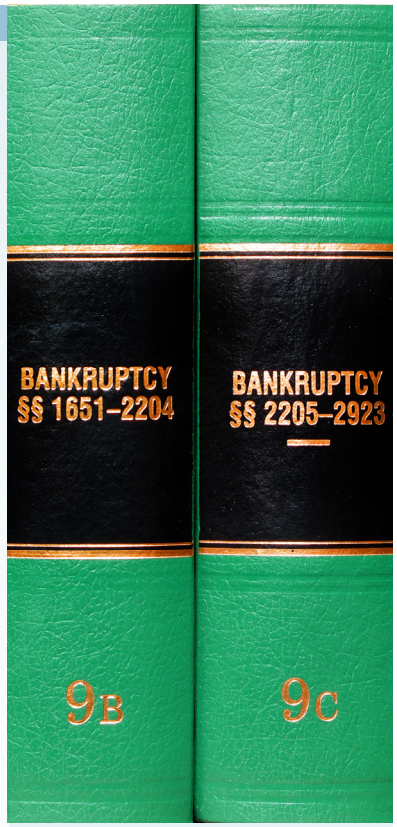
Summer 2018

Bankruptcy Court Liaison Committee Newsletter



Behind the Bench with Judge Hunt

By Ainat Margalit, Legal Assistance Foundation of Metropolitan Chicago

LaShonda Hunt was appointed to a 14-year term as bankruptcy judge in the Eastern Division of the Northern District 18 months ago. I recently had the opportunity to sit down with Judge Hunt for a short interview.

Who is Judge Hunt?

Judge Hunt was born in Mississippi and moved to Chicago at age one with her mom and two siblings. She grew up in the Ida B. Wells Homes public housing project in the Bronzeville neighborhood. Her mother, who raised three children alone, went back to school and got her high school diploma and associates degree. She then went to work as a secretary at Northwestern University. When Judge Hunt was young, her mother was one of only a few mothers she knew that went to work.

Judge Hunt's mother was her inspiration. She taught her children the importance of bigger dreams and education.

Judge Hunt tested in to the academic program at Kenwood Academy in Hyde Park and had a fulfilling experience. She then received a full scholarship to the University of Illinois at Urbana-Champaign. She enrolled in a five-year BA/MBA program but then switched gears. In her senior year of college, she decided on law school, walked over to the law school and signed up for the LSAT. She started at the University of Michigan in 1995.

Judge Hunt was the first in her family to graduate college and is the only lawyer.

After law school and a PILI fellowship at LAF, she worked at Sonnenschein Nath & Rosenthal, which later merged into Dentons. After that, Judge Hunt undertook federal clerkships and worked at Exelon in between stints at the U.S. Attorney's Office.

She found ways to get involved in corporate pro bono and community service—

Inside this issue

Co-Editors

David D. Cleary, Greenberg Traurig, LLP

Ainat Margalit, Legal Assistance Foundation of Metropolitan Chicago

Mind your P's

Pet Peeves

- Show up prepared for hearings including confirmation! It's not fair or efficient to have to continue issues because parties are unprepared. Judge Hunt has read everything in advance and is usually ready to rule! When you show up in court, know the issues and be ready to propose a solution.
- Be careful to state relevant facts accurately in pleadings.

Practice Pointers

- Find a mentor – preferably one outside of your current work place who can advise on pitfalls and give perspective.
- Establish good relations with trustee and opposing counsel. You will be working with the same people again and again, so you want them to be able to rely on your representations.
- Keep studying, read case law and attend CLEs.

Judge Hunt *(Continued)*

which was encouraged at Sonnenschein—and directed pro bono and community service for the legal department at Exelon.

How Judge Hunt became a bankruptcy judge

Judge Hunt took a course in bankruptcy law while at law school but then did not have the opportunity to practice until she started working at Exelon as in-house counsel. They needed to establish a bankruptcy department and she volunteered to help. This was during the economic downturn in 2008 and she trained staff, reviewed national filings, preference actions and more robust collection against those stealing electricity.

Her interest was piqued then, and years later she saw the Bankruptcy Judge position advertised and the rest is history.

Less knowledge of bankruptcy coming in, an advantage or disadvantage?

According to Judge Hunt, both! It is a disadvantage because there was a steep learning curve regarding the rules and code. Initially, the full context, practical application and consequences were not apparent and she had to learn quickly to obtain a full understanding,

The advantage of coming from a broad litigation and generalist background was that she came with a fresh set of eyes. She isn't willing to accept "this is how it is done." Her general litigation experience has given her significant leverage. In addition, her prior experience as a law clerk in the district court taught her about calendar management and presiding over a courtroom.

She also has been able to draw from a diverse perspective, as an African American woman who grew up poor in Chicago.

