Contributing Editors:
Thomas Rice
Cox Smith Matthews Incorporated
San Antonio
trice@coxsmith.com

Aaron M. Kaufman
Cox Smith Matthews Incorporated; Dallas
akaufman@coxsmith.com

Lien Stripping Junior Lien in "Chapter 20": Two Views

Two cases deal with whether a debtor in a chapter 13 case, who had recently received a discharge in a chapter 7 case ("chapter 20"), could seek to strip off a junior lien under § 1325. In *In re Casey*, 428 B.R. 519 (Bankr. S.D. Cal. 2010), a creditor holding a third-priority lien on the debtor's property sought relief from the automatic stay, arguing that since the debtor could not receive a discharge under chapter 13, the debtor could not strip off the lien under § 1325. Hon. Peter W. Bowie disagreed with the creditor, and in denying the motion he found that if the debtor is eligible to be a debtor under chapter 13, then all the rights would be available to such debtor, except for the right to a discharge.

In contrast, in *In re Fenn*, 428 B.R. 494 (Bankr. N.D. Ill. 2010), Hon. **Jacqueline P. Cox** determined that a debtor could not strip off a junior lien in a chapter 20 case. In connection with the chapter 13 plan confirmation, the debtor sought to strip off the junior lien of a mortgagor and have the lien declared immediately void. The creditor objected, asserting that the debtor could not strip off the lien since the debtor was ineligible for a discharge. The court recognized that plan confirmation required that the creditor either retain its lien until the earlier of payment in full or discharge under § 1328. In the event that the debtor was not eligible for a discharge, the court reasoned that granting an immediate strip off of a junior lien would result in a *de facto* discharge upon completion of the plan. In denying the plan confirmation, Judge Cox held that the ability to permanently strip off a lien in a chapter 13 plan was not available to a debtor that was not eligible for a discharge.

Agreement to Buy Electricity May Be a Forward Contract

The determination of whether an agreement to purchase electricity constituted a forward contract for purposes of exempting payments from recovery as preferential transfers was addressed by Hon. Elizabeth W. Magner in *In re MBS Management Services*, 430 B.R. 750 (Bankr. E.D. La. 2010). Pre-petition, the debtor entered into an agreement to purchase all of its electrical power from the creditor at a set price for two years. After the debtor filed for bankruptcy protection and confirmed a plan, a trust was created to pursue preferential-transfer claims under § 547. The trustee filed an adversary proceeding seeking to recover the payments made to the creditor for electrical power as preferential transfers. The creditor filed a summary-judgment motion asserting that the trustee was prohibited from recovering the payments under § 546(e), as the payments were made in connection with a forward contract.

The bankruptcy court addressed three issues: (1) Is electricity a commodity?, (2) Was the creditor a forward contract merchant? and (3) Did the contract meet the terms of a forward contract despite the lack of listing a specific quantity? The court initially determined that electricity did qualify as a commodity, but also then found that the creditor was a forward-contract merchant based on its dealings in the energy industry. In addressing the final question, the bankruptcy court determined that summary judgment was not appropriate, as additional evidence was needed to determine whether the type of contract was intended to hedge against the risks faced by the debtor. The court refused to take a one-size-fits-all approach to determining whether a contract qualified as a forward contract, rejecting the decisions of other courts that required a contract to set a specific quantity in order to qualify as a forward contract.

About the Authors

Thomas Rice is a shareholder in the San Antonio firm of Cox Smith Matthews Inc., and Aaron Kaufman is an attorney in the firm's Dallas office.

Rescission of Reaf. Ineffective, Despite Debtors' Attempted Surrender of Collateral

In *In re Graham*, 430 B.R. 473 (Bankr. E.D. Tenn. 2010), the debtors executed a reaffirmation agreement with respect to a home-equity loan, and the agreement was signed by the debtors, their attorney and a credit union lender representative. Before the debtors received a fully executed copy of the agreement, then decided to surrender their residence. To notify the relevant parties, the debtors filed an amended statement of intent acknowledging that they would surrender the collateral. Unfortunately, the amended statement did not reference the reaffirmation agreement by name or explain that by surrendering the property, the debtors also intended to rescind the reaffirmation agreement. Although the credit union received notice of the amended statement, it continued its collection efforts by freezing the debtors' bank accounts. The debtors moved for sanctions, arguing that these efforts were clear violations of the discharge injunction. The credit union responded that the debt was reaffirmed under § 524(c) and, thus was not subject to the discharge order.

