AUSTIN BAR ASSOCIATION

BENCH BAR 2008

BANKRUPTCY LAW SESSION

- **There's a new sheriff in town.** Don't assume that he does things the same way as the old sheriff.
  - Judge Gargotta asks more questions than Judge Monroe. Try to have intelligent, articulate, responsive answers. (A lot of this is background. How did we get here? Why is this getting reset? Again? "I haven't gotten around to it" is not an acceptable basis for a second or third reset.)
  - There are more hearings you will need to bring your client to. Don't assume that you can just argue your way through a hearing. We really do need evidence (occasionally).
  - Judge Gargotta has written several opinions. His stated intention is to provide some guidance to the bar about what and how he thinks. Go to the Bankruptcy court website www.txwb.uscourts.gov and click on the opinions button. The case numbers have the judges' initials in them. Any case that has "cag" as part of the case number is from Judge Gargotta. If you want to know how he thinks, you can ask me or you can go straight to the source.
  - This isn't particular to Judge Gargotta, but I am always amazed by how long it takes some lawyers to say a whole bunch of nothing. Tell him everything he needs to know to rule on the matter before the court, then stop talking. If he needs more information, he will not hesitate to ask.

- **The 2005 amendments added a residency requirement for claiming exemptions.** See 522(b)(3)(A). If the debtor has not lived in the state for at least 730 days, they have to use the exemptions from the state where they lived for the six month period prior to the 730 day period. If they did not live in one state for the entire six month period, they have to use the exemptions for the state where they lived for the greatest part of the six month period.
  - There is a savings clause at the end of 522(b). (The other hanging paragraph.) If requiring the debtor to use the prior state's exemptions deprives the debtor of "any" exemption, they get to use the federal exemptions, even if the prior state is an opt out state.
  - This is a far more common issue than you might expect.

- **The 2005 amendments impose a cap on homestead of $125,000** if the debtor's interest in the property was acquired within 1215 days [three years and four months] of filing.
  - See 522(m) which says that each debtor gets a set of exemptions so in a joint filing they each get $125,000 equity in a homestead.

  - There were four cases I know of in Austin in the first six months or so after the 2005 amendments went into effect where the debtor lost at least part of their homestead because of this provision. This is an easy issue to catch if you ask the right questions and do your own basic research.
  - If you have older clients, make sure they own their homestead. I know this sounds crazy, but I have had several clients who conveyed their homestead to one of those "avoid probate" revocable trusts. If the house is owned by a trust, can the debtor claim it as a homestead? Under the old law, I would just have the client revoke the trust and deed the property back from the trust to themselves individually. I'm not sure that works under the new law.
  - Watch for multiple homesteads in the 1215 days. I have had a couple of cases where the debtor sold a house in California, moved to Texas and bought a homestead, sold that homestead, and bought another homestead all within 1215 days. There is an exception to the 1215 day rule if the debtor simply rolled the equity from one homestead into another homestead, but they have to have been located in the same state. The problem in these cases is that the $500,000 in proceeds the debtor used as a down payment on the first Texas home were not proceeds of a Texas homestead, so the cap applies. Its easy to just look at this fact pattern and think the down payment was from the proceeds of a prior Texas homestead make it okay. You have to follow the trail back 1215 days.
  - Judge Bohm has written a rather scary opinion in which he concludes that a transfer of a community property interest in a homestead pursuant to a divorce decree is an acquisition of an interest in property for the purposes of the homestead cap. See, In re Presto, 2007 WL 2913316 (Bankr.S.D.Tex.2007). (I hate this opinion, but I haven't been able to figure out what's wrong with it.)

- **The "super discharge" in Chapter 13 isn't nearly as super** under the new law. See 1328(a)(2). Under the old law, a debtor could discharge debts which were "tainted" because of some misconduct on the debtor's part. The theory was that the debtor was committing his income to pay at least part of the debt, so his sins could be forgiven. Under the new law, penance doesn't result in absolution.

- **"Domestic support obligations"** [defined in 101(14A)] are treated differently under the new law.
  - See 362 (b)(2) which is an exception from the automatic stay related to family law issues generally. The stay is much more limited in scope in family law matters under the new law. Essentially, family law matters are not stayed **except** the division of property if it is property of the estate [362(b)(2)(A)(iv)] and collection of support or alimony from property which is property of the estate [362(b)(2)(B)].
  - See 523(a)(5) which excepts domestic support obligations from discharge and 523(a)(15) which excepts other obligations under a divorce decree or other court order. The scope of the discharge is more limited than under the old law.
  - See 522(c)(1) which provides that exemptions are effectively waived with respect to domestic support obligations. 523(a)(5), but not 523(a)(15).

6. **Automatic dismissal under 521(i)(1).** If the debtor fails to provide required information/documents within 45 days of filing of the petition, the case is automatically dismissed on the 46th day. The problem is no order gets entered on the 46th day, the dismissal just happens and no one may notice for a long, long time after the dismissal happened. dismissed.
    - See 521(a)(1)(B)(iv) in particular. You have to provide the trustee with copies of all "pay advices" received from any employer within 60 days prior to filing of the case. This includes part time jobs. [Most of the stuff required under 521(a)(1) are the official forms. If you don't file the schedules within 45 days after filing, the case should probably be dismissed because you have bigger problems.]