Black Women Lawyers Association

Judge Hunt has been very active in the Black Women Lawyers Association. There, she found mentors and role models, all part of a network of black women lawyers that nurture and support one another. Members consist of associate attorneys, judges, general counsels and named partners. The experience was powerful and encouraging. The Association is a warm and welcoming venue where it is understood that it can be isolating to be different as a black women lawyer.

Judge Hunt started by attending events at the invitation of women she had met. Once her children were older, she joined the board and became president from 2015-2016.

The organization's goal is to focus on the specific needs of black women lawyers as professionals and mothers. The organization offers scholarships and organizes community service projects, mentoring and writing and resume workshops along with substantive educational and professional development programming. ❖

Frequent Tax Issues in Consumer Bankruptcy

By Michael Kelly, United States Department of Justice

This column is part of a series that provides guidance on frequently encountered IRS consumer bankruptcy issues. The views expressed here are mine alone, and not necessarily those of the United States.

General Unsecured but Non-Dischargeable Claims—Pitfall for the Unwary

As most practitioners know, IRS priority claims are not subject to discharge and must receive full payment in a chapter 13 case. 11 U.S.C. §§ 523(a)(1)(A) (no discharge), 1322(a)(2) (full pay), and 1328(a)(2) (no discharge). IRS secured claims, on the other hand, are dischargeable, and also must be fully paid in a chapter 13 case in accordance with § 1325(a)(5)(B)(ii). Given the outsized impact that IRS priority and secured claims can have on a consumer debtor's case, it is understandable that many consumer attorneys focus their attention on this part of the IRS proof of claim form and allocate less consideration to IRS general unsecured claims. After all, the IRS general unsecured claims can be paid pennies on the dollar in a chapter 13 case—just like any other unsecured claims—and whatever balance remains will be discharged. Or will it?

Lurking in the general unsecured claim portion of the IRS proof of claim may be general unsecured claims that are not subject to bankruptcy discharge. One such category: taxes incurred on late-filed returns. Most general unsecured debts that receive payment in a chapter 13 case are subject to discharge because 11 U.S.C. § 1328(a) provides a discharge for "all debts provided for by the plan." But the chapter 13 discharge statue then goes on to except from discharge any debt "of the kind specified in section 507(a)(8)(C) or in paragraph *(1)(B)*, (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a)." 11 U.S.C. § 1328(a)(2) (emphasis supplied). Specifically, § 523(a)(1)(B)(ii) excepts from discharge any tax debt "with respect to which a return, if required… was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition." [1]

Compare § 523(a)(1)(B)(ii)'s provision for non-dischargeable late-filed taxes with § 507(a)(8)(A)'s provisions for priority tax claims. Section 507(a)(8)(A) grants priority status to (1) taxes for which a return is due within three years before the petition; (2) taxes *assessed* within 240 days before the petition (exclusive of certain tolling events); and (3) taxes (*other than* those specified in § 523(a)(1)(B)) that are not assessed but assessable after case commencement. The third category of 507(a)(8)(A) expressly contemplates that taxes owed on late-filed (or fraudulent) returns are *not* priority tax claims. Rather, those debts are general unsecured claims and therefore, tempting to ignore -- but they are also non-dischargeable.

Some chapter 13 debtors have a history of non-compliance when it comes to filing tax returns. But when those debtors file bankruptcy, they can end up in the position of filing multiple returns for old tax years all at once, right before or right after the bankruptcy is filed. If some of those tax returns were due *more* than three years before the petition, they will create general unsecured claims that are *not* subject to discharge. The IRS proof of claim does *not* indicate what portions of the claim are non-dischargeable, so the onus is on the debtor to investigate whether some part of the general unsecured claim is not subject to discharge. Failing to investigate this can set up debtors for an unpleasant surprise after discharge: rather than obtaining a "fresh start," they face collection activity on old, non-dischargeable tax debt.

To avoid this, it is incumbent on consumer debtor attorneys to carefully investigate each debtor's tax filing history to confirm or rule out the possibility of non-dischargeable, but general unsecured, tax debt before the debtor files for bankruptcy. Obtaining a tax transcript (available here: https://www.irs.gov/individuals/get-transcript) can be a helpful tool in this endeavor.

[1] To be clear, late-filed tax debts are not the only tax debts excepted from discharge by § 523(a)(1). There are others, namely certain priority tax debts, taxes for which returns were not filed at all, and fraudulent returns. Keep your eyes on this space for discussions of those tax debts in future columns.

Frequent Tax Issues *(Continued)*

Federal Tax Liens Are Not Avoidable Under 11 U.S.C. § 522(f)

The newly revised chapter 13 form plan is, in this bankruptcy practitioner's opinion, an improvement over its predecessor. Among other features: it builds into the plan helpful references to applicable bankruptcy code and bankruptcy rule citations, prompting counsel to consider their options in challenging claims as they work through the plan. Among the reminders found in the plan is this one: § 522(f) can avoid certain liens to the extent they impair the debtor's interest in exempt property. Perhaps prompted by the new version of the chapter 13 plan, some debtors have been seeking to rely on § 522(f) to try to avoid federal tax liens against exempt property. This strategy is not viable. To understand why requires a close look at both § 522(f) and an examination of how federal tax liens arise.

