? How do you get paid for non-bankruptcy work when clients become involved in bankruptcy and how to keep what you're paid? Join us as we discuss numerous topics such as how to advise clients who may need bankruptcy protection, when is it time to recommend they consult with a bankruptcy attorney, and what they avoid when they prepare for a bankruptcy filing.

PRESENTERS

Erin K. Brignola, Esquire
Cooper Levenson, P.A.

Nina Pappoulis, Esquire
Law Offices of Gregory & Pappoulis

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& BROWN, LLC

"Every question no matter how simple deserves a quick, understandable and reasonable answer so that each client can plan for their future".

ERIN K. BRIGNOLA recently joined **GELLERT SCALI BUSENKELL & BROWN, LLC** to add her 30+ years of legal knowledge and experience in Consumer Bankruptcy litigation and small-business bankruptcy representation. Recognized by her peers annually since 2001 as a "Top Lawyer" in Consumer Bankruptcy, she devotes 95% of her practice to helping people file successfully for debt relief.

Erin's personal and attentive representation of thousands of satisfied clients insures her notable recognition of the top 1% of America's Most Honored Lawyers for client satisfaction. Erin provides attention to detail to tailor her representation to each client's individual needs.

Erin is an experienced and accredited mediator and provides not only debt relief options but practical solutions to inter-related issues in other areas of the law including family law, real estate closing and title law, and she offers simple wills, and agency documents (POA/AHD).

As a Consumer Bankruptcy attorney, Erin provides a complete analysis of a possible federal court filing which when timely filed will provide relief from creditor harassment or attachment. She provides remedies for each individual and /or small business owner to protect their assets including their home, cars, bank accounts, retirement accounts and their business and income livelihood. Representation in federal court will lead to stopping most state court actions for the benefit of a fresh start for her clients.

Erin has and continues to actively serve her Delaware Community as a legal service volunteer attorney for the Delaware State Bar Association, and Delaware Volunteer Legal Services and serves on the referral panel. Since the inception in 2006, she has proudly served as the Vice-Chair to the Consumer Bankruptcy Section to assist and mentor other attorneys to become better advocates for their clients. She is well known in the Delaware legal community as someone who is easily approachable and will always try to help. Erin is a member of many organizations both locally and nationally to continue her education to provide for her clients the best possible results.

2022 marked the 10th year anniversary of producing DE Consumer Bankruptcy Forum—for Bankruptcy Chapter 13 Judge Shannon and his committee members--which Erin relishes as a successful honor.

Erin has been a speaker and guest lecturer for many local and national organizations regarding the elements of bankruptcy case law and the interaction of bankruptcy law in family law, real estate title and foreclosure issues and wills and inheritance. Call Erin with your questions so that she and her team can help you.

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Nina Pappoulis, Esquire has represented debtors in consumer bankruptcy cases for 18 years. She is the Managing Partner at Gregory & Pappoulis, located in Dover, DE. She attended the University of Delaware for undergraduate studies and Widener University Delaware Law School. Ms. Pappoulis serves on the board for Delaware Board of Bar Examiners and also serves on the board of DFRC Blue-Gold. She is a frequent speaker on consumer bankruptcy issues. She has also been named as one of the Best Consumer Bankruptcy Attorney by DE Today consecutively for the last 6 years.

CASE REVIEW:

***In re Aleckna*, 13 F. 4th 337 (3rd Cir. 2021)— university "willfully" violated the automatic stay by refusing to provide debtor a complete transcript that affirmatively included a graduation date, and the district court did not err in awarding damages and attorneys' fees for the willful stay violation, notwithstanding that a good faith reliance on persuasive legal authority standard is not "willful" under *University Medical* (3rd Cir. 1992), which remains good law in the Third Circuit post-BAPCPA (Adam Crouse)**

Relevant Provisions: 11 U.S.C. § 362

Summary:

The debtor filed her chapter 13 petition bankruptcy while owing tuition to California Coast University ("CCU"). The debtor sought a copy of her transcript from CCU, which would only send her an incomplete transcript due to a "financial hold" on her account. The bankruptcy court determined that CCU committed a willful violation of the automatic stay and awarded damages and attorney's fees to the debtor. The district court affirmed and CCU appealed.

