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Recent Supreme Court Decisions

Interpreting BAPCPA's debt relief agency (DRA) provisions, Court held 1) attorneys who provide bankruptcy assistance to assisted persons are DRAs; 2) § 526(a)(4) is not an overly broad, content based restriction on attorney-client communications, but merely a prohibition on advising a client to incur more debt because the client is filing for bankruptcy; and 3) § 528's disclosure requirements do not act as an affirmative limitation on speech and are reasonably related to the government's interest in preventing consumer deception. *Milavetz, Gallop & Milavetz, PA v. United States*, ___ U.S. ___, 176 L. Ed. 2d 79 (2010).

The Court ruled against a student loan creditor that sought relief under Rule 60(b)(4) from a chapter 13 confirmation order that contained language declaring the debtor's student loan debts discharged. Emphasizing finality, the Court held the creditor, which failed to object to the plan or appeal the confirmation order, was afforded the due process to which it was entitled. Although the bankruptcy court should have assured itself that the student loans did in fact impose an undue hardship, its failure to do so does not render the confirmation order void. *United Student Aid Funds v. Espinosa*, ___ U.S. ___, 2010 U.S. LEXIS 2750 (Mar. 23, 2010).

For purposes of diversity jurisdiction, the Court adopted the "nerve center" test for corporate citizenship. Resolving division among lower courts on the meaning of "principal place of business," the "nerve center," which will usually be corporate headquarters, will place citizenship in the state where high officers direct, control and coordinate business activities. *Hertz Corp. v. Friend*, ___ U.S. ___, 130 S. Ct. 1181 (2010).

Judicial Estoppel. Continuing a trend among the courts, post-bankruptcy plaintiff's employment discrimination action was dismissed on grounds of judicial estoppel because plaintiff failed to disclose claims during bankruptcy, took inconsistent positions under oath and violated her continuing duty of disclosure. *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010).

Trade Creditors Liable for Post-Petition Transfer. Between petition date and court's denial of motion to use cash collateral, debtor purchased goods from a supplier in the ordinary course of business. Trustee sued supplier to avoid unauthorized post-petition transfer. *Held*, payments were recoverable because they were transfers of estate property made without authorization from the court or the Bankruptcy Code. *Marathon Petroleum Co. v. Cohen (In re Delco Oil, Inc.)*, 2010 U.S. App. LEXIS 5452 (11th Cir. Mar. 16, 2010).

Trustee's Claims against Receiver not Time Barred. Although time period under applicable state statute of limitations had elapsed, trustee's suit against pre-bankruptcy receiver was proper. As receiver had never filed a final accounting or been discharged, statute of limitations had not yet begun to run. *Riley v. Decoulos (In re Am. Bridge Prods.)*, 2010 U.S. App. LEXIS 5019 (1st Cir. Mar. 10, 2010).

Pennsylvania Supreme Court Rules on Certified *In Pari Delicto* Questions. On questions certified by the Third Circuit, the Supreme Court of Pennsylvania concluded that 1) the proper test to determine the availability of defensive imputation in scenarios involving non-innocents depends on whether or not the defendant dealt with the principal in good faith. While one of the primary justifications for imputation lies in the protection of innocents, in Pennsylvania, it may extend to scenarios involving auditor negligence, subject to an adverse-interest exception, as well as other limits arising out of the underlying justifications supporting imputation. Imputation does not apply, however, where the defendant materially has not dealt in good faith with the principal; and 2) the *in pari delicto* defense may be available in its classic form in the auditor-liability setting, subject to ordinary requirements of pleading and proof (including special ones related to averments of fraud where relevant), and consideration of competing policy concerns. However, as noted, imputation is unavailable relative to an auditor which has not dealt materially in good faith with the client-principal. This effectively forecloses an *in pari delicto* defense for scenarios involving secretive collusion between officers and auditors to misstate corporate finances to the corporation's ultimate detriment. *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PricewaterhouseCoopers, LLP*, 989 A.2d 313 (Pa. 2010).

Ohio Appellate Court Upholds Receiver's "Free and Clear" Sale. Trial court's approval of private sale of receivership property free and clear of junior lien interests affirmed. For more information, see "Ohio Court of Appeals Decides Courts May Authorize Receiver's Sales Free and Clear of Liens," by Susan Argo and Zachary Prendergast, in the current edition of the TACR Quarterly.