

Bankruptcy Law Section

News - March 2005

State Bar of New Mexico

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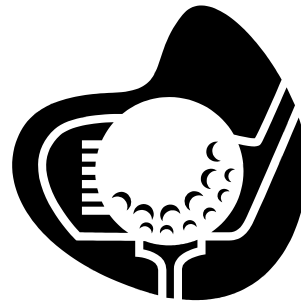
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**THE 7th
ANNUAL GOLF
TOURNAMENT
FOUR HILLS
COUNTRY CLUB
MAY 6, 2005**

MARK YOUR CALENDERS!!!!

A WORD FROM THE CLERK'S OFFICE

March 1, 2005, is now the official date for implementation of the Court's requirement for attorney and trustee filers to electronically file cases and documents in the United States Bankruptcy Court for the District of New Mexico. Training sessions are available from the Clerks office call Sharon to schedule a time.

As announced in earlier notices to practitioners, the Bankruptcy Court will begin charging for access to electronic case records available via the Internet. Currently there is no date certain for the charges to begin however, the charges may happen as soon as September 2005. Once the Court begins charging for these services court customers will need to access PACER (Public Access to Court Electronic Records) to view case records and documents, but you will continue to use ACE to submit documents electronically. If you do not have access to PACER, you are recommend to register for a PACER account. Registration is free, with no charges unless the service is used. Registration is simple and can be accomplished on-line. If you register on-line and provide credit card information on-

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UPCOMING BROWN

BAG CLE'S

TAXES, LIENS THE STATE

THE IRS AND YOU

APRIL 15TH - 12:00 NOON

CLERKS TRAINING ROOM

10TH FLOOR

NOTICE REQUIREMENTS AND HOW TO AVOID RE-NOTICING

MAY, 2005 - 12:00 NOON

CLERKS TRAINING ROOM

10TH FLOOR

(A FORMAL DATE IS FORTHCOMING)

*If you have any ideas for a brown bag
CLE you would like to see please
contact anyone on the Board*

line, you can receive a PACER account within days; if you do not provide credit card information on-line, you will receive your PACER login and password in the mail within a week. To register and for more information, go to <http://pacer.psc.uscourts.gov/>, which is the PACER Service Center homepage. You can also access PACER via **Electronic Services / Login** to PACER on the Court's homepage.

THINGS IN THE NEWS:

MORE THAN HALF OF BANKRUPTCIES FILED IN THE UNITED STATES CAN BE ATTRIBUTED TO MEDICAL BILLS:

Researchers from Harvard Medical and Law Schools wanted to know, of the approximately 1.5 million bankruptcies filed each year, how many had illness or unpaid medical bills as a big contributing factor. The researchers examined 1,771 bankruptcy filings from five different court districts all across the country, which was a representative sample of all bankruptcies. They spoke to the judges and had the debtors fill out questionnaires about the reasons for their debt, and followed this up with telephone interviews.

The research found that the debtors were working class or middle class people, 76% had health insurance when they got sick but later lost the insurance for one reason or another. A little more than half of the bankruptcies filed were caused in part by illness and medical debt. The median debt was about \$16,500 and the major part of the debt was payments to doctors and hospitals. The families initially tried to pay the debt for several months. Sixty-one percent went without needed medical care to make payments, 30 percent had a utility shut off, and 22 percent cut bank on their food. The study found that many of the individual families who thought they had full coverage medical insurance found out too late that the insurance covered only a small portion of the overall bill. As noted above many lost the insurance that they did have and were left to fend for themselves. The full article is "illness and Injury as Contributors to Bankruptcy." Himmelstein, D. U. et al. Health Affairs, Feb. 2, 2005.

NEW BANKRUPTCY LEGISLATION:

On of February 15, 2005 the Bankruptcy Bill advanced out of the Senate Judiciary Committee, propelled by a unified Republican majority and with little public debate 12 to 5. The Bill now goes to the full Senate. Senate Majority Leader Bill Frist, said debate could begin within 10 days. Republicans and many Democrats believe the bill eventually will pass. Its chief sponsor, Sen. Charles E. Grassley, predicted a final vote of 80 to 20 in its favor -- but only after a drawn-out and heated discussion on the Senate floor. Sen. Charles E. Schumer again indicated he would tie his abortion clinic rider to the bill. The rider would bar individuals from using bankruptcy to avoid paying court-imposed fines for unlawful protests against abortion and the clinics that provide the service to its patients.

The legislation's backers think the Senate Republicans' 55 to 45 majority provides the necessary margin to scuttle Schumer's attempts to attach the amendment once again. Schumer has said he will do whatever is needed to save the amendment, which could include a filibuster. As a result, both sides are counting to see whether the Republicans would have the 60 votes needed to cut off debate. Republican House leaders have said they will take up the legislation as soon as the Senate acts. President Bush has said he will sign it.

The pending bill in the Senate will be head this week.

If or when the legislation is passed the Section will provide either a brown bag seminar or a formal CLE on the resulting provisions.

CASE SUMMARIES

TAX ISSUES:

11 U.S.C. § 507(a)(8)(A)(i) & 105(a). Tolling of Three-Year "Lookback" For Priority Tax Claims and Court's Equitable Powers. *In re Tarullo*, 312 B.R. 209 (Bankr. N.D. N.Y. 1999).

