

"Advertising Material"

FACING THE ISSUES[®]

LEGAL BRIEFS FROM THE ATTORNEYS OF MACKALL, CROUNSE & MOORE, PLC

Creditors' Corner

Deficiency Claim Allowed Under "Hanging Paragraph."

Capital One Auto Finance v. Osborn, No. 07-1726, 2008 WL 304750, 8th Cir. February 5, 2008 (Benton, CJ); *AmeriCredit Financial Services, Inc. v. Moore*, No. 07-1315, 2008 WL 304743, 8th Cir. February 5, 2008, (Benton, CJ). In these two cases the 8th Circuit addressed whether the "hanging paragraph" eliminates an under-secured creditor's claim on a vehicle purchased within the 910-day period preceding the bankruptcy petition and turned over pursuant to a Chapter 13 plan. The decision overruled Eighth Circuit Bankruptcy Appellate Panel precedent and adopted the "minority" position.

Pointing out that BAPCPA eliminated the cram down option for 910-day cars, the Eighth Circuit stated that the surrender option in 11 U.S.C. Sec. 1325 (a)(5)(C) does not address satisfaction of the claim and that it only removes the bankruptcy code's method of bifurcation. Holding that the hanging paragraph had no effect on Missouri law, the court found that Missouri law allowed an unsecured deficiency claim. Extending the settled law that claims enforceable under applicable state law are allowed in bankruptcy unless expressly disallowed, the Court reversed the BAP and the Bankruptcy Court and awarded Capital One and AmeriCredit Financial Services an unsecured deficiency claim.

The Eighth Circuit asserted that while still a minority position, its logic is the trend and has been adopted by courts in the Seventh Circuit, Ninth Circuit, and Michigan.

Potential New Legislation

The Protecting Employees and Retirees in Business Bankruptcies Act (S. 2092) is currently pending before both the United States House of Representatives and United States Senate. Noteworthy for asset based lenders is a provision seeking to add a new category of costs that can be satisfied from a secured lender's collateral. In particular, the legislation proposes to add unpaid employee wages, accrued vacation, severance or other benefits owed pursuant to a collective bargaining agreement for services rendered after the petition date, to the list of costs necessary to preserving or disposing of property securing an allowed claim.

Also before Congress is *The Helping Families Save their Homes in Bankruptcy Act of 2008* (S. 2636). Particularly troubling is the provision authorizing bankruptcy judges to actually re-write the terms of a mortgage, upon a showing that the debtor has insufficient income to retain the residence by curing default and maintaining payments during the life of a Chapter 13 plan. If passed there will also be a new duty for mortgagees to file with the court the costs and fees it incurred during the debtor's bankruptcy. If such a filing is not made, the debtor will not be obligated to pay for those costs and fees under the terms of its plan.

Negotiable Instruments in Bankruptcy

In re Meadows, 379 B.R. 737 (Bky. S.D. Ohio, Jan. 7, 2008) – A creditor that presents a negotiable instrument without knowledge of debtor's bankruptcy does not violate the stay unless it refuses to remit payment from the negotiable instrument to the estate once it learns of the bankruptcy. In *Meadows*, a creditor made a short-term, high-interest loan to debtor. To secure repayment of \$460, the creditor required debtor to provide a negotiable instrument post-dated to the due-date of the loan. Prior to the due-date, debtor filed bankruptcy and served notice on the creditor by regular mail. Prior to receiving notice, the creditor presented the negotiable instrument for payment and received \$460. Later, the creditor received actual notice of the bankruptcy filing that occurred prior to the due-date of the loan, but the creditor refused to remit payments of the funds to the estate.

The court found the creditor's refusal to remit the proceeds constituted a willful violation of the automatic stay. While Section 362(b)(11) of the Bankruptcy Code provides that a creditor who presents a negotiable instrument after a debtor's bankruptcy filing does not violate the stay, the Bankruptcy Code does not allow the creditor to retain the payment from the negotiable instrument. The exception merely allows banks and other financial institutions to present and process the significant volume of negotiable instruments daily without having to check the bankruptcy status of each maker.



CELEBRATING 90 YEARS 1918-2008

"Advertising Material"

Wednesday, April 01, 2009 •

FACING THE ISSUES[®]

LEGAL BRIEFS FROM THE ATTORNEYS OF MACKALL, CROUNSE & MOORE, PLC

If you have any questions, please call one of the following in our MCM Creditors' Remedies group:

Timothy D. Moratzka
(612) 305-1456
tdm@mcmlaw.com

Allen E. Christy, Jr.
(612) 305-1490
aec@mcmlaw.com

Robert S. Lee
(612) 305-1448
rsl@mcmlaw.com

Patrick C. Summers
(612) 305-1473
pcs@mcmlaw.com

Stacy A. Woods
(612) 305-1409
saw@mcmlaw.com

Matthew A. Anderson
(612) 305-1401
maa@mcmlaw.com

Andrew P. Moratzka
(612) 305-1418
apm@mcmlaw.com

Mychal A. Bruggeman
(612) 305-1478
mab@mcmlaw.com

"MCM has prepared these materials for informational purposes only and not as legal advice or recommendations for specific situations. Receipt of this information does not create an attorney-client relationship. You should not act upon this information without seeking professional counsel for specific legal guidance." If you do not wish to receive future newsletters from Mackall, Crouse & Moore, please email newsletters@mcmlaw.com with the subject of Unsubscribe.

IMPORTANT NOTICE:

This email message, including attachments, is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521, and for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, copying, disclosure or distribution is prohibited. If you are not the intended recipient, please contact sender by phone or reply via email and destroy all copies of the original message. Thank you.

Any tax information contained in this email or its attachments is not intended, and cannot be used by the taxpayer or any other person, to avoid any civil or criminal tax penalties which the Internal Revenue Service or another governmental agency may impose on the taxpayer or any other person for acting in reliance upon information contained in this email or its attachments.

1400 AT&T Tower • 901 Marquette Avenue • Minneapolis, MN 55402
Telephone: 612.305.1400 • Fax: 612.305.1414
E-mail: info@mcmlaw.com • Web: www.mcmlaw.com