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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

CD TRUST UTD 10/22/92; CHRISTOPHER J. KOH and DAVID A.
KOH, co-Trustees; and WESTAR FUNDING, INC., a Washington
corporation,

Respondents,

v.

QUALITY LOAN SERVICE CORP., Trustee; and DLJ MORTGAGE
CAPITAL, INC. through its servicing agent, SELECT PORTFOLIO
SERVICING, INC.,

Appellants.

BRIEF OF THE APPELLANTS

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

I. Assignments of Error

1. The trial court erred in granting Westar's motion for summary judgment.
2. The trial court erred in denying Select Portfolio's motion for summary judgment.

II. Issues Pertaining to Assignments of Error

1. Whether the bankruptcy court order voiding the Select Portfolio trustee foreclosure sale was a "conveyance" as defined under RCW 65.08.060(3) and required recording under RCW 65.08.070 to maintain the lien priority of the Select Portfolio deed of trust. (Assignments of Error 1 and 2.)
2. Whether Westar and Fidelity's actual knowledge of the bankruptcy case constitutes constructive or inquiry notice of the Bankruptcy Court order voiding the trustee foreclosure sale. (Assignments of Error 1 and 2.)
3. Whether, if RCW 65.08.070 is applicable, Westar's good faith requirement under RCW 65.08.070 is a genuine issue of material fact in

dispute such that the trial court erred by granting Westar's Cross-Motion for Summary Judgment. (Assignments of Error 1 and 2.)

4. Whether Westar can avail itself of the comparative innocence doctrine upon a finding that Westar had actual, constructive or inquiry notice of the Bankruptcy Court order and/or the Select Portfolio deed of trust. (Assignments of Error 1 and 2.)

B. STATEMENT OF THE CASE

In 1994, John J. Sanchez ("Borrower") received a \$288,000.00 loan from Washington Mutual Savings Bank ("WaMu") for the purchase of a home ("Property"). CP 164-69. The loan was secured by a deed of trust encumbering the Property and was recorded May 13, 1994 under Snohomish County Auditor's File number 9405130181 ("1994 Deed of Trust"). CP 169-72. Co-appellant DLJ Mortgage Capital ("DLJ") is the successor holder of the WaMu note and 1994 Deed of Trust. CP 161, 173. Co-appellants Select Portfolio Servicing, Inc. ("Servicer") is the loan servicer, and Quality Loan Service Corp. ("Trustee") is the successor trustee of the 1994 Deed of Trust. CP 159-62. The three appellants are collectively referred to herein as "Select Portfolio."

Borrower defaulted on the loan payments, resulting in Servicer requesting Trustee to commence foreclosure. CP 161. In December 2005, Borrower filed for Chapter 13 bankruptcy protection in the Western District of Washington ("2005 Bankruptcy"). CP 161. The bankruptcy court granted Select Portfolio conditional relief from the bankruptcy stay. CP 83. The trustee sale occurred in August 2006 without satisfaction of the conditions imposed by the Bankruptcy Court. CP 190. The winning bidder was John Gamlam ("Gamlam"). CP 132. The trustee's deed was recorded on September 5, 2006 ("Trustee's Deed"). CP 132.

On September 21, 2006, the Bankruptcy Court entered an order declaring the foreclosure sale void and further ordering return of the purchase proceeds to Gamlam ("The Order"). CP 176. On March 6, 2008, the 2005 Bankruptcy was dismissed. CP 190.

During the summer of 2008, Borrower sought a \$400,000.00 loan from Westar. CP 90-113. As collateral for the loan, Borrower pledged an interest in the same Property encumbered by the 1994 Deed of Trust. CP 147-49. On August 29, 2008, Gamlam, despite having no interest in the Property by operation of law and the order of the

Bankruptcy Court, quitclaimed the Property to Borrower in consideration for \$76,470.18. CP 135. Westar valued the Property at \$618,200.00. CP 91.

Also on August 29, 2008, Westar received from Fidelity National Title Company of Washington (“Fidelity”) a preliminary title commitment for mortgagee insurance (“Commitment”). CP 91. The Commitment reflected the August 29, 2008 quitclaim deed but failed to list the 1994 Deed of Trust. CP 101.