First, let's examine the scope of § 522(f). That subsection allows a debtor to "avoid the fixing of lien" if it impairs exempt property. More specifically, it applies to all judicial liens and to nonpossessory, nonpurchase-money security interests in certain categories of exempt property. The bankruptcy code further defines some of these terms in § 101. A "lien" is defined broadly and covers any "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). A "judicial lien" is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). And, finally, a "security interest" is a subset of a lien, covering any "lien created by *agreement*." 11 U.S.C. § 101(51) (emphasis supplied).

Now, let's consider federal tax liens. Federal tax liens arise by operation of statute; when a person liable for taxes "neglects or refuses to pay the same after demand," then a lien arises in favor of the United States upon all of the tax debtor's property or rights to property. 26 U.S.C. § 6321. So, while a federal tax lien is plainly a lien, is it a "judicial lien"? No, because it arises by statute, not by any judicial process. And is it a "security agreement"? No; it is a non-consensual lien that does not arise "by agreement."

Since a federal tax lien does not fit into either of the two § 522(f) slots—judicial lien or security agreement—is it not vulnerable to § 522(f) avoidance. *See In re Khoe*, 255 B.R. 581, 588 (E.D. Cal. 2000).

That brings this installment to an end. If you have IRS bankruptcy questions that you'd like to see addressed in this column, please don't hesitate to reach out to me at michael.kelly@usdoj.gov. ❖

Proposed Increases to the Illinois Personal Property Exemption Amounts – A Boon to Chapter 7 Debtors?

By Christopher L. Muniz, United States Bankruptcy Court, Southern District of Indiana

Section 12-1001 of the Illinois Code of Civil Procedure, 735 ILCS 5/12-1001 et seq. ("Section 12-1001"), affords bankruptcy debtors the option to shelter some assets from creditors. These exempt assets form the basis of a debtor's "fresh start" upon emerging from bankruptcy: without the ability to keep possessions, a debtor would be destitute and far worse off than they were prior to the filing of the petition. For example, a debtor's right to receive social security benefits, unemployment compensation or public assistance benefits is deemed exempt pursuant to Section 12-1001(g)(1). This means that creditors cannot execute upon these assets to satisfy debts and that a debtor can retain these payments after the conclusion of his bankruptcy case.

But why is the Illinois personal property exemption schedule relevant to the filing of a federal bankruptcy petition? The reason is because Illinois, like most states, opted out of the federal bankruptcy exemption scheme (found within 11 U.S.C. §522) in favor of state exemp-

Proposed Increases *(Continued)*

tions. While the Illinois and federal exemptions are similar in some respects,[1] the amounts between some of the other exemptions do differ.[2]

The exemption amounts set forth within Section 12-1001(b-d) are certainly outdated, being last amended in January 2006. The Illinois legislature is currently considering House Bill 5480 ("HB 5480"), which, if enacted, would dramatically increase the amounts of personal property exemptions available to Illinois debtors. Should the bill pass in its current form[3], it will amend the following three provisions of Section 12-1001[4]:

- The exemption for implements, professional books, or tools of the trade of the debtor will increase from $1,500 (735 ILCS 5/12-1001(d)) to $7,500;
- The exemption for one motor vehicle will increase from $2,400 (735 ILCS 5/12-1001(c)) to $10,000; and
- The most drastic change would be the 1,150% increase in the wildcard exemption (i.e. an exemption that a debtor can apply to any personal property not covered by any other available exemption) from its current $4,000 value (735 ILCS 5/12-1001(b)) to $50,000.

HB5480, if passed, will go into effect immediately. Although HB5480 is silent on the issue, it is likely that the increased exemption amounts will apply prospectively, rather than retroactively. For example, if a debtor files a bankruptcy petition on July 1, but HB5480 does not take effect until July 30, the debtor is stuck with the $2,400 vehicle and $4,000 wildcard exemptions. Conversely, a debtor filing a petition on August 1 would be entitled to the more generous exemption amounts contained within HB5480. Applying the new exemption amounts retroactively would simply be too chaotic - numerous chapter 7 debtors would file amended schedules of exempt property in their bankruptcy cases seeking to take advantage of the higher exemptions, requiring extensive review by chapter 7 trustees, potentially grinding the bankruptcy process to a halt.