CCU did not argue that it had not violated the stay, but only that it had not done so "willfully" and thus that the $100,000 award of damages and fees was improper.

The Third Circuit began its analysis by asking whether its decision in *In re University Medical Center*, 973 F. 2d 1065 (3rd Cir. 1992) remained good law in light of the 2005 BAPCPA amendments to section 362. When that case was decided, the applicable § 362 provision stated that "[a]n individual injured by any willful violation of a stay ... shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The statute was silent on whether a "good faith" defense existed.

In 2005, Congress amended section 362(k), so that it now reads that damages and attorney's fees may be awarded unless "such violation is based on an action taken by an entity in the good faith belief" that the stay had terminated due to the debtor's failure to file a timely notice of intention. The court noted that, because the amended provision could be read to establish a good-faith defense that is narrower than the one articulated in *University Medical*, several bankruptcy courts in the circuit had concluded that the case has been statutorily overruled.

But it concluded that the 2005 amendment did not affect the *University Medical* rule because the amended statute does not provide a means to disprove willfulness, while the rule "provides a theory by which defendants can challenge the 'willfulness' element in its entirety."

The Third Circuit affirmed nonetheless, because CCU had not pointed to any authority that reasonably supported its belief that its actions were in accordance with the stay. The lack of case law to the contrary, on which CCU relied, did not render the law sufficiently unsettled to disprove its "willfulness" under the rule of *University Medical*.

***Strategic Funding Source, Inc. v. Veale* (In re Veale), No. 21-10418 (BLS), Adv. Pro. 21-50486 (BLS), 2021 Bankr. LEXIS 3271, 2021 WL 5614923 (Bankr. D. Del. Nov. 30, 2021) (Howard Robertson)**

In the chapter 13 bankruptcy case of Michelle A. Veale (the "Debtor") Strategic Funding Source,

Inc. (“SFS”) filed an adversary complaint to determine dischargeability of the Debtor’s personal guarantee of a business loan. SFS alleged that the Debtor misrepresented several facts at the time the loan was made, rendering the personal guarantee nondischargeable under Bankruptcy Code section 523(a). The Debtor filed a motion to dismiss the complaint that the Court granted in its entirety, holding that the personal guarantee of the business loan was dischargeable.
Background: In 2017, the Debtor executed a high interest loan agreement with SFS in her capacity as owner of a business and in her individual capacity, as guarantor. Upon finalizing the loan, the Debtor stated in a recorded phone call that she was not planning to file for bankruptcy and had no reason to believe that the business would need to file for bankruptcy in the foreseeable future. She also stated that she did not have a balance with any other merchant cash advance provider. After the loan was executed, the business made the first five weekly payments, then defaulted. The Debtor did not make any payments as personal guarantor and SFS filed suit and obtained a default judgment against her in Virginia state court. Almost three years later, on February 18, 2021, the Debtor filed for bankruptcy protection under Chapter 13 in the District of Delaware. SFS subsequently filed an adversary complaint alleging that Debtors’ personal guarantee is nondischargeable.
Analysis: SFS alleges that the Debtor made several misrepresentation upon making the loan, therefore the guarantee is nondischargeable because the Debtor obtained the loan by (i) false pretenses, false representation or fraud, under section 523(a)(2)(A); (ii) a false statement in writing concerning the Debtor’s financial condition, under section 523(a)(2)(B); (iii) actions substantially certain to cause willful and malicious injury to SFS and its property, under section 523(a)(6); and (iv) fraud or defalcation while acting as a fiduciary, embezzlement or larceny, under section 523(a)(4).

i. Section 523(a)(2)(A)