As part of the loan application process, Borrower submitted to Westar a loan application dated October 9, 2008. CP 109-13. That application (“Loan Application”) included the following questions and answers:

- 1) Have you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years? “No.” (Sec. VIII.c.) (CP 110);
- 2) Have you directly or indirectly been obligated on any loan of which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment? “No.” (Sec. VIII.e.) (CP 110);

- 3) Amount of Mortgages & Liens for real estate owned at 8625 200th Street SW, Edmonds, Washington 98026 (the 1994 SPS Deed of Trust collateral). "\$0.00." (Sec. VI.) (CP 110);
- 4) Are you presently delinquent or in default on any Federal debt or any other loan, mortgage, financial obligation, bond, or loan guarantee? "No." (Sec. VIII.f.) (CP 112);
- 5) Borrower stated that the purpose for the loan was a "refinance" (Sec. II) (CP 109), notwithstanding the representation in Sec. VI that "\$0.00" remained outstanding in mortgage debt and that there were no other lienholders (CP 110); and
- 6) Borrower represented under Sec. II that the home is an "investment" property rather than a "primary or secondary residence," (CP 109) compared with Sec. VIII.m. wherein he stated that the home is his "principal residence." CP 112.

Borrower reported to Westar on the Loan Application that he had been declared bankrupt within the past seven years. CP 110. Fidelity discovered the 2005 Bankruptcy. CP 116-17. Fidelity discovered the Trustee's Deed. CP 115. Fidelity stated it did not inquire further about

the substance of the 2005 Bankruptcy pleadings because the 2005 Bankruptcy was dismissed. CP 117. It is presumed that Fidelity reported the 2005 Bankruptcy and the Trustee's Deed to Westar.

Westar stated that it "had no reason to question the information on the title commitment." CP 91. Westar had no prior dealings or history with Borrower. CP 91. Westar stated that whether Borrower paid less than market value for the Property was of no consequence as long as Borrower was in record title. CP 91.

On October 28, 2008, Westar loaned Borrower \$375,000.00. CP 94-95. The loan was secured by a deed of trust encumbering the same Property as the 1994 Deed of Trust. CP 97-99. The Westar Deed of Trust was recorded October 28, 2008 under Snohomish County Auditor's File No. 20081020201 ("2008 Deed of Trust"). CP 97. Fidelity issued Westar a mortgagee title policy and insured Westar as a first position lien holder. CP 92. Fidelity did not report the 1994 Deed of Trust on the mortgagee title policy. CP 92.

Borrower is presently in default to both Select Portfolio and Westar. CP 92, 162. Select Portfolio resumed foreclosure in 2010, and Westar received notice of a pending trustee's sale. CP 161-62. Westar

responded to the notice by filing this lawsuit seeking determination of the relative lien priority between the 1994 and 2008 Deeds of Trust. CP 220-30. Westar and Select Portfolio filed cross motions for summary judgment, with each party praying for first lien priority. CP 81-89, 191-01.

The trial court denied Select Portfolio's motion for summary judgment and granted Westar's cross-motion for summary judgment. CP 23-25. Select Portfolio filed a motion for reconsideration, and the trial court denied the motion. CP 9-11. Select Portfolio filed this appeal. CP 1-8.

C. ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PRIORITY TO THE WESTAR DEED OF TRUST BECAUSE THE ORDER OF THE BANKRUPTCY COURT VOIDING THE TRUSTEE'S DEED WAS NOT A CONVEYANCE AS DEFINED UNDER RCW 65.08.060(3)

Under the common law, first in time is first in right as to lien interests in real property. *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 560, 582, 160 P.3d 17 (2007) (Owens, J., dissenting). Washington's recording statute, RCW 65.08.070, provides a limited modification to the common law. Under RCW 65.08.070, the first to

record a lien is first in lien priority so long as the party asserting RCW 65.08.070 has acted in good faith. *Id.* RCW 65.08.070 states in whole (emphasis added):

A **conveyance** of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such **conveyance** not so recorded is void as against any subsequent purchaser or mortgagee **in good faith** and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

“Conveyance” is defined under RCW 65.08.060(3):

The term “conveyance” includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien; except a will, a lease for a term of not exceeding two years, and an instrument granting a power to convey real property as the agent or attorney for the owner of the property. “To convey” is to execute a “conveyance” as defined in this subdivision.

The Order does not meet the definition of conveyance. Because a statute in derogation of common law is to be strictly construed absent

legislative intent to the contrary, the Court erred in expanding the scope and definition of the term “conveyance” to result in a holding that contradicts the common law. See *Baum v. Burrington*, 119 Wn. App. 36, 41, 79 P.3d 456 (2003).

In *Fed. Intermediate Credit Bank of Spokane v. O/S Sablefish*, the Supreme Court held that conveyance as defined under RCW 65.08.060(3) does not include a lien created by a money judgment. 111 Wn.2d 219, 226-27, 758 P.2d 494 (1988) (footnotes omitted). The court explained:

[W]e do not perceive that a judgment lien can reasonably be considered to be a conveyance of real property, which commonly denotes a transfer of an estate or title. Moreover, conveyances must be by deed, and deeds, in turn, must be in writing, signed by the party bound, and acknowledged. Such requirements simply do not apply to a judgment lien.