What impact will the passing of HB5480 potentially have on the number of chapter 7 petitions filed by individuals in Illinois? There is no way to know for sure. On the one hand, the bill could result in fewer chapter 7 bankruptcy filings if debtors are able to protect more assets outside of bankruptcy (particularly in situations in which a debtor is being chased by a small number of creditors each owed a relatively small amount of money). Alternatively, chapter 7 filings in Illinois may increase, as HB5480 will provide more protection to debtors who elect to file. In either event, some debtors may elect to delay their filing until after HB5480's passage in order to avail themselves of the increased exemption amounts. It may also cause chapter 7 trustees to more closely scrutinize the value a debtor ascribes to his personal property, such as for a vehicle or jewelry, potentially leading to stricter appraisal and valuation examinations and more contested issues with chapter 7 cases.

Or, the enactment of HB5480 could have no effect on the number of chapter 7 petitions filed in Illinois. In June 2015, by way of example, Alabama more than doubled its wildcard exemption, from $3,000 to $7,500 (Ala. Code Sec. 6-10-6). Despite this change (which admittedly is far less drastic than the increase proposed within HB5480), there was no statistically significant change in the number of chapter 7 petitions filed by consumers within the Alabama bankruptcy courts in the year before and after the wildcard exemption increase.

Lastly, one note for creditor attorneys (and their clients) holding a valid judgment against an Illinois debtor outside of bankruptcy – if you have yet to execute on the judgment, you should consider doing so as quickly

[1] As an illustration, Section 12-1001(g)(1) is comparable to 11 U.S.C. § 522(d)(10)(A).

[2] The exemption amount for a debtor's interest in one motor vehicle is $3,775 under the federal exemption (11 U.S.C. § 522 (d)(2)) but only $2,400 (Section 12-1001(c)) for Illinois debtors.

[3] The Illinois House re-referred HB 5480 to the Rules Committee on April 13, 2018.

[4] HB5480 also adds a new section (k) to Section 12-1001, which would establish a $4,000 exemption for funds held in a checking or savings account (subject to a state court hearing on the issue and the debtor's designation of assets protected by the new $50,000 wildcard exemption) and prohibit financial institutions from freezing the debtor's account or turning over to a judgment creditor any amount of $4,000 or less held in the debtor's accounts.

Proposed Increases *(Continued)*

as possible. Unless there is a legal or strategic reason for not executing on the judgment at this time, creditors stand to miss out on more than $50,000 in potentially executable assets by holding off on collecting until after HB5480's enactment.

The continued saga of HB5480 is an interesting development for debtors, creditors and chapter 7 trustees to keep an eye on. Even if HB5480 is not passed in its current iteration, it is clear that an increase in the Illinois personal property exemption amounts is on the horizon. ❖

Beep! Beep! Parking Tickets in Consumer Bankruptcy in the Northern District of Illinois

By Ainat Margalit, Legal Assistance Foundation of Metropolitan Chicago

Editor's Note: This article was originally published in the August 2018 edition of the American Bankruptcy Institute's Consumer Bankruptcy Committee Newsletter.

The City of Chicago finds itself entangled in a set of legal issues surrounding the bankruptcy code and the enforcement of parking tickets through civil fines, impoundment and license suspension. The interplay of Chicago parking ticket debt and consumer bankruptcy is making for a fascinating legal showdown. Driving these questions is the City's strategy of aggressively enforcing and collecting pre- and post-petition parking ticket fines and circumventing the hurdles historically imposed by the automatic stay.

Some relevant background numbers[1]:

- Of the 8,809 chapter 13 consumer bankruptcy filings overseen by chapter 13 Bankruptcy Trustee Tom Vaughn in 2016, 47 percent listed the City of Chicago, Department of Revenue as a creditor.
- Non-business chapter 13 filings decreased 26.8 percent nationwide from 2011 to 2016. But in the Northern District of Illinois, non-business chapter 13 filings increased 35 percent during the same period.
- In 2015, DNAinfo reported that Chicago had $1.5 billion in unpaid ticket debt for parking, red light and speed camera violations.
- In 2016, tickets, fines, and fees generated approximately $264 million in revenue for the City.[2]

Three questions are currently pending before the Northern District of Illinois Bankruptcy and District Courts and the Seventh Circuit Court of Appeals. These are:

- Does post-petition retention of an impounded vehicle violate the automatic stay?
- Are post-petition traffic fines "administrative expenses" under §503 of the Bankruptcy Code and thus entitled to priority status and payment ahead of pre-petition creditors?
- Does the Northern District's form confirmation order constitute an abuse of discretion because it provides that all property of the chapter 13 bankruptcy estate remains property of the estate without a finding that the property is required to fulfill the plan?

This article will examine the recent decisions surrounding these questions.

Does post-petition retention of an impounded vehicle violate the automatic stay?

Until recently, bankruptcy courts interpreted the Seventh Circuit decision in *Thompson v. Gen. Motors Acceptance Corp.*, LLC, 566 F.3d 699 (7th Circuit. 2009) as requiring the immediate release of vehicles retained by a secured creditor upon filing of a bankruptcy petition.

