3.4.11

First Circuit

Ransom v. Fia Card Services, 131 S. Ct. 716 (January 11, 2011)(Opinion by Justice* Kagan*, Justice Scalia dissented).

Supreme Court affirmed the 9th Circuit's denial of confirmation of the debtor's Chapter 13 plan because it did not dedicate all of his disposable income. Resolving a split amongst the circuits, the Supreme Court held in calculating disposable income the debtor was entitled to deduct applicable expenses specified in the IRS standards for determining how much a delinquent taxpayer could pay. In so doing, because the debtor owned his car outright, he was not entitled to take the car ownership expense (which in his category would have been $471); and, his deduction for auto operating expenses was limited to the expense actually incurred. This comported with the legislative goal of ensuring that the debtor paid his creditors the maximum amount the debtor could reasonably afford. The Bankruptcy Code defines the debtor's disposable income as his current monthly income less amounts reasonably necessary to be expended. The amounts reasonably necessary to be expended are defined by the "means test". *See* §1325(b)(3). For the above median debtor, meaning the debtor whose income falls above the state's median, the means test of §707(b)(2)(A)(ii)(I) applies. The IRS Local Standards divide auto expenses into the two categories of "ownership" and "operation". A debtor who owns his vehicle is not entitled to the car ownership expense deduction as that was meant to cover the average cost of a loan or lease of the auto. He is however entitled to deduct the actual expenses of operation.

Beane v. Beane, 2011 DNH 12 (D.N.H. 1/24/11(Hon. Joseph N. Laplante, District Judge).

Foreclosure of LLC property did not violate the automatic stay in the personal bankruptcy of one of the members since it was not property of the bankruptcy estate. In applying 11 U.S.C. §541(a)courts look to state law to determine the existence and extent of the debtor's interests in particular property. New Hampshire law expressly provides that, while a limited liability interest is intangible personal property, an individual member has no interest in limited liability company property. NH RSA §304-C:45.

Houghton v. US (In re Szwyd), 2011 Bankr. Lexis 471 (Bankr. D. Mass, 2/15/11)(Hon. Henry J. Boroff, Bankruptcy Judge).

Court granted summary judgment to Trustee which effectively marshaled the IRS' lien to debtor's home to free up other assets for creditors. Issue of marshalling had already been decided, appealed and affirmed by the District Court. Although IRS had a lien on all property, it was not entitled to pick and chose where to assert the lien to the detriment of all other creditors, particularly, where, as here, the IRS could be made whole by foreclosing its lien on debtor's house. Marshalling is an equitable doctrine.

Garcia v. P.V. Collection Servs. Inc.(In re Garcia), 2011 Bankr. Lexis 428 (Bankr. D.P.R. 2/3/11)(Hon. Brian K. Tester, Bankruptcy Judge).

Debtor's motion for partial summary judgment granted. In evaluating violations of the Fair Debt Collection Practices Act, courts use the "least sophisticated debtor" standard, violated here where collection letter implied adverse consequences would result if debtor did not

contact the agency within five days. FDCPA gives debtors 30 days to dispute, orally or in writing, the debt at issue. Circuits are split as to whether the dispute may be orally or a writing required. Damages and attorneys fees to be determined thereafter.

In re Sosa, 2011 Bankr. Lexis 233 (Bankr. D.R.I. 1/28/11)(Hon Arthur N. Votolato, Chief Bankruptcy Judge).

Court has the authority to require mortgagees to participate in the court's Loss Mitigation Program and Procedures under 11 U.S.C. §105(a) as well as under the inherent authority to manage its own calendar. *See Fed. R. Bankr. P. 9014(c) incorporating 7016.* The program was conceived as a case management tool designed to encourage the resolution of differences between residential mortgage lenders and their borrowers, and to provide a way for them to access the various federal housing programs available outside of bankruptcy, such as "HAMP".

Cruz v. Hacienda Assoc.,(In re Cruz), 2011 Bankr. Lexis 259 (Bankr. D. Mass. 1/26/11)(Hon. Melvin S. Hoffman, Bankruptcy Judge).

Debtor granted preliminary injunction to prevent foreclosure of his home; he had filed a "HAMP" request to modify the mortgage and while his application was pending, bank attempted to foreclose. Court held that debtor made a preliminary showing that he would be irreparably harmed and would likely succeed on the merits for bank's breach of good faith and reasonable diligence to proceed with a foreclosure while a HAMP application was pending.

Canning v. Beneficial Maine, Inc., (In re Canning), 2011 Bankr. Lexis 540 (Bankr. D. ME 2/17/11)(Hon. James. B. Haines, Jr., Bankruptcy Judge).

Debtor brought adversary proceeding for bank's violation of discharge injunction by sending collection letter and refusing to foreclose on home he surrendered during the bankruptcy case. Court held the mortgagee was not obligated to foreclose or else release its lien on the home; however, it did violate the discharge injunction with collection efforts and further hearing was scheduled to determine sanctions.

Cadle Co., v. Anderson, 2011 Bankr. Lexis 317 (BAP 1st Cir 1/20/11)(Per curiam , before Bankruptcy Judges Votolato, Lamoutte and Tester).

BAP reversed bankruptcy court's denial to reopen Chapter 7 case since creditor had uncovered millions of dollars in transfers, with tens of thousands of dollars in cash transfers occurring on a daily basis related to the debtor's interests revealed in an allegedly defunct family corporation.

Submitted by:
PATRICIA S. GARDNER, ESQ.
THE GARDNER LAW FIRM
PO Box 453, Newmarket, NH 03857
Phone: (603) 766 - 4933
Fax: (603) 292 - 5207
email to: GardnerBusinessLaw@gmail.com
web site: www.GardnerBusinessLaw.com