Applying the *Sablefish* analysis, The Order did not convey, transfer or encumber the Property. CP 176. The Order did not contain a legal description or any property description such as a tax parcel number or common property address. The Order does not have vesting or granting language. The Order was not acknowledged and signed by Borrower or Gamlam.

For the above reasons, The Order was not a conveyance; rather, it was an order voiding a conveyance. “Void” means of no legal effect; null. Black’s Law Dictionary, 1568 (7th ed. 1999). A trustee foreclosure sale in violation of an automatic stay is a procedural irregularity that renders the foreclosure sale void. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007). Similarly, when a court vacates an order, it is as if the vacated order had never been issued, and the parties are restored to the status quo ante. *See Hasso v. Mozsgai (In re La Sierra Fin. Servs.)*, 290 B.R. 718, 732 (B.A.P. 9th Cir. 2002).

Westar acknowledged in the Complaint that The Order “restored” the 1994 Deed of Trust. CP 227. The 1994 Deed of Trust was recorded in 1994 with the Snohomish County Auditor. CP 169-72. The 1994 Deed of Trust has priority because it was recorded in 1994 pursuant to RCW 65.08.070 and restored by The Order.

It is important to note that Westar has never asserted that the 1994 Deed of Trust had to be re-recorded. Rather, Westar has asserted that to comply with RCW 65.08.070 required recording The Order to reestablish lien priority for the 1994 Deed of Trust. CP 11, 83-84, 87.

There is simply no authority to support Westar's nexus recording argument. Further, the plain language of RCW 65.08.070 makes clear that only conveyances require recording to establish lien priority.

Westar suggests that the eventual recording of The Order constituted a form of argument that under RCW 65.08.070 The Order needed to be recorded to preserve the priority of the 1994 Deed of Trust. CP 88. The *Sablefish* court rebuts such a contention: "While a judgment creditor *may* record a judgment with the county auditor, recording is not prerequisite to an effective judgment lien." *Sablefish*, 111 Wn.2d at 227 (emphasis in original).

The Order was not a conveyance; therefore, RCW 65.08.070 is not applicable. For these reasons, the trial court erred as a matter of law by granting Westar summary judgment and denying Select Portfolio summary judgment.

II. WESTAR'S ACTUAL KNOWLEDGE OF THE 2005 BANKRUPTCY AND CONSTRUCTIVE OR INQUIRY NOTICE OF THE ORDER VOIDING TRUSTEE'S DEED DENY WESTAR THE PROTECTION OF RCW 65.08.070.

Westar cannot avail itself of the protections of RCW 65.08.070 even if The Order was a conveyance because Westar and Fidelity had

actual knowledge of the 2005 Bankruptcy, which constitutes constructive and inquiry notice of The Order. RCW 65.08.070 protects only “good faith” lien holders without actual or constructive knowledge of a prior lien. *Bank of America, N.A.*, 160 Wn.2d at 582 (Owens, J., dissenting).

A public record gives constructive notice. *Ellingsen v. Franklin County*, 117 Wn.2d 24, 33, 810 P.2d 910 (1991) (Smith, J., dissenting) (citing, e.g., *Paganelli v. Swendsen*, 50 Wn.2d 304, 308-09, 311 P.2d 676 (1957)). “Pursuant to 11 U.S.C. § 107(a), filing for bankruptcy is a public act and, accordingly, all papers filed in bankruptcy cases and the dockets of bankruptcy courts are public documents subject to examination by members of the public.” *In re Joyce*, 399 B.R. 382, 385 (Bankr. D. Del. 2009), citing 2 Collier on Bankruptcy ¶ 107.02 (15th ed. 2008).

In re Professional Inv. Properties of America, 955 F.2d 623 (9th Cir. 1992) is an example of a case wherein the notice imputed by a bankruptcy filing defeated the claim of a subsequent lien holder. In *Professional*, Briggs lent \$50,000 to Professional Investment Properties (“PIP”). *Id.* at 625. PIP granted Briggs a deed of trust but Briggs failed

to record that deed of trust. *Id.* PIP defaulted and Briggs forced an involuntary bankruptcy. *Id.* Although the bankruptcy schedules referenced the unrecorded deed of trust, the trustee claimed bona fide purchaser status and sought to avoid the unrecorded deed of trust. *Id.* 626-28.