SFS alleged that the Debtor falsely represented her intent to guarantee the business loan and therefore, the guarantee is nondischargeable. The Court analyzed section 523(a)(2)(A), which provides that a debt is nondischargeable if “obtained by false pretenses, a false representation or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” The Court determined that SFS failed to allege with particularity that the Debtor “knowingly made a false representation at the time she guaranteed the loan.” The Court focused on the Debtor’s intent at the time of her promise and determined that the complaint did not show at the time of her promise the Debtor intended not to perform (false as to her intent). Showing that the Debtor later decided not to perform is not proof that the Debtor intended not to perform at the time of making the loan.

ii. Section 523(a)(2)(B)

SFS argued that the guarantee is nondischargeable under section 523(a)(2)(B) because the Debtor stated on a recorded phone call that she had no reason to believe that she or her business would file for bankruptcy in the foreseeable future. The Court evaluated section 523(a)(2)(B), which states that a debt is nondischargeable if obtained by “use of a statement in writing -- (i) that is materially false; (ii) respecting the debtor’s or insider’s financial condition; (iii) on which”

the creditor reasonably relied; and (iv) that the debtor made or "published with intent to deceive." The Court dismissed this claim because the recorded phone call was not a writing.

iii. Section 523(a)6)

SFS alleged that the personal guarantee is nondischargeable under section 523(a)(6) because the Debtor's failure to make payment under the loan was substantially certain to cause injury and was therefore willful and malicious. Section 523(a)(6) states that a debt is nondischargeable "for willful and malicious injury by the debtor to another entity or the property of another entity." The Court dismissed this claim because an intentional breach of contract is not willful and malicious conduct under this section unless the breach is "accompanied by conduct that would give rise to a tort action under state law."

iv. Section 523(a)(4)

SFS alleged that the personal guarantee is nondischargeable under section 523(a)(4) because the Debtor's business was insolvent at the time of making the loan which makes the Debtor a fiduciary of the creditor as the business's office and director. Secondly, SFS argued that the Debtor took the loan with no intent to repay, therefore the personal guarantee is nondischargeable due to embezzlement or larceny. The Court dismissed this claim because a simple contractual relationship, without more, does not create a fiduciary duty. Additionally, the fiduciary duty that an insolvent corporation owes to creditors cannot support a claim under section 523(a)(4) because it does not create an express or technical trust relationship. With respect to SFS's assertion that the Debtor committed embezzlement, the Court dismissed that argument stating that because this was a loan transaction, SFS did not entrust property to the Debtor. As for larceny, the Debtor did not take SFS's property without consent, so that argument also failed.

See also: *In re Robinson*, 20-50533 (BLS) (Nov. 19, 2021)

Chen v. Phat 623 B.R. 371 (E.D.P.A. 2021, Chan, B.J.)

The Debtor and Plaintiff were friends for 10 years and became close friends for 4 years. The Debtor had a gambling addiction and borrowed $120,000 from Mr. Chen between 2013 and 2016. The Debtor paid Chen $1700 per month for four years, all of which Chen called interest. Their financial transactions were entirely oral until 2017 when Chen insisted that the Debtor sign an installment note agreeing to pay $10,550 per month for 12 months.

The Debtor did not make payments. In early 2018, Chen entered a Confession of Judgement against the Debtor for $146,165. In June of 2018, the parties entered into a settlement agreement reducing the amount to $60,000. The agreement required an initial payment of $5,000 within 30 days and monthly payments of $500 with any balance all due and payable by October 1, 2027. The agreement was secured by a mortgage in the Debtor's residence.

Debtor tendered the $5,000 payment timely. However, the check was returned NSF twice. When the Debtor tendered the first $500 payment, it also came back NSF. No further payments were made.