The primary issue was whether the statement of intent could serve as proper rescission of an otherwise valid reaffirmation agreement. The court found that under applicable Tennessee state law, rescission must be positive, unequivocal and inconsistent with the existence of a contract (*i.e.*, the rescission must be expressed in writing). The court found no such unequivocal rescission in the amended statement. Finding that the debtors failed to rescind the agreement effectively within the time prescribed by the Bankruptcy Code, the court held that the reaffirmation agreement remained binding and enforceable, such that the credit union could not be held in contempt for violating the discharge injunction.

Benchnotes

Miscellaneous

• *In re Introgen Therapeutics Inc.*, 429 B.R. 570 (Bankr. W.D. Tex. 2010) (confirming liquidating plan despite creditors' objections that plan lacked consenting unimpaired class because secured creditor class received full payment of allowed claim, and that plan violated absolute-priority rule by providing equity interest-

continued on page 8

holders with contingent rights to distributions and ability to elect board member to liquidating trust oversight board);

• *In re Sanchez*, 429 B.R. 393, 396 (Bankr. D. P.R. 2010) (dismissing small business chapter 11 case after debtor failed to file plan or seek extension before 300th day of case, leaving court to conclude that "no relief is available under Chapter 11" and thus cause existed for dismissal under § 1112(b)(1) and (b)(4)(J));

• *Securities Investor Protection Corp. v. Madoff*, 429 B.R. 423 (Bankr. S.D.N.Y. 2010) (actions pursued by Madoff victims against unaffiliated third-party conspirators in Florida violated automatic stay in effect pursuant to 15 U.S.C. § 78fff(b) and 11 U.S.C. § 362(a) and could be enjoined because victims could not allege any particularized injury, claims were based on same set of facts, and claimants targeted same funds as those targeted by SIPA trustee in his action against same defendants);

• *In re Midway Games*, 428 B.R. 303 (Bankr. D. Del. 2010) (in matter of first impression, bankruptcy court determined that committee cannot recover fees paid by debtor to its independent board of directors as preferential transfer, finding that ordinary-course-of-business defense may protect such payments);

• *In re Gregg*, 428 B.R. 345 (Bankr. D. S.C. 2009) (claimant held in contempt of court for failing to file amended proofs of claim redacting any private information as required by Fed. R. Bankr. P. 9037);

• *In re Grant*, 428 B.R. 504 (Bankr. N.D. Ill. 2010) (debtor's chapter 13 case dismissed based on material default, where debtor was unable to complete plan payments within 60-month time frame);

• *In re Olguin*, 429 B.R. 346 (Bankr. D. Colo. 2010) (chapter 13 debtor required to include Social Security benefits received by nondebtor grandparent that was living in same household in calculation of current monthly income for debtor);

• *In re Bucciarelli*, 429 B.R. 372 (Bankr. N.D. Ga. 2010) (attorneys' fees incurred by debtor during divorce proceeding held nondischargeable based on debtor's admission that she never intended to pay full amount of fees incurred by creditor law firm);

• *In re Hampson*, 429 B.R. 360 (Bankr. N.D. Ga. 2009) (credit card company was not entitled to default judgment on nondischargeability complaint, notwithstanding debtor's failure to respond, as creditor had failed to sufficiently allege facts that would support finding that credit card debt was nondischargeable as being incurred under false pretenses, false representations and/or actual fraud);

• *In re Defilippi*, 430 B.R. 1 (Bankr. D. Me. 2010) (debtor's obligation to pay guardian *ad litem* fees held nondischargeable as domestic-support obligation where court expands definition of "child of the debtor" to include grandparents that were awarded custody of child);

• *In re Dowden*, 429 B.R. 894 (Bankr. S.D. Ohio 2010) (termination of automatic stay under § 362(c)(3)(A) applies only to actions against debtor; automatic stay remains in place as to property of estate); and

• *In re Hermosilla*, 430 B.R. 13 (Bankr. D. Mass. 2010) (after finding debts nondischargeable based on debtor's "willful and malicious injury" of plaintiff, bankruptcy court threatens to sanction debtor's counsel for advancing defenses and legal contentions not warranted by fact or law). ■