The *Professional* court stated that RCW 65.08.070 governed the issue and analyzed the issue accordingly. *Id.* at 627. The *Professional* court concluded that:

[A] reasonably prudent purchaser of the debtor's property would be placed on notice of the bankruptcy pleadings from the time of their being filed.

The district court held, and the circuit court affirmed, the *Professional* bankruptcy court's above finding of fact but reversed the bankruptcy court's finding of law and held that the trustee could not avail itself of RCW 65.08.070 because the trustee had notice of the unrecorded deed of trust via the bankruptcy schedules. *See id.* at 629.

Borrower disclosed to Westar in the Loan Application having been declared bankrupt within seven years. CP 110. Fidelity found and reviewed the 2005 Bankruptcy to the extent of determining that the bankruptcy was dismissed. CP 116-17. Like the trustee in *Professional*,

Westar and Fidelity are imputed with constructive knowledge of the 2005 Bankruptcy petition, schedules and docket that reported both the 1994 Deed of Trust and The Order.

At the trial court, Westar alleged that because the 2005 Bankruptcy case had been dismissed, it had no duty to examine the pleadings filed within that case. CP 87-88. This argument presupposes bankruptcy court orders are only valid if the debtor ultimately receives a discharge, which is not the case. The Order was entered in a Chapter 13 case. CP 176. Under 11 U.S.C. § 349(b)(1), made applicable to Chapter 13 cases by 11 U.S.C. § 103, a Chapter 13 dismissal only vacates an order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of title 11.

It is a “universal maxim that ignorance of the law excuses no one.” *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947). As a matter of law, The Order survived the dismissal. Westar and Fidelity are thus imputed with knowledge of The Order and all other conditions and filings within the 2005 Bankruptcy case and chose not to review the same at their own peril.

Westar also argues that it relied upon Fidelity to perform a limited bankruptcy check. CP 87-88. However, an ordinarily prudent lender would perform its own credit check at minimum before making a \$375,000.00 loan, and a credit check would have also revealed the bankruptcy filing and the loan secured by the 1994 Deed of Trust.

Westar and Fidelity's actual notice of the 2005 Bankruptcy constituted constructive or inquiry notice of The Order. For these reasons, the trial court erred as a matter of law by granting Westar summary judgment and denying Select Portfolio summary judgment.

III. THE TRIAL COURT ERRED IN FINDING NO MATERIAL QUESTION OF FACT EXISTED AS TO WESTAR'S GOOD FAITH.

A. The determination of good faith is a question of fact and a material requirement of any party seeking to reverse priority under RCW 65.08.070.

“RCW 65.08.070 **requires** that, in order for a subsequent party to reverse the priority of a prior unrecorded party, he **must be** in ‘good faith.’” 18 Wash. Prac., Real Estate § 14.10 (2d ed. 2004) (emphasis added). A material fact is one upon which the outcome of the litigation depends, in whole or in part. *McDonald v. Murray*, 3 Wn.2d 17, 19, 515 P.2d 151 (1973). “Although good faith is usually a question of fact, it

may be resolved on summary judgment where no reasonable minds could differ on the question.” *Morris v. Swedish Health Services*, 148 Wn. App. 771, 778, 200 P.3d 261, *review denied*, 170 Wn.2d 1008 (2010).

The foregoing authority establishes that the good faith component of RCW 65.08.070 is a material issue of fact for summary judgment purposes. Therefore, the trial court should only have granted summary judgment to Westar if the trial court record establishes that “no reasonable minds could differ” on the question of whether Westar had constructive or inquiry notice of the The Order and/or the 1994 Deed of Trust.

B. Select Portfolio established at summary judgment that a material question of disputed fact is whether Westar had actual, constructive or inquiry notice of either The Order or the 1994 Deed of Trust.

The “good faith” requirement of RCW 65.08.070 prevents a second lienholder who records first from vaulting into the first-priority lien position if that second lienholder has actual or constructive knowledge of the first unrecorded lien. *Bank of America, N.A.*, 160 Wn.2d at 582 (Owens, J., dissenting). Constructive notice means that a

person exercising reasonable care would have discovered the information at issue. *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 166, 189 P.3d 233 (2008). Inquiry notice is a form of constructive notice and means “knowledge of some fact or information that would lead a reasonable person to suspect that a prior unrecorded interest may exist and to make further investigation about it.” 18 Wash. Prac., Real Estate at § 14.10.