Northern District of Illinois Bankruptcy Judges Donald R. Cassling, Jack B. Schmetterer and Jacqueline P. Cox, however, have now split on the issue of whether *Thompson* applies where a debtor's vehicle is impound-

[1] http://news.medill.northwestern.edu/chicago/expensive-chicago-parking-tickets-contribute-to-huge-bankruptcy-filings/
[2] https://www.propublica.org/article/illinois-license-suspensions

ed by the City. See *In re Avila*, 566 B.R. 558, 559 (Bankr. N.D. Ill. 2017) (Cassling, J.), *In re Walker*, Case No. 17 BK 33957 (Bankr. N.D. Ill. Feb. 8, 2018) (Schmetterer, J.);[3][4] and *In re Scott*, Case No. 17 BK 25141 (Bankr. N.D. Ill. April 19, 2018) (Cox, J.).

In response to the City's motion to declare that its retention of the vehicle did not violate the automatic stay in *Avila*, Judge Cassling found that the City was not in violation because its act of possessing the vehicle counted as an action to perfect or maintain its interest in the property as permitted by Section 362(b)(3). Based on a 2016 amendment to the municipal code, Judge Cassling found that the City has a possessory lien on impounded vehicles and that this lien has priority over pre-existing lienholders. Therefore, the City's possessory lien "qualifies as the type of generally applicable law referred to in § 546(b)(1)(B), making the trustee subject to the perfection of such a lien."

Judge Cassling distinguished the Seventh Circuit's ruling in *Thompson* because that decision did not address possessory liens. According to Judge Cassling, the creditor is protected from the automatic stay if the "continued possession of the property is necessary to maintain or continue that creditor's perfection of its statutory lien under § 546(b)." As such, the debtor can only regain the vehicle by proposing a voluntary replacement lien in the plan.

In *Walker*, Judge Schmetterer disagreed, finding that *Thompson* required the City to turn over a debtor's vehicle upon request; otherwise, the City must file a motion to lift the automatic stay in order to retain its possessory lien. Judge Schmetterer subsequently withdrew his opinion due to settlement of the underlying issue. But in his order withdrawing the decision, Judge Schmetterer declared that "not a single syllable of the Opinion's logic is withdrawn." Judge Schmetterer reiterated this reasoning in In re Cross, Case No. 18 BK 00986 (Bankr. N.D. Ill. May 25, 2018) (Schmetterer, J.) and *In re Fulton*, Case No. 18 BK 02860 (Bankr. N.D. Ill. May 31, 2018) (Schmetterer, J.).

Neither of these decisions were appealed, but the City did appeal Judge Cox's earlier decision in *In re Kennedy*, Case No. 17 BK 08656 (Bankr. N.D. Ill. Aug. 14, 2018), which sided with Judge Schmetterer on this issue.[5] District Court Judge Manish Shah issued his opinion in *City of Chicago v. Kennedy*, Case No. 17 CV 05945, on May 4, 2018, holding that continued possession of the vehicle was an exception to the automatic stay according to § 362(b)(3) because it perfected the City's interest in the property. However, citing to *United States v. Whiting Pools Inc.*, 462 U.S. 198, 207 (1983) and 11 U.S.C. § 542, Judge Shah found that the possessory interest of the bankruptcy estate required returning the car to the debtor in return for adequate protection. Judge Shah found that the City had not had an opportunity to seek adequate protection because no adversary complaint had been filed in the underlying bankruptcy seeking turnover of the vehicle. The case was remanded to the bankruptcy court for that hearing.[6]

In another decision by Judge Cox, she reaffirmed the application of *Thompson*. In *In re Scott*, Case No. 17 BK 25141 (Bankr. N.D. Ill. April 19, 2018), Judge Cox found that, according to Illinois law, there is no possessory lien in favor of the City because the City has not supplied the debtor with goods or services as required by Illinois law. Judge Cox then fined the City for failing to release the vehicle.

Are post-petition traffic fines "administrative expenses" under §503 of the Bankruptcy Code and thus due priority status ahead of pre-petition creditors?

The City has moved to have post-petition traffic fines recognized as administrative expenses for allowance of priority payment in seven separate bankruptcies.

In motions filed in those cases, the City argued that recognition under §503 is the only way it can enforce

[3] *See also In re Cross*, Case No. 18 BK 00986 (Bankr. N.D. Ill. May 25, 2018) (Schmetterer, J.); *In re Fulton*, Case No. 18 BK 02860 (Bankr. N.D. Ill. May 31, 2018) (Schmetterer, J.).

[4] Unless another cite is given, all unpublished decisions cited in this article are available on the website of the United States Bankruptcy Court of the Northern District of Illinois, www.ilnb.uscourts.gov/judges-info/opinions.

[5] There was no memorandum opinion entered. The City was simply ordered to release the vehicle.

[6] To date, June 26, 2018, no hearing has been held.

