LESSONS IN STATUTORY INTERPRETATION: IS PLAIN MEANING ALWAYS THE ANSWER?

1. Disagreement Regarding § 521(i)

Section 521(i) provides:

(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

Issue 1: The courts are split on the date on which a dismissal by reason of § 521(i) is effective.

Compare:

In re Spencer, 2008 WL ________ (Bankr. D.D.C. May 13, 2008) (available on court's website, https://ecf.dcb.uscourts.gov/cgi-bin/Opinions.pl (Document No. 36, not Document No. 34) (the effective date of a

dismissal under § 521(i) is the date on which the court enters its order of dismissal, not day 46 after the petition filing date),

with:

In re Fawson, 338 B.R. 505 (Bankr. D. Utah 2006) (seminal decision holding that case stood dismissed on day 46 without necessity of order of dismissal); and

Warren v. Wirum, 378 B.R. 640, 647 (N.D. Cal. 2007) (same), appeal pending (9th Cir. Case No. 07-17226).

Issue 2: The courts are also split on whether the bankruptcy court may retroactively excuse the debtor from the requirement of filing documents whose non-filing would otherwise trigger § 521(i).

Compare:

In re Parker, 351 B.R. 790, 801 (Bankr. N.D. Ga. 2006); (court directed under § 521(a)(1)(B) that certain missing documents were not required to be filed under § 521(a)(1)(B), and thereby prevented a dismissal requested by the debtor under § 521(i)(1) that would have worked a substantial injustice on creditors);

In re Jackson, 348 B.R. 487, 499-500 (Bankr. S.D. Iowa 2006);

In re Warren, 2007 WL 1079943 (Bankr. N.D. Cal. Apr. 9, 2007), rev'd sub nom. Warren v. Wirum, 378 B.R. 640 (N.D. Cal. 2007), appeal pending (9th Cir. Case No. 07-17226);

In re Withers, 2007 WL 628078 (Bankr. N.D. Cal. 2007);

In re Fileccia, 2007 WL 1695387 (Bankr. M.D. Tenn. June 6, 2007); and

In re Ackerman, 374 B.R. 65 (Bankr. W.D.N.Y. 2007),

with:

Warren v. Wirum, 378 B.R. 640, 647 (N.D. Cal. 2007) (because the case was automatically dismissed on day 46, court had no choice but to treat case as dimissed), appeal pending (9th Cir. Case No. 07-17226); and

Rivera v. Miranda, 376 B.R. 382, 385-86 (D. Puerto Rico 2007) (same), appeal pending (1st Cir. Case No. 07-2736).

Question: Will the Court of Appeals' view of the propriety of *nunc pro tunc* orders in other areas of the law determine the outcome?

2. **Disagreement re Effect of § 362(a)(3) on Property Seized Prepetition**. Typically this issue arises in the context of an automobile seized prepetition. Does § 362(a)(3) (barring an act to exercise control over property of the estate) require the creditor to surrender possession to the trustee (or to the debtor in a chapter 13 case)?

Compare:

State of California Employment Development Dept. v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1152- 53 (9th Cir.1996) (duty to return property arises upon the filing of petition);

Knaus v. Concordia Lumber Co., Inc., 889 F.2d 773, 774- 75 (8th Cir.1989) (same); and

TranSouth Financial Corp. v. Sharon (In re Sharon), 234 B.R. 676, 682 (6th Cir. BAP 1999) (same),

with:

Barringer v. EAB Leasing (In re Barringer), 244 B.R. 402, 405-10 (Bankr. E.D. Mich. 1999) (no stay violation because right of possession belongs to creditor, with trustee having only a right to obtain order of turnover so that possessory right becomes property of the estate under § 541(a)(7));

In re U.S. Physicians, Inc., 235 B.R. 367, 375-76 (Bankr. E.D. Pa. 1999) ("exercising control" for purposes of § 362(a)(3) requires a "more affirmative act" than "passively retaining possession" of estate property);

In re Young, 193 B.R. 620, 623-29 (Bankr. D.D.C. 1996) (same, finding conclusion mandated by United States v. Inslaw, 932 F.2d 1467, 1473 (D.C. Cir. 1991) ("it is difficult to believe that Congress intended a violation whenever someone already in possession of property mistakenly refuses to capitulate to a bankrupt's assertion of rights in that property."), cert. denied, 502 U.S. 1048, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992);

In re Bernstein, 252 B.R. 846, 850-51 (Bankr. D.D.C. 2000) (The right of adequate protection cannot be "rendered meaningless by an interpretation of § 362(a)(3) ... that

would compel turnover even before an opportunity for the court's granting adequate protection." Neither Bankruptcy Code section 362(a)(3) nor the turnover provision of section 542(a) "operate to destroy the right to insist on adequate protection as a condition to turnover than did section 362(a)(3) destroy the right of setoff in [Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20-21, 116 S.Ct. 286, 133 L.Ed.2d 258, 286 (1995)] . . . . " No stay violation even though the prepetition seizure violated state law.);

Coleman v. Grand Nat'l Bank (In re Coleman), 229 B.R. 428, 431-32 (Bankr. N.D. Ill. 1999) (no stay violation absent definite provision of adequate protection); and

Spears v. Ford Motor Credit (In re Spears), 223 B.R. 159, 165-67 (Bankr. N.D. Ill. 1998) (same).