The evidence at trial showed that at various points during the period after the payments were

tendered there was a sufficient balance in the account to cover the payments. Chen was not lucky enough for the checks to have been tendered on a day when they would have cleared.
The Debtor filed Chapter 13 in February 2019. Chen filed an objection to discharge of the $60,000 settlement pursuant to Section 523(a)(2)(A) of the Code, claiming false pretenses and false representation. Chen contended that when the Debtor signed the $60,000 settlement agreement he never intended to perform based upon the repeated tender of payments returned for insufficient funds.
The Court disagreed and found the debt to be dischargeable. Initially finding the settlement agreement to constitute an extension of credit or a forbearance within the meaning of Section 523(a)(2), the Court focused upon intent, including whether the Debtor's conduct was reckless. The Court found that because there were sufficient funds in the account at times to cover the payments tendered in 2018: "…not only were there five days between July 5 and August 28 when the Second Check could have been honored, but *thirty-five* days when the Second Check could have been honored. If the Debtor had never intended to make payments under the Agreement, the Debtor would have never risked having sufficient funds in the Account to make any payments or he would have written the Checks from an account with a zero balance." The Court concluded with a cite from another gambling case where the discharge was objected to, *In re August*, 448 B.R. 331 (E.D.P.A. 2011): "So long as the debtor has an honest, even if unreasonable belief, that he will get lucky at gambling and pay off his debts this Court is satisfied that the debtor has the requisite intent to pay."

U.S.B.J. Christopher S. Sontchi Consumer Opinions

1. *In re Scioli*, 12-10572 CSS (Bankr. D. Del. Jan. 28, 2013)
Debtor filed chapter 7 but his spouse did not. Debtor scheduled three vehicles as jointly held property on Schedule B and also listed the automobiles as exempt on Schedule C.
Chapter 7 trustee objected to the debtor's claimed exemption in the three automobiles. The trustee contended that the claimed exemption was not available because the vehicles were titled solely in the Debtor's name and had not been paid for by a joint checking account held by the Debtor and his spouse. The Debtor countered that the name on the titles was not determinative and that the vehicles were purchased with marital funds during marriage and, thus, were owned by the Debtor and his wife as tenants by the entirety
Noting that interests in property are determined by state law in the absence of controlling federal law, the Court reviewed numerous Delaware cases addressing tenancy by entirety property. After distilling precedent from the Delaware Chancery Court, the Delaware Superior Court and the Delaware Supreme Court, Judge Sontchi concluded that (i) property held by husband and wife is presumed to be held as tenants by the entirety; (ii) the intent to create entireties property must be measured at the time of the property's acquisition; (iii) the designation of ownership on a legal document, while not dispositive, is "strong evidence as to the nature of the ownership interest"; and (iv) the presumption that property is entirety property is directly related to the extent that the property is "intimately associated" with the marital relationship (i.e. linens and furniture versus commercial property).
Judge Sontchi found that the Trustee met his initial burden of producing evidence to rebut the presumptively valid exemption by the Debtor. As a result, Court found that the automobiles were held solely by the debtor and could not be exempted as tenants by the entirety property.

2. *In re Willis*, No. 07-10046 (CSS) (Dec. 18, 2012) (Letter Op.) (Howard Robertson)
The chapter 7 bankruptcy of Clarencinia D. Willis (the "Debtor") was reopened to revise Debtor's schedules to include an employment discrimination claim as an exempted asset under 10 Del. C. § 4914(b) (wildcard exemption) with a current value of $10. The Chapter 7 Trustee filed an objection to the Debtor's asserted exemption. The Court held that the Debtor's employment discrimination claim is exempt in the amount of $10, but any appreciation of value of the claim in excess of $10 is property of the estate. The Court further held that the proper value of an exempted asset is the fair market value of the claim as of the bankruptcy filing.
The Court also evaluated whether (i) the Debtor should be able to amend her schedule to increase the amount of the exemption to the maximum amount of $25,000 as allowed by 10 Del. C. § 4914(b); and (ii) whether the Debtor or the Trustee should control the employment discrimination claim. As to the first issue, the Court only afforded the Debtor the opportunity to amend her exempted claim amount because the Trustee agreed to allow the Debtor to increase the exempted amount to the maximum amount allowed by law. As to the second issue, the Court determined that the Trustee should control the employment discrimination claim. The Court reasoned that the Debtor only has incentive to seek recovery in the amount of the exemption claimed, but the Trustee has incentive to seek recovery for the full amount of the claim to maximize recovery. Therefore, the Trustee is better positioned to pursue the employment discrimination claim.