When good faith or the reasonableness of a party’s actions is a material issue of fact in dispute, then it is generally improper to grant summary judgment. *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7 (1974); *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). On a motion for summary judgment, the trial court must view all evidence and draw all reasonable inferences in favor of the nonmoving party; then it must deny the motion if the evidence and inferences create any question of material fact. *Scott v. Pac. West Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992). “The trial court must deny a motion for summary judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

The following are among the statements made by Borrower in the Loan Application:

- 1) Have you been declared bankrupt within the past 7 years?
“Yes.” (Sec. VIII.b.) (CP 110);
- 2) Have you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years? “No.” (Sec. VIII.c.) (CP 110);
- 3) Have you directly or indirectly been obligated on any loan of which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment? “No.” (Sec. VIII.e.) (CP 110);
- 4) Amount of Mortgages & Liens for real estate owned at 8625 200th Street SW, Edmonds, Washington 98026 (the 1994 SPS Deed of Trust collateral). “\$0.00.” (Sec. VI.) (CP 110);
- 5) Are you presently delinquent or in default on any Federal debt or any other loan, mortgage, financial obligation, bond, or loan guarantee? “No.” (Sec. VIII.f.) (CP 112);
- 6) Borrower stated that the purpose for the loan was a “refinance” (Sec. II) (CP 109), but then, three sections later

asserts that “\$0.00” is outstanding in mortgage debt and that there are no other lienholders (CP 110); and

- 7) Borrower represented under Sec. II (CP 109) that the home is an “investment” property rather than a “primary or secondary residence,” but then, five sections later, in Sec. VIII.m. asserts that the home is his “principal residence.” CP 112.

In the Response of Select Portfolio to Westar’s Cross-Motion for Summary Judgment, Select Portfolio explained the numerous reasonable inferences drawn from the above assertions and how each raise a genuine issue of material fact as to whether Westar satisfied the good faith requirement under RCW 65.08.070. CP 49-60.

Fact 1 placed Westar and Fidelity on actual notice of the 2005 Bankruptcy and constructive or inquiry notice of The Order. Facts 2 and 3 contradict Fidelity’s discovery of the Trustee’s Deed. Facts 4 and 5 would contradict a credit report that would be a routine part of any loan process. Assertions 6 and 7 identify contradictory statements that would have prompted a reasonably prudent lender to further investigate.

The reasonable inferences drawn from the Loan Application omissions, misrepresentations and contradictory statements establish that

a genuine issue of material fact exists as to whether Westar had inquiry or constructive notice of The Order and/or the 1994 Deed of Trust.

C. Select Portfolio established at summary judgment that a material question of disputed fact is whether Westar acted as a reasonably prudent lender in order to avail itself of RCW 65.08.070.

Mr. Hogan, the president of Westar, stated in his declaration (“Hogan Declaration”):

- 1) “Westar had no prior dealings or history with” Borrower. CP 91;
- 2) “We had no reason to question the information on the title commitment.” CP 91;
- 3) “Whether [Borrower] had paid less than market value for the Property (or whether he had some off-record compensation arrangement with his vendor) was of no consequence as long as he was in record title and no one challenged that title.” CP 91;
- 4) “We determined that the assessed value of the Property was \$618,200.” CP 91; and
- 5) “Based primarily on clear title and 60.7 percent loan to assessed value ratio, Westar approved the loan.” CP 92.

In *Levien v. Fiala*, 79 Wn. App. 294, 299, 902 P.2d 170 (1995), a case involving RCW 65.08.070, the court cited the following excerpt from *Miebach v. Colasurdo*, 102 Wn.2d 170, 177, 685 P.2d 1074 (1984), quoting *Mann v. Young*, 1 Wash.Terr. 454, 463 (1874):

Persons cannot be bona fide purchasers if they refuse to pursue inquiry, to which, were [they] honest and prudent, the knowledge [they have] would clearly send [them]. It will not do for a purchaser ... to rely on the interested representation of the seller of land that a suspicious circumstances does not concern the title.

A reasonable inference drawn from Statement 1 is that an ordinarily prudent lender that has never done business with Borrower would investigate the Loan Application red flags.

A reasonable inference drawn from Statement 2 is that Westar had every reason to question the Commitment because Borrower denied twice in the Loan Application having been foreclosed, when in fact Fidelity discovered the Trustee's Deed, and presumably reported the Trustee's Deed to Westar and/or provided the Trustee's Deed to Westar. A reasonable inference drawn from Statement 3 is that Westar decided not to pursue inquiry of suspicious circumstances pertaining to title.