Chapter 13 debtor objected to priority claim filed by the IRS, asserting that the taxes that were owed were more than three years old at the time of the filing of his

latest bankruptcy petition. The IRS asserted that the three-year priority period was tolled during the pendency of the debtor's three prior bankruptcy filings, which resulted in the IRS having only 205 days (days which were not covered by the automatic stay) during which they could have collected the taxes. The court held that the three-year "lookback" period was not automatically tolled during the pendency of the debtor's prior bankruptcy filings pursuant to the Code's provision governing extensions of time. However, the court further held that, where a debtor's prior bankruptcy filings prevented the taxing authorities from collecting a tax debt, even in the absence of a finding of bad faith, equity will generally favor the taxing authority and the court could exercise its equity powers to enter a "necessary or appropriate" order to suspend the three-year "lookback" period for priority of the tax debt.

11 U.S.C. §§ 507(a)(8); 523. IRS Claim to Recapture Erroneous Refund Is a Claim for "Taxes" Not Dischargeable in Bankruptcy. *In re Frontone*, 383 F.3d 656 (7th Cir. 2004).

Debtors received a refund for tax year preceding chapter 7 bankruptcy. After receiving their discharge, the IRS made a supplemental assessment for that tax year and sought to recoup the refund. Debtors argued that claim to recover refund was discharged as an unsecured debt in the chapter 7 proceeding. IRS successfully argued that a claim for taxes based on an erroneous refund is still a "claim for taxes" for purposes of the Bankruptcy Code's dischargeability provisions.

11 U.S.C. § 105(a); 26 U.S.C. § 7122(a). IRS Internal Policy of Refusing to Consider Offer in Compromise Frustrates Basic Bankruptcy Principles and IRS, Therefore, Must Process and Consider Chapter 13 Debtor Taxpayer's Offer. *In re Peterson*, 317 B.R. 532 (Bankr. D. Neb. 2004).

A debtor taxpayer proposed a chapter 13 plan which, in dealing with the IRS's priority claim for approximately \$102,000, proposed to make an offer in compromise which would provide for an initial payment of \$500 and then the waiver by the debtor of hundreds of thousands of dollars of loss carry forward credits. The IRS, whose internal policies provide that it will not entertain compromise offers from debtors in bankruptcy, refused to process the offer and objected to the plan. The court found that the IRS statutorily may compromise any tax obligation, 26 U.S.C. § 7122(a), and that

its internal policy is "clearly discriminatory with regard to individuals in bankruptcy." The policy was deemed merely procedural in nature and not to have the force of law. Under section 105(a) of the Code, therefore, the court ordered the IRS to process and consider the offer just as it would an offer made by an individual who is not in a pending bankruptcy case.

STUDENT LOAN DISCHARGE ISSUES:

11 U.S.C. § 523(a)(8). Bankruptcy Court Can Grant Partial Discharge of Student Loan if Debtor Proves Undue Hardship with Respect to the Discharged Portion of the Loan. *In re Miller*, 377 F.3d 616 (6th Cir. 2004).

Debtor sought undue hardship discharge. After a trial, bankruptcy court held that she failed to prove undue hardship with respect to the entirety of her loan but nonetheless discharged two thirds of her loans pursuant to its "equitable powers." District court affirmed on appeal. Court of appeals reversed and remanded, holding that the bankruptcy court cannot grant a partial discharge based upon its equitable powers. The court can grant, however, a partial discharge if it finds after trial that the Debtor has proved that paying the discharged portion would impose undue hardship.

11 U.S.C. § 523(a)(8). Confirmation of Plan Does Not Estop Collection of Student Loan Debt Unless It Expressly States that Confirmation Constitutes a Finding of Undue Hardship. *In re Poland*, 382 F.3d 1185 (10th Cir. 2004).

Tenth Circuit precedent holds that the binding effect of a confirmed plan can estop a creditor from collecting a student loan even if the debtor never commenced an adversary proceeding to procure a determination of undue hardship. The court distinguished the present case, however, on the ground that the debtor had failed to include language in the plan which expressly stated a finding of undue hardship. The court concluded that where a plan states that a student loan is discharged, but does not expressly state that confirmation constitutes a finding of undue hardship, the plan does not estop the creditor from collecting the loan.

A WORD FROM THE NEW MEXICO ATTORNEY GENERALS OFFICE

The New Mexico Attorney General's Office is investigating and prosecuting crimes against consumers arising from predatory and/or fraudulent real estate lending practices reported to it within the applicable statute of limitations. Offenses can range from misdemeanors, with a two year limitation, to a second degree felony for crimes involving more than \$20,000, which have a six year limitation. Being an unregistered loan broker is a 4th degree felony, with a five year limitation. Cases need to be reported sooner, rather than later, for cases brought to the AG's attention as the limitation nears don't allow the AG sufficient time for the investigation and development needed prior to seeking an indictment.

If any of your clients may have been the victim of illegal practices within the last few years, and are willing to testify, the Attorney General would appreciate receiving contact information and a written summary of the transaction(s). The AGO has obtained convictions and awards of criminal restitution. Please

contact Hamish Thomson, NM Attorney General's Office, 111 Lomas Blvd. NE, Suite 300 Albuquerque, NM 87102, telephone (505) 222-9000 for further information.

The AGO also investigates and attempts to resolve allegations of unfair business practices against consumers. Occasionally, where there are a significant number of victims, it prosecutes dischargeability cases using