Beep! Beep! *(Continued)*

post-petition fines. Section 503 defines administrative expenses as "the actual, necessary costs and expenses of preserving the estate…" The City argued that it cannot proceed with progressive sanctions allowing it to tow and dispose of vehicles involved in traffic violations because the vehicle remains the property of the estate. Therefore, fundamental fairness mandates that the City be allowed to collect the post-petition traffic fines as administrative expenses.

Judges Timothy A. Barnes and Pamela S. Hollis denied these motions. Judge Barnes held that allowing the City's motion would create "a rolling fresh start," and that, in order to pursue enforcement, the City can move to lift the automatic stay or seek dismissal of the bankruptcy case.

The City appealed each case and the seven appeals were consolidated before District Court Judge Elaine Bucklo, *City of Chicago v. Marshall*, Case No. 17-5631 (N.D. Ill.). Judge Bucklo held that the City had not satisfied the test for recovering administrative expenses under *Reading Co. v. Brown*, 391 U.S. 471 (1968). The *Reading* test has two parts: (1) the debt arises out of a transaction with the estate; and (2) fundamental fairness weighs in favor of granting priority status to the debt. Judge Bucklo found that the City had failed to meet the second prong. While fundamental fairness may mandate priority status in chapter 11 cases, as per *Reading*, the same is not true in chapter 13, where debtors are not operating businesses. Allowing recognition of fines as administrative expenses would create a perverse incentive for debtors to be heedless of traffic laws, because some or all of such non-compliance would simply be borne by other creditors who would get paid less.

The City has appealed and this matter is before the Seventh Circuit in *City of Chicago v. Marshall*, Case No. 17-3630.

Does the Northern District's form confirmation order constitute an abuse of discretion because it provides that all property of the chapter 13 bankruptcy estate remain property of the estate without further showing that the property is required to fulfill the plan?

The City has objected to the Northern District form confirmation order in two cases, *In re Moore*, Case No. 17 BK 23867 (Bankr. N.D. Ill.), and *In Re Hernandez*, Case No. 17 BK 32345 (Bankr. N.D. Ill.). The City is challenging the portion of the form order stating that, unless specifically surrendered or sold, all of the bankruptcy's estate shall remain property of the estate. Under such language, a vehicle owned by the debtor enjoys the protection of the automatic stay.

According to the City, the form order is a reaction to the 1997 opinion in *In re Fisher*, 203 B.R. 958 (N.D. Ill. 1997). In that case, the City enforced post-petition parking tickets by booting and destroying the debtor's vehicle. The debtor moved for a rule to show cause alleging violation of the automatic stay. The District Court denied the motion, finding that under § 1327(b), the car vested in the debtor upon confirmation because the plan did not provide otherwise. The City argues that, as a result of *Fisher*, the bankruptcy court adopted the form confirmation order, which improperly "negates the decision on appeal." The City further asserts that keeping all property within the estate post-confirmation is a "presumed abuse of discretion."

Judge Hollis confirmed the plans of debtors Moore and Hernandez over the City's objection. The City appealed and a direct appeal to the Seventh Circuit was granted in Case No. 17-3663.

With these three issues bubbling their way up through the courts, the future of the methods of enforcement of City of Chicago parking tickets in the bankruptcy arena is plainly uncertain. ❖

Supreme Court Finds That Loans Obtained by an Individual Debtor's False Oral Statement About a Specific Asset Are Dischargeable Under § 523 (A)(2)

By Brad Berish, Adelman & Gettleman, Ltd .

It is clear under Section 523(a)(2) of the Bankruptcy Code that a debt for money (or property or services) which is premised upon a false oral statement "respecting the debtor's… financial condition" is dischargeable because the statement was not made in writing. What has not been clear, until recently, is whether a false oral statement concerning a particular asset of the debtor is considered a "statement respecting the debtor's… financial condition" which, as stated, must be in writing to be considered nondischargeable. On June 4th, the Supreme Court, in a unanimous decision in *Lamar, Archer & Cofrin, LLP v. Appling*, 2018 WL 2465174 (June 4, 2018), resolved a split amongst several Courts of Appeals, and found that loans or credit obtained by a false oral statement concerning a single asset of the debtor is a statement "respecting the debtor's… financial condition" and thus, is nondischargeable.

Lamar Facts and Decision

In *Lamar*, the debtor hired a law firm to represent him in litigation. When the debtor fell behind on his legal bills by more than $60,000, he met with the firm and falsely represented to them that he was expecting a tax refund of approximately $100,000. The firm relied on that statement and continued to represent the debtor without beginning collection efforts. The debtor's filed tax return, however, only sought a refund of $60,000, which was collected about six months later and promptly spent by the debtor. About a month later the debtor met again with his attorneys and falsely represented that he had not yet collected the refund. In reliance on that statement, the firm agreed to complete the pending litigation. About four months later, the firm sent its final invoice, which the debtor never paid, and thereafter the firm obtained a judgment and the debtor then filed for bankruptcy.