The quitclaim deed (CP 189), recorded the same day that Fidelity

issued the Commitment (CP 101), stated consideration paid of paid \$76,470.18, but Westar valued the Property at \$618,200.00 (CP 91). According to the Trustee's Deed, Gamlam paid \$563,000.00 at the foreclosure sale held on August 25, 2006. CP 132-33. The inference drawn is that Gamlam sold the Property back to the foreclosed Borrower for \$486,529.82 less than Gamlam paid, which is very suspicious. Rather than Westar investigating the peculiarities of the quitclaim deed and consideration stated, Westar's attitude was that the peculiarity "was of no consequence" to Westar. CP 91.

The Hogan Declaration when considered alone, but especially when considered with the Loan Application red flags, raises a material question of whether Westar acted in good faith. If Westar did not act in good faith, it cannot assert the benefits of RCW 65.08.070. Because a material dispute exists, the trial court erred in granting summary judgment to Westar.

IV. WESTAR'S ACTUAL, CONSTRUCTIVE OR INQUIRY NOTICE OF THE BANKRUPTCY ORDER OR 1994 DEED OF TRUST WOULD BAR WESTAR FROM SEEKING RELIEF UNDER THE COMPARATIVE INNOCENCE DOCTRINE.

Select Portfolio and Westar's respective summary judgments

asserted lien priority under the comparative innocence doctrine. The Order Granting Westar's Cross-Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment ("Summary Judgment Order and Denial") does not state the legal basis for the trial court's decision. Therefore, Select Portfolio assumes that the trial court's decision in part or whole was based upon the comparative innocence doctrine. "It is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on what grounds summary judgment is sought." *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wn.2d 118, 148, 969 P.2d 458 (1999).

"The comparative innocence doctrine provides that where two innocent persons must suffer due to the fraud of a third person, the loss should fall on the 'innocent' party who enabled the fraud." *Sorenson v. Pyeatt*, 158 Wn.2d 523, 542 n.16, 146 P.2d 1172 (2006) (citing *Stohr v. Randle*, 81 Wn.2d 881, 882-83, 505 P.2d 1281 (1973)). This doctrine "is available only to an innocent party who proceeds without knowledge or warning that he is acting contrary to another's vested property interest." See *Foster v. Nehls*, 15 Wn. App. 749, 754, 551 P.2d 768

(1976).

A finding that Westar had actual, constructive or inquiry notice of the The Order and/or the 1994 Deed of Trust would defeat a claim of innocence under the comparative innocence doctrine because equity will not relieve a complainant from his own vice and folly. *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941). For the sake of brevity and lack of repetition, Select Portfolio respectfully incorporates by reference Parts II and III of this brief as if repeated word for word herein because Parts II and III concern the good faith issue, which is a material requirement under the comparative innocence doctrine.

If this Court concludes that a genuine issue of material fact exists whether Westar satisfies the good faith prong of RCW 65.08.070, then it follows that Westar cannot as a matter of law be deemed an “innocent” party under the comparative innocence doctrine if an underlying material question of fact remains in dispute. *See J.L. Cooper & Co.*, 9 Wn.2d at 72. For these reasons, the trial court erred in granting summary judgment to Westar if the holding was based in any part upon the comparative innocence doctrine.

D. CONCLUSION

If this Court determines that RCW 65.08.070 is not applicable, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; 2) grant Select Portfolio summary judgment; and 3) deny Westar summary judgment.

If this Court determines that Westar had constructive or inquiry notice of the The Order and/or the 1994 Deed of Trust, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; 2) grant Select Portfolio summary judgment; and 3) deny Westar summary judgment.

If this Court determines that RCW 65.08.070 is applicable and this Court makes no determination whether Westar had actual, constructive or inquiry notice of the The Order and/or the 1994 Deed of Trust, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; and 2) remand the case to the trial court for further proceedings.

Finally, if this Court determines that Westar or Select Portfolio can avail themselves of the comparative innocence doctrine but this

Court makes no determination whether Westar had actual, constructive or inquiry notice of The Order and/or the 1994 Deed of Trust, then Select Portfolio respectfully requests this Court to instruct the trial court to: 1) vacate the Summary Judgment Order and Denial; and 2) remand the case to the trial court for further proceedings.

DATED this 9th day of May, 2011.

ROUTH CRABTREE OLSEN, P.S.

By: 

Lance E. Olsen, WSBA No. 25130
Brian S. Sommer, WSBA No. 37019
Attorneys for Appellants

E. APPENDIX

11 U.S.C. § 103

11 U.S.C. § 107(a)

11 U.S.C. § 349(b)(1)

11 U.S.C. § 522(i)(1)

11 U.S.C. § 542

11 U.S.C. § 550

11 U.S.C. § 553

United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 1. General Provisions (Refs & Annos)

11 U.S.C.A. § 103

§ 103. Applicability of chapters

Effective: December 22, 2010

Currentness

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

(b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

(c) Subchapter III of chapter 7 of this title applies only in a case under such chapter concerning a stockbroker.

