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FACING THE ISSUES® Legal Briefs from the Attorneys of Mackall, Crouse & Moore, PLC

Creditors' Corner

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FUNDS IN JOINT BANK ACCOUNT AS RESULT OF A WEDDING GIFT ARE NOT AUTOMATICALLY SUBJECT TO FULL LEVY IN COLLECTION EFFORTS AGAINST ONLY ONE SPOUSE

Phillips v. Messerli & Kramer, P.A., et al., Case No. 08-4419, District of Minnesota, November 20, 2008, arose under the Fair Debt Collection Practices Act and other claims against a law firm collecting on a judgment. Specifically, a non-debtor plaintiff claims the law firm wrongfully levied on a joint account he held with his judgment debtor spouse. The couple stated that the deposits in the joint account were the result of wedding gifts. The non-debtor spouse sued for wrongful levy and conversion of his funds. The case involved the application of the Minnesota Multiparty Accounts Act in regards to joint accounts. The Act provides that a joint account belongs to each party in proportion to their net contributions to the account. Relying on the recent *Enright v. Lehman* case from the Minnesota Supreme Court, the District Court denied the law firm's motion to dismiss and held that the burden was on the law firm to prove by clear and convincing evidence that funds in a joint account were intended by the non-debtor depositor to belong to the debtor.

ARBITRATION CLAUSE ENFORCED AGAINST A BANKRUPTCY TRUSTEE

In *Moglia v. Pac. Employers Ins. Co.*, decided on November 6, 2008, the Seventh Circuit Court of Appeals enforced a mandatory arbitration clause against a Trustee in a bankruptcy-related action in which debtor's trustee sought partial release of letters of credit issued by debtor to defendants-insurers. Defendants sought enforcement of the mandatory arbitration clause through which the debtor had previously agreed with the insurers to arbitrate all disputes. The agreement also included a requirement that the debtor sign a hold-harmless agreement in favor of the arbitrator. The District Court upheld the arbitration clause. The Seventh Circuit held that: 1) Trustee could be required to sign the arbitrator's hold-harmless agreement; 2) an appeal from the order to sign the agreement was interlocutory in nature, and appellate review was not available; and 3) the court could not review the order under the doctrine of pendent appellate jurisdiction. This Seventh Circuit case continues the trend that enforces arbitration agreements in bankruptcy cases.

The Creditor Remedies attorneys at MCM have litigated the enforceability of these provisions at various court levels and represented numerous parties in arbitration matters.

INTERCREDITOR AGREEMENTS: BUYOUT CLAUSES

In prior issues of this newsletter we have discussed the rise of second lien lending among both investors and borrowers. The senior and junior lien facilities are usually designed to accommodate multiple participants and an agent for the groups is usually provided for. To secure the senior position against junior debt a subordination is required that generally allows senior debt to unilaterally administer the facility and allows for payment of the senior debt in full, including costs and attorney fees, before junior liens receive any distribution. This arrangement may not always satisfy the junior lien holders where the perceived equity is likely to be used up by the methods and timing applied by the senior debt.

To protect against this type of dispute, an intercreditor agreement may provide for a "buyout" which allows junior debt to pay off senior debt in full and assume the senior position and interests. When the junior creditors execute this provision a number of issues arise, not the least of which is that a notice of intent to execute the buyout may be irrevocable. Before the exercising the buyout, the junior creditors need to organize under a written agreement to determine commitment, allocation, who is "in", and agree on instructions to a junior lien agent. Indemnification issues should be addressed and reaffirmations of the prior intercreditor agreement should be made.

The attorneys at MCM are prepared to provide complete advice on these transactions when events trigger disputes between senior and junior debt.



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