The law firm initiated an adversary proceeding concerning the dischargeability of its debt and the bankruptcy court found that the firm's judgment was nondischargeable under section 523(a)(2)(A) because the debtor made fraudulent oral statements on which the firm justifiably relied. The district court affirmed. However, the Eleventh Circuit (848 F.3d 953 (11th Cir. 2017)) reversed, finding that the debtor's oral statement about a single asset constitutes a "statement respecting the debtor's… financial condition" which invokes section 523(a)(2)(B), instead of section 523(a)(2)(A), and since the debtor's "statements were not in writing", as is required by subsection (B), his debt is therefore dischargeable.

Section 523(a)(2)

Section 523(a)(2) creates two mutually exclusive exceptions to discharge of a debt "for money, property, services, or an extension, renewal, or refinancing of credit", whereby:

1) subsection (A) does not allow discharge of such debt if obtained by "false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's… financial condition*"

2) subsection (B) does not allow discharge if such debt is obtained by "use of a statement in writing:

   i) that is materially false:

   ii) *respecting the debtor's…financial condition*;

   iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

   iv) that the debtor cause to be made or published with intent to deceive;"

11 U.S.C. § 523(a)(2) (emphasis added).

As the Eleventh Circuit noted, "[a]ll fraud[,] 'other than a statement respecting the debtor's… financial condition'[,] is covered by subsection (A)." 848 F.3d at 956. However, if a statement is made 'respecting the debtor's… financial condition' then subsection (B) governs, and under subsection (B) that statement must be in writing to be considered nondischargable. *Id.* at 957. Therefore, "a debt incurred by an oral, fraudulent

statement respecting the debtor's financial condition can be discharged in bankruptcy." *Id.*

The key issue in *Lamar*, as well as in four other Circuit Court cases addressing similar facts, was whether the debtor's false oral statements about a specific asset (or group of assets) is a "statement respecting [his] financial condition", which would invoke subjection (B) under which the debt will be discharged because the statement was not in writing. The Eleventh Circuit in *Lamar*, along with the Fourth Circuit, held that such oral statements about specific assets is a "statement respecting the debtor's… financial condition", and thereby invokes subsection (B). *Id.* "But the Fifth, Eighth, and Tenth Circuits have held that a statement about a single asset does not respect a debtor's financial condition, reasoning that it 'says nothing about the overall financial condition of the person making the representation or the ability to repay the debt.'" *Id.* at 957.

Supreme Court's Reasoning

The Supreme Court affirmed the Eleventh Circuit's decision, and premised its ruling on the language of the statute, finding that the word "respecting" in the phrase "statement respecting the debtor's… financial condition" has an ordinary dictionary meaning of "related to", "about", or "concerning". 2018 WL 2465174 at 5-6. Accordingly, the Court found that since a statement *about* or *relating to* "[a] single asset has a direct relation to and impact on aggregate financial condition… [it] does bear on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, [or] able to repay a given debt or not." *Id.* at 7. The Court found that the appellant failed to put forth any examples of the same "phrase in a legal context similar to the one at issue here" that would support its assertion that the words "respecting" connote only statements limited to the "debtor's overall financial condition". *Id.* at 5. Instead, the Court pointed to several other instances in its prior decisions where it has interpreted such phrases as "respecting" or "relating to" broadly, such "that the scope of a provision [containing that phrase] covers not only its subject [i.e., financial condition] but also matters relating to that subject [i.e., a single asset]. *Id.* at 6. Indeed, the Court noted that interpreting the phrase as appellant urges, would essentially violate a statutory maxim by assigning no meaning whatsoever to the word "respecting" in the statute. *Id.* at 7. The Court also found that the appellant's interpretation would yield incoherent results, citing as an example that under the appellant's viewpoint, "a general statement like, 'I am above water,' would need to be in writing to foreclose discharge, whereas a highly specific statement like 'I have $200,000 of equity in my house,' would not." *Id.* at 8. Finally, the Court supported its interpretation by looking to the statutory history of the phrase "statement respecting the debtor's financial condition." Tracing its roots to a 1926 amendment to the Bankruptcy Act of 1898 that included the phrase "statement in writing respecting his financial condition", the Court noted that Courts of Appeals had for over 50 years, until that language was essentially incorporated into the Bankruptcy Code in 1978, "consistently construed the phrase to encompass statements addressing just one or some of a debtor's assets or liabilities." *Id.* at 8.

Lastly, and putting aside the "plain-text" findings discussed, the Supreme Court disagreed with two other contentions of the appellant. First, the appellant contended that the foregoing construction of §523(a)(2)(B) gives it such significant reach that "little would be covered by §523(a)(2)(A)'s general rule rendering nondischargeable debts arising from "false pretenses, a false representation, or actual fraud." *Id.* at 9. The Court disagreed, by citing to several case decisions as examples of how §523(a)(2)(A) "still retains significant function when the phrase 'statement respecting the debtor's financial condition' is interpreted to encompass a statement about a single asset." *Id.* Secondly, the appellant asserted that the appellee's interpretation of §523(a)(2) violates the long-recognized principal that the Code "exists to afford relief only to the 'honest but unfortunate debtor'", because it allows debtors to obtain a discharge even though they have orally lied about their finances to obtain money or other assets. The Court (6 of 9 justices joined in this reasoning), however, noted that the heightened requirements of a writing when the fraud involves a "statement respecting the debtor's financial condition" is "not a shield for dishonest debtors", but ra-

Supreme Court *(Continued)*

ther, "reflect(s) Congress' effort to balance the potential misuse of such statements by both debtors and creditors" *Id.* at 9. The Court concluded that reducing representations respecting the debtor's financial condition to writing, "will likely redound to [the creditor's] benefit, as such writings can foster accuracy at the outset of a transaction, reduce the incidence of fraud, and facilitate the more predictable, fair, and efficient resolution of any subsequent dispute." *Id.* at 10.

In summary, the Supreme Court's decision in *Lamar* reinforces the notion that creditors who intend to rely on representations concerning a debtor's financial condition or even a particular asset, when extending credit or services, would be wise to insist that those representations be made in writing.❖

Bankruptcy Liaison Committee Summer Outing!

This July, the Committee, Judges, Court Staff and Members of the Bar enjoyed a pleasant evening socializing in the City of Chicago's beer garden adjacent to the Pritzker Pavilion. The event took place during one of the Grant Park Music Festival performances.

Join us this December for the Committee's Winter Holiday Party, more information to come. In the meanwhile, enjoy some pictures from the Summer event. ❖

Brad Berish and Alexander Brougham

Cari Kauffman, Briana Czajka, John Fonferko, Judge Hollis, Judge Hunt, Jose Moreno

Mission Statement

The Bankruptcy Court Liaison Committee for the Northern District of Illinois was formed to assist the Bankruptcy Court and its practitioners to create a more efficient and collegial environment throughout the entire Northern District of Illinois. In addition to promoting communications, supporting educational programs, and sponsoring social events, Section 2.01 of the Committee's Bylaws provides that practitioners may relay issues, concerns, or complaints about Bankruptcy Judges or the Bankruptcy Court to the Committee – anonymously – through the Co-Chairs or any other Committee Member. The information will then be anonymously presented to the appropriate Bankruptcy Judge Committee Members for review and consideration under 28 U.S.C. § 154(b), which provides that the Chief Judge of the Bankruptcy Court "shall ensure that the business of the bankruptcy court is handled effectively and expeditiously."

Practitioners wishing to share any issues, concerns, or complaints with the Committee may contact any of its Members anonymously via, mail, email, phone, or on the Bankruptcy Court's website at the following link: http://www.ilnb.uscourts.gov/bankruptcy-court-liaison-committee

United States Bankruptcy Court, Northern District of Illinois

Judge Pamela S. Hollis, Chief Judge

Judge Janet S. Baer

Judge Timothy A. Barnes

Judge Donald R. Cassling

Judge Jacqueline P. Cox

Judge Carol A. Doyle

Judge A. Benjamin Goldgar

Judge LaShonda A. Hunt

Judge Thomas M. Lynch

Judge Jack B. Schmetterer

Judge Deborah L. Thorne

2018-2019 Bankruptcy Court Liaison Committee

Honorable Pamela S. Hollis (Chief Judge)

Honorable Janet S. Baer

Honorable Benjamin Goldgar

Honorable Thomas M. Lynch

Jeffrey P. Allsteadt
Clerk of Court

Jean M. Dalicandro
Operations Manager

Brenda Likavec (Co-Chair)
Potestivo & Associates, P.C.

Ainat Margalit (Co-Chair)
Legal Assistance Foundation of Metropolitan Chicago

Nora Matranga (Co-Chair)
Tom Vaughn Chapter 13 Trustee

Michael A. Brandess
Sugar Felsenthal Grais & Helsinger LLP

Alexander Brougham
Adelman & Gettleman, Ltd.

David D. Cleary
Greenberg Traurig, LLP

David D. Doyle
Fox Rothschild LLP

Matthew T. Gensburg
Gensburg, Calandreillo & Kanter, P.C.

David P. Holtkamp
City of Chicago Department of Law

Michael Kelly
United States Department of Justice

Geoffrey M. Miller
Dentons US LLP

Michael Miller
Law Office of Robert J. Semrad & Associates, LLC

Ha Nguyen
Office of the U.S. Trustee

Alexandra Schwarzman
Kirkland & Ellis

James E. Stevens
Barrick, Switzer, Long, Balsley & Van Evera, LLP

Brian P. Welch
Burke, Warren, MacKay & Serritella, P.C.

Blair Zanzig
Hiltz Wantuch & Zanzig LLC