(d) Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker.

(e) **Scope of application.**--Subchapter V of chapter 7 of this title shall apply only in a case under such chapter concerning the liquidation of an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(f) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(g) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

(h) Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

(i) Chapter 13 of this title applies only in a case under such chapter.

(j) Chapter 12 of this title applies only in a case under such chapter.

(k) Chapter 15 applies only in a case under such chapter, except that--

(1) sections 1505, 1513, and 1514 apply in all cases under this title; and

(2) section 1509 applies whether or not a case under this title is pending.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2555; Pub.L. 97-222, § 2, July 27, 1982, 96 Stat. 235; Pub.L. 98-353, Title III, § 423, July 10, 1984, 98 Stat. 369; Pub.L. 99-554, Title II, § 252, Oct. 27, 1986, 100 Stat. 3104; Pub.L. 106-554, § 1(a)(5) [Title I, § 112(c)(5)(A)], Dec. 21, 2000, 114 Stat. 2763, 2763A-394; Pub.L. 109-8, Title VIII, § 802(a), Apr. 20, 2005, 119 Stat. 145; Pub.L. 111-327, § 2(a)(2), Dec. 22, 2010, 124 Stat. 3557.)

Notes of Decisions (24)

Current through P.L. 112-9 approved 4-14-11

End of Document

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 1. General Provisions (Refs & Annos)

11 U.S.C.A. § 107

§ 107. Public access to papers

Effective: December 22, 2010

Currentness

(a) Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may--

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

(2) Upon ex parte application demonstrating cause, the court shall provide access to information protected pursuant to paragraph (1) to an entity acting pursuant to the police or regulatory power of a domestic governmental unit.

(3) The United States trustee, bankruptcy administrator, trustee, and any auditor serving under section 586(f) of title 28--

(A) shall have full access to all information contained in any paper filed or submitted in a case under this title; and

(B) shall not disclose information specifically protected by the court under this title.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2556; Pub.L. 109-8, Title II, §§ 233(c), 234(a), (c), Apr. 20, 2005, 119 Stat. 74, 75; Pub.L. 111-327, § 2(a)(5), Dec. 22, 2010, 124 Stat. 3557.)

Notes of Decisions (55)

Current through P.L. 112-9 approved 4-14-11

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 3. Case Administration (Refs & Annos)

Subchapter III. Administration

11 U.S.C.A. § 349

§ 349. Effect of dismissal

Currentness

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--

(1) reinstates--

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2569; Pub.L. 98-353, Title III, § 303, July 10, 1984, 98 Stat. 352; Pub.L. 103-394, Title V, § 501(d)(6), Oct. 22, 1994, 108 Stat. 4144.)

Notes of Decisions (170)

Current through P.L. 112-9 approved 4-14-11

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter II. Debtor's Duties and Benefits

11 U.S.C.A. § 522

§ 522. Exemptions

Effective: December 22, 2010

Currentness

(a) In this section--

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is--

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that--

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that--

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except--

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in such paragraph);

(2) a debt secured by a lien that is--

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed \$21,625¹ in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed \$3,450¹ in value, in one motor vehicle.

(3) The debtor's interest, not to exceed \$550¹ in value in any particular item or \$11,525¹ in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed \$1,450¹ in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value \$1,150¹ plus up to \$10,825¹ of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed \$2,175¹ in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmaturing life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value \$11,525¹ less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmaturing life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive--

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to--

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed \$21,625,¹ on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

(B) a nonpossessory, nonpurchase-money security interest in any--

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor--

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds \$5,850¹.

(4)(A) Subject to subparagraph (B), for purposes of paragraph (1)(B), the term "household goods" means--

(i) clothing;

(ii) furniture;

(iii) appliances;

(iv) 1 radio;

(v) 1 television;

(vi) 1 VCR;

(vii) linens;

(viii) china;

(ix) crockery;

(x) kitchenware;

(xi) educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

(xii) medical equipment and supplies;

(xiii) furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;

(xiv) personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and

(xv) 1 personal computer and related equipment.