3. Disagreement re: whether the privileges of § 108(a) can be invoked by a chapter 13 debtor.

Section 108(a) provides:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of-

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

Compare:

In re Dawson, Adv. Pro. No. 04-10083, 2008 WL 1700419, *9 (Bankr. D.D.C. Apr. 9, 2009)(holding that § 108(a)'s tolling provision is applicable not only to trustees and Chapter 11 debtors in possession, but also to chapter 13 debtors when suing on a cause of action on behalf of the estate).

- In chapter 13, the § 323 capacity to sue may be invoked by whoever it is, the debtor or the trustee, who possesses a trustee's power under provisions of other chapters of the Code to sue on the cause of action. Id. At 12.

- Section 1303 confers on a chapter 13 debtor, to the exclusion of the chapter 13 trustee, the power of a trustee under § 363 to pursue estate causes of action. In such a case, the chapter 13 debtor is stepping into the role of trustee and exercising trustee's power to represent the estate ("capacity to sue").

with:

Ranasinghe v. Compton (In re Ranasinghe), 341 B.R. 556, 564-66 Bankr. E.D.Va. 2006)(holding that § 108(a) is unavailable to a chapter 13 debtor);

Estate of Carr ex rel. Carr v. United States, 482 F.Supp.2d 842, 850 (W .D. Tex.2007)(same);

Bowen v. Lee Lewis Constr., Inc. (In re Bowen), 2004 Bankr.LEXIS 356, at *25 (Bankr.N.D. Tex. March 29, 2004); and

Craig v. Barclays Am. Fin., Inc. (In re Craig), 7 B.R. 864 (Bankr. E.D. Tenn. 1980).

4. Disagreement regarding calculation of monthly disposable income.

- Pursuant to § 1325(b)(1)(B), the debtor's projected disposable income must be applied to make payments to unsecured creditors. 11 U.S.C. § 1325(b)(1)(B).

- Section 1325(b)(2) defines disposable income as "current monthly income received by the debtor ... less amounts reasonably necessary to be expended."

- **§ 1325(b)(3) incorporates, as part of the disposable income test, the expenses side of the § 707(b)(2) means test.** "[A]mounts reasonably necessary to be expended ... shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor" is an above median-income debtor. 11 U.S.C. § 1325(b)(3)(A). In turn, § 707(b)(2) (which sets forth a means test for determining whether a debtor's chapter 7 case is presumptively abusive), states that the "debtor's monthly expenses *shall be* the debtor's *applicable* monthly expense amounts specified under the National and Local Standards ... issued by the Internal Revenue Service for the area in which the debtor resides." *Id.* at § 707(b)(2)(A)(ii)(I) (emphasis added).

Issue 1: Disagreement over interpretation of § 707(b)(2) for

purposes of determining "amounts reasonably necessary to be expended." Whether Congress intended for the values contained in the Local Standards of the Financial Analysis Handbook to serve as fixed values or caps in calculating an above median-income debtor's monthly expenses, and ultimately, for purposes of calculating such a debtor's monthly disposable income.

Compare:

> In re Briscoe, 374 B.R. 1, 6-12 (Bankr. D.D.C. 2007)(holding that for purposes of 1325(b)(3), the figures set forth in the Local Standards should apply regardless of the debtor's actual expenses);
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> In re Sawdy, 362 B.R. 898, 911-913 (Bankr. E.D. Wisc. 2007);
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> In re Farrar-Johnson, 353 B.R. 224, 230 (Bankr. N.D. Ill. 2006);
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> In re Fowler, 349 B.R. 414, 415-421 (Bankr. D. Del. 2006); and
>
> In re Demonica, 345 B.R. 895, 903 (Bankr. N.D. Ill. 2006),

with:

> In re Rezentes, 368 B.R. 55, 61-62 (Bankr. D. Haw. 2007)(the lesser of the debtor's actual expenses or the Local Standards should apply);
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> In re Slusher, 359 B.r. 290, 309 (Bankr. D. Nev. 2007); and
>
> In re Hardacre, 338 B.R. 718, 724-28 (Bankr. N.D. Tex. 2006).

Issue 2: Disagreement over the calculation of projected disposable income. Should the court use the Code's definition of disposable income in § 1325(b)(2), or the definition of current monthly income as defined in § 101 (10A)), or some other formulation to calculate the debtor's projected disposable income?

> Section 1325(b)(2) defines "disposable income" as "current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child)" less reasonably necessary expenses. 11 U.S.C. § 1325(b)(2).

"[C]urrent monthly income," as defined by the Bankruptcy Code § 101(10A), is:

> (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on-
>
> > (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
> >
> > (ii) the date on which the current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(1); and
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> (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse) on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

Compare:

In re Briscoe, 374 B.R. 1, 12-20 (Bankr. D.D.C. 2007)("projected disposable income" refers to "income that it is reasonable to project that the debtor will receive");

In re Jass, 340 B.R. 411, 415(Bankr. D. Utah 2006)("§ 1325(b)(1)(B)'s requirement that a plan propose to pay 'projected disposable income' means that the number resulting from Form 22C is a starting point for the [c]ourt's inquiry only."); and

In re Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex.

2006)("The court believes that the term 'projected disposable income' must be based upon the debtor's anticipated income during the term of the plan, not merely an average of her pre[-]petition income."),

with:

In re Alexander, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006)("to arrive at 'projected disposable income,' one simply takes the calculation mandated by § 1325(b)(2) and does the math.").

S. Martin Teel, Jr.
U.S. Bankruptcy Judge
June 2, 2008