7. **The means test.** This is pretty simple. If you aren't a bankruptcy lawyer, you absolutely should not be filing cases where the debtor's income exceeds the median family income for a family of their size in the state where they live. There are a lot of lawyers who file a lot of bankruptcies who still can't seem to get this right.
    - Essentially, if the debtor's current monthly income [see 101(10A)(A) and (B)] is less than the median family income, they should qualify for Chapter 7. If the debtor's current monthly income exceeds the median family income, they have to complete a convoluted budget analysis to determine if they qualify.
    - In Chapter 13, if the debtor's current monthly income is less than the median, they can file a 36 month plan, if their income exceeds the median, they have to file a 60 month plan. In Chapter 13, the debtor has to pay "projected disposable income" to unsecured creditors. This does not set the minimum plan payment - this is the minimum amount that must be received by the unsecured creditor class.

    - The non-filing spouse.
    - Who is a household member?

- **Car claims.** This has too many permutations and implications to cover here, but the short version is a debtor may no longer cram down a claim secured by a car if the debt was incurred withing 910 days [two and half years] prior to filing of the case and the vehicle was purchased for the personal use of the debtor.
    - If the vehicle was purchased for the business use of the debtor or someone else, this limitation does not apply.
    - If the vehicle was purchased for the personal use of someone other than the debtor, this limitation does not apply.
    - If the debtor rolled the negative equity from a prior vehicle onto the vehicle in question, this limitation may not apply.
    - Even if the limitation does not apply, you might still have a problem as several courts have denied confirmation of plans which tried to cram down a vehicle regarding which the limitation does not apply, but the court denied confirmation based upon a lack of good faith standard. See 1325(a)(3).
    - If a creditor repossesses a car prior and then the debtor files bankruptcy, you have to give it back. "Exercising control" over property of the estate is a violation of the automatic stay. If there are dire circumstances, you can immediately file a

motion for relief and a motion for expedited hearing, but a car really is just a car.

- **Appearing in Bankruptcy Court.**
  - Get a copy of the local rules. They are available on the court's website. Read them.
  - You have to be admitted to practice in federal court. You can file a motion to appear pro hac vice in individual cases, but if you are going to make a habit of it, you should get admitted. In the Western District, you have to watch a day long DVD on federal court practice, get two sponsors, pay a fee, and get introduced to the court.
  - Local Rule 2004 provides the mechanism for conducting a deposition without having filed an adversary.
    - Local Rule 2004 does not apply in adversaries. This is covered by the 7000 rules.
    - If the party sending the notice provides less than 15 days notice, you don't have to go.
    - If the party sending the notice provides appropriate notice, the burden is on the party opposing the discovery to file a motion to quash and a motion for expedited hearing on the motion to quash and get it heard prior to the scheduled date, or the examination shall be "deemed ordered by the Court."
  - Federal Rules 26 through 37 and/or their 7000 rule counterparts govern discovery in adversary proceedings.
    - Read FRCP 26(a)(1). Each party is required to make specified initial disclosures without any discovery request.
    - Read FRCP 26(d). "...a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." I get this one all the time. My client gets sued on a 523 complaint, I file an answer and the next thing I get is a set of interrogatories, requests for admissions and request for production. I answer the admissions because I don't want them to be deemed admitted (notwithstanding the violation in sending them), but I ignore the interrogatories and the production. When the lawyer sends me a snotty letter threatening a motion to compel, I respond by sending a snotty letter threatening a motion for sanctions for filing a motion to compel on prohibited discovery. It usually ends up that the plaintiffs attorney has to file a motion to extend the discovery deadline and I get to file a response that says that we wouldn't need to extend the deadline if the creditor's attorney would follow the rules in the first place.

- **Bankruptcy impact on state court litigation.**
  - The automatic stay almost certainly applies. See 362(b) for the list of exceptions. Unless you are a government entity, most of them don't apply to you. (See domestic support obligations above.)
  - If you represent the plaintiff, the cause of action belongs to the estate unless and until the debtor can claim it as exempt and the exemptions are allowed. Unless you are formally employed by the estate, you are working as a volunteer and may

not get paid. If you settle the case without authority, you will be lucky if you only get sanctioned.
  - If you represent a non-debtor plaintiff, the stay will apply. Your choices are: (1) sever; (2) dismiss; or (3) file a motion for relief from stay. If there is an eve of trial filing, you may be able to convince a judge to give you emergency relief.
  - If you represent a non-debtor defendant, you will get the benefit of the stay at least briefly, but all good things must end.

- **Nondischargeable debts.**
  - Taxes, taxes, taxes.
    - See 523(a)(1) and 507(a)(8).
  - Student loans.
    - See 523(a)(8).
  - Marital obligations
    - See above.
  - Debts incurred through fraud.
    - See 523(a)(2).
  - Fraud or defalcation while acting in a fiduciary capacity.
    - See 523(a)(4).
  - Willful and malicious injury to the person or property of another.
    - See 523(a)(6).

- **Filing claims**.
  - If a creditor wants to get paid, they generally have to file a claim. (There is a limited exception in Chapter 11.) The claims form is available online.
  - There is a deadline. (Usually 90 days after the first date set for the creditors meeting.)
  - Don’t file claims in Chapter 7 cases unless you get a notice that says to file a claim. (Most Chapter 7's are no asset cases and there will never be any distribution to creditors. Save a tree. Don’t file a claim unless you need to.)
  - If you want information on how much and when there will be a distribution, call the trustee. Good luck. They really may not know.