3. *In re Hart*, 08-12107 CSS (Bankr. D. Del. Mar. 10, 2009) (Toyia Haines)
Chapter 7 Debtors sought to reaffirm their real property debt by executing a Reaffirmation Agreement with their mortgage lender. The loan secured by a lien on their farm and equipment, was not feasible due to debtors' monthly expense negative balance of $3001. The presumption of undue hardship arose and could not be rebutted by debtors' promise to (1) take in renters; and (2) improve revenue through their chicken farm business plan.
The Court determined that real property reaffirmations, were not necessary, and this loan could "pass through" the bankruptcy case unaffected, further the Court disapproved the agreement as not being in the best interest of debtors. [(BAPCPA) 11 U.S.C.A. §§ 362(h)(1), 521(a)(6).]

4. *In re Akulova,* 07-11654 CSS (Bankr. D. Del. Jul. 21, 2009)
Issue
- May the Chapter 7 debtor amend her schedules to substitute a personal injury claim for a different claim previously identified as exempt and abandoned by the trustee? (No)
Facts
- Debtor (Ms. Kira Akulova) was injured in an auto accident in 2005. Shortly after she retained PI counsel and filed suit.
- Debtor voluntarily filed for Chapter 7 on November 6, 2007, and the same date she filed her schedules. Debtor did not list her PI claim as an asset of her estate under schedule B or C, claims she simply forgot about her claim at the time she filed.
- In January 2008, debtor filed amended schedules. She again did not include the PI claim. Debtor first made the Court and Trustee aware of the PI claim when the trustee sent her a questionnaire, prior to the 341 meeting, asking if she was currently suing anyone.
- July 2008, the debtor's PI counsel was retained on behalf of the estate, at request of the trustee. The PI claim was settled for payment of $9,000. Debtor learned of settlement on February 9, 2009.

- February 10, 2009, Debtor filed a second amended schedule C which included the net proceeds of the PI claim.
- Trustee objects to the Debtor's amendment of her schedules to include the proceeds of her PI claim as an exempt asset.

Legal Analysis

- Amendment of a Debtor's Schedule
  - Bankruptcy Rules allow a debtor to exempt property having aggregate FMV of not more than $25,000.
  - A debtor may, any time before case is closed, amend a voluntary petition, list, schedule or statement (court permission and a hearing is not required)
    - This gives debtors the best opportunity to make a fresh start
  - Debtor may also amend the schedules to add property that is exempt from distribution, however, the debtor's proffered amendment to the schedule of property claimed as exempt is not to be allowed automatically
  - An amendment to the schedule of exemptions may be denied if the debtor acts in bad faith or if there is prejudice to a creditor
    - The prejudice to the creditor must outweigh any prejudice to the debtor
    - Debtor's ability to amend for purpose of correcting mistakes/omissions if limited to situations involving inadvertence and does not extend to undoing concealment of known information
- Ms. Akulova may not amend her schedule because she acted in bad faith
  - She had prior knowledge of her PI claim and chose not to include the claim in her initial and revised schedules. Even giving debtor the benefit of the doubt that she forgot about it, once debtor did become aware of it she waited 11 months to include the claim as an exempt asset
  - Debtor also allowed trustee to retain counsel and pursue and liquidate the claim. It was only after the trustee was successful and debtor was aware of the liquidation that she sought to retain the proceeds as exempt. It is inequitable to allow a debtor to induce a trustee to act on what the trustee believes to be the creditors' behalf while the debtor retains an option (for which no consideration has been paid) to exempt the fruits of the trustee's labor if, and only if, the trustee is successful.
  - Debtor exacerbated her bad faith by trying to substitute proceeds of the PI claim for property that was previously abandoned by the trustee

5. *Moran v. Crowe* (In re Moran), 09-50040 CSS (Bankr. D. Del. Sep. 11, 2009)

Issue

- Should the Court grant Debtor's motion to dismiss the amended complaint of the Crowes (Discharge Plaintiffs) to have debt declared non-discharged in accordance with § 523(a) of the Code? (No, the Court should deny the Debtor's motion to dismiss)