(B) The term "household goods" does not include--

- (i) works of art (unless by or of the debtor, or any relative of the debtor);
 - (ii) electronic entertainment equipment with a fair market value of more than \$600¹ in the aggregate (except 1 television, 1 radio, and 1 VCR);
 - (iii) items acquired as antiques with a fair market value of more than \$600¹ in the aggregate;
 - (iv) jewelry with a fair market value of more than \$600¹ in the aggregate (except wedding rings); and
 - (v) a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.
- (g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--
- (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
 - (B) the debtor did not conceal such property; or
 - (2) the debtor could have avoided such transfer under subsection (f)(1)(B) of this section.
- (h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--
- (1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and
 - (2) the trustee does not attempt to avoid such transfer.
- (i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.
- (2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.
- (j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.
- (k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except--
- (1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and
 - (2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(n) For assets in individual retirement accounts described in section 408 or 408A of the Internal Revenue Code of 1986, other than a simplified employee pension under section 408(k) of such Code or a simple retirement account under section 408(p) of such Code, the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under section 402(c), 402(e)(6), 403(a)(4), 403(a) (5), and 403(b)(8) of the Internal Revenue Code of 1986, and earnings thereon, shall not exceed \$1,171,650¹ in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in--

- (1) real or personal property that the debtor or a dependent of the debtor uses as a residence;
- (2) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- (3) a burial plot for the debtor or a dependent of the debtor; or
- (4) real or personal property that the debtor or a dependent of the debtor claims as a homestead;

shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$146,450¹ in value in--

- (A) real or personal property that the debtor or a dependent of the debtor uses as a residence;
- (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- (C) a burial plot for the debtor or a dependent of the debtor; or
- (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2)(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.

(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate \$146,450¹ if--

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from--

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 or under section 6 of the Securities Act of 1933;

(iii) any civil remedy under section 1964 of title 18; or

(iv) any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2586; Pub.L. 98-353, Title III, §§ 306, 453, July 10, 1984, 98 Stat. 353, 375; Pub.L. 99-554, Title II, § 283(i), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-647, Title XXV, § 2522(b), Nov. 29, 1990, 104 Stat. 4866; Pub.L. 103-394, Title I, § 108(d), Title III, §§ 303, 304(d), 310, Title V, § 501(d)(12), Oct. 22, 1994, 108 Stat. 4112, 4132, 4133, 4137, 4145; Pub.L. 106-420, § 4, Nov. 1, 2000, 114 Stat. 1868; Pub.L. 109-8, Title II, §§ 216, 224(a), (e)(1), Title III, §§ 307, 308, 313(a), 322(a), Apr. 20, 2005, 119 Stat. 55, 62, 65, 81, 87, 96; Pub.L. 111-327, § 2(a)(17), Dec. 22, 2010, 124 Stat. 3559.)

- 1 Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

Notes of Decisions (2951)

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 542

§ 542. Turnover of property to the estate

Currentness

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2595; Pub.L. 98-353, Title III, § 457, July 10, 1984, 98 Stat. 376; Pub.L. 103-394, Title V, § 501(d)(16), Oct. 22, 1994, 108 Stat. 4146.)

Notes of Decisions (469)

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United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 550

§ 550. Liability of transferee of avoided transfer

Currentness

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section ¹ (a)(2) of this section from--

- (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
- (2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition--

- (1) is avoided under section 547(b) of this title; and
- (2) was made for the benefit of a creditor that at the time of such transfer was an insider; the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--

- (A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and
- (B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes--

- (A) physical additions or changes to the property transferred;
- (B) repairs to such property;
- (C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of--

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2601; Pub.L. 98-353, Title III, § 465, July 10, 1984, 98 Stat. 379; Pub.L. 103-394, Title II, § 202, Oct. 22, 1994, 108 Stat. 4121.)

1 So in original. Probably should be "subsection".

Notes of Decisions (530)

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Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 553

§ 553. Setoff

Currentness

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that--

(1) the claim of such creditor against the debtor is disallowed;

(2) such claim was transferred, by an entity other than the debtor, to such creditor--

(A) after the commencement of the case; or

(B)(i) after 90 days before the date of the filing of the petition; and

(ii) while the debtor was insolvent (except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561); or

(3) the debt owed to the debtor by such creditor was incurred by such creditor--

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor (except for a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, or 561).

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of--

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

(2) In this subsection, "insufficiency" means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

(c) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Credits

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2602; Pub.L. 98-353, Title III, §§ 395, 467, July 10, 1984, 98 Stat. 365, 380; Pub.L. 101-311, Title I, § 105, June 25, 1990, 104 Stat. 268; Pub.L. 103-394, Title II, §§ 205(b), 222(b), Title V, § 501(d)(19), Oct. 22, 1994, 108 Stat. 4123, 4129, 4146; Pub.L. 109-8, Title IX, § 907(n), Apr. 20, 2005, 119 Stat. 181.)

Notes of Decisions (1061)

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