Facts

- The Crowes entered into a contract with Debtor to provide labor and materials for the improvement of the Crowe's home. Contact price was $83,365. Crowes paid the Debtor $68,000 on account of the Contract price, leaving a $15,365 balance
- Debtor commenced performance of contract on February 5, 2008. Performance was sporadic and inconsistent. By June 2008, the Debtor abandoned the project or failed to return to the property. The Crowes terminated the contract and sued Debtor for breach of

contract and breach of trust. Oct. 20, 2008, Crowes obtained a default judgment against Debtor for $59,625
- Nov 9, 2008, Debtor filed voluntary chapter 7 petition. Crowes filed a complaint seeking to have the debt the Debtor owes them as non-discharged pursuant to § 523(a). Crowes alleged breach of contract and trust, fraud, and breach of fiduciary duties. Crowes also claimed res judicata and collateral estoppel barred Debtor from disputing the breach of FD and obtained funds through fraud

Legal Analysis

- Res Judicata does not prevent the Crowes from objecting to the discharge of the debt the debtor owes them
  - Res judicata is an affirmative defense that forecloses a party from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties.
    - The procedural bar extends to all issues which might have been raised and decided in the first suit as well as to all issues actually decided
  - The Court cannot find the Crowes neglected or failed to assert claims which in fairness should have been asserted in the first action because state courts cannot determine whether debts specified in § 523(a)(2), (4) are non-dischargeable in bankruptcy
    - SC and 3rd Circuit have found Congress intended to leave certain discharge questions in exclusive jurisdiction of the bankruptcy courts.
- Collateral Estoppel does not preclude the Crowes from litigating the issues of fraud and breach of fiduciary duty in this adversary proceeding
  - Once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.
    - The burden is on a defendant to demonstrate that the issue in relitigation was actually decided in the first proceeding
  - Where a party seeks to rely on a state court judgment to preclude relitigation of the same issues in federal court, a federal court must look to the state law and its assessment of the collateral estoppel doctrine to determine the extent to which the state would give its own judgment collateral estoppel effect
    - Crowes obtain judgment in Delaware state court so Bank. Ct. will apply Delaware law
  - Collateral estoppel does not bar the Crowes from litigating the issues of fraud and breach of fiduciary duty. The default judgment was based on breach of contract and breach of trust. The bankruptcy complaint is based on Crowe's objection to the Debtor's right to discharge from his debt to them.
    - Therefore, the Crowes have initiated an adversary proceeding based upon a different cause of action from that in the Superior Court of Delaware
- The Court will deny the debtor's motion to dismiss the Crowes claim for relief under 11 U.S.C. § 523(a)(2)
  - § 523(a)(2) provides certain exceptions to discharge of claims including those incurred by the debtor under false pretenses or through fraud. Creditor has burden of proving debt is non-dischargeable
  - The Crowes have stated a valid claim for relief under § 523(a)(2). The

Bankruptcy complaint satisfies the elements of misrepresentation or perpetuated fraud and knowledge that the representations were false
- Debtor used funds for personal reasons and not to pay for labor or materials and the debtor knew they were false when he made them to the Crowes
- Crowes were aware of three sub-contractors the Debtor failed to pay after claiming he did
- Debtor claimed to have gotten materials from multiple vendors but no such materials were purchased

- The Court will deny the debtor's motion to dismiss the Crowe's claim for relief under 11 U.S.C. § 523(a)(4)
  - § 523(a)(4) provides another exception to discharge for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny
  - The Crowes and Debtor entered into a contract for the debtor to provide labor and materials for home improvements. The complaint alleges the Crowes paid the Debtor $68,000 on account of the contract price. Plus it alleges that Title 6, Chapter 35 was violated because all money paid to Debtor were paid in trust to be used for payment of cost of labor and materials and a fiduciary relationship was created which was to ensure that all money paid to Debtor would be used only for paying for labor and materials
  - Debtor breached their fiduciary duties when it used the funds to pay himself personally and not for labor or materials
- Should the Debtor be awarded attorneys' fees and costs because the filing of the bankruptcy complaint was not substantially justified
  - § 523(d) the court can grant attorneys' fees and costs to a debtor if they find that the creditors complaint seeking determination of dischargeability is not substantially justified
    - Goal of this section is to discourage creditors from initiating false financial statement exception to discharge actions
  - Debtor must prove creditor brought a dischargeability complaint w/ respect to a consumer debt and that the debt was discharged, the creditor can defeat a motion by establishing that its non-dischargeability action had reasonable basis in law and fact or there were special circumstances
  - The Court will deny Debtor's request because assuming Crowes' allegations are true, their objection is meritorious so § 523(d)'s requirements are not met

6. *In re Baker*, 08-10077 CSS (Bankr. D. Del. Jun. 10, 2008), aff'd (D. Del. 2009) (Toyia Haines)

Chapter 7 debtors filed a Motion to Reopen and a Rule to Show Cause for Willful Violation of a Court Order for Wrongful Repossession of a Motor Vehicle. After the parties executed a timely reaffirmation agreement, the debtors' alleged the creditor wrongfully repossessed. While the Court had not approved the reaffirmation agreement as it constituted an undue hardship, debtors' motions were granted as there was no legal basis for repossession under Delaware law.
Chapter 7 debtors filed a Statement of Intention to retain the vehicle and make regular payments but did not choose one of the three statutory options –surrender, redemption, or reaffirmation. Even though the parties had timely entered into a reaffirmation agreement, this Court refused to

approve the Reaffirmation Agreement because it would constitute an undue hardship on the Debtors—making the reaffirmation agreement unenforceable.
Guided by the Third Circuit's opinion in Price, the Court found that a default based upon the debtors' filing of bankruptcy is an unenforceable ipso facto clause because the debtors timely entered into a reaffirmation agreement—regardless of whether the agreement was approved by the Court. The Court held the creditor in civil contempt; ordered the return of the vehicle; and awarded compensatory damages to the debtors because the creditor repossessed the vehicle in violation of the discharge injunction. Finally, the request for punitive damages was denied without prejudice.

Please also read the DSBA Journal February 2022 edition for a special article on all Judge Sanchi's Consumer Opinions.

ADD: Domestic Opinion-- In re Lee

LEE opinion for Davis 2013.pdf

11 U.S. Code § 362 - Automatic stay

U.S. Code Notes

(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—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(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;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105–277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681–866;]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part

of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other

credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization’s regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization’s regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does

not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue;

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act); and

(29) under subsection (a)(1) of this section, of any action by—

(A) an amateur sports organization, as defined in section 220501(b) of title 36, to replace a national governing body, as defined in that section, under section 220528 of that title; or

(B) the corporation, as defined in section 220501(b) of title 36, to revoke the certification of a national governing body, as defined in that section, under section 220521 of that title.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

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

(1) the 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;

(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;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded —

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)

(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under

subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor’s equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)

(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)

(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)

(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the

filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)

(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)

(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)

(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay

provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)

(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A),

(B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2570; Pub. L. 97–222, § 3, July 27, 1982, 96 Stat. 235; Pub. L. 98–353, title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub. L. 99–509, title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub. L. 99–554, title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub. L. 101–311, title I, § 102, title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub. L. 101–508, title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 103–394, title I, §§ 101, 116, title II, §§ 204(a), 218(b), title III, § 304(b), title IV, § 401, title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub. L. 105–277, div. I, title VI, § 603, Oct. 21, 1998, 112 Stat. 2681–886; Pub. L. 109–8, title I, § 106(f), title II, §§ 214, 224(b), title III, §§ 302, 303, 305(1), 311, 320, title IV, §§ 401(b), 441, 444, title VII, §§ 709, 718, title IX, § 907(d), (*o*)(1), (2), title XI, § 1106, title XII, § 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub. L. 109–304, § 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub. L. 109–390, § 5(a)(2), Dec. 12, 2006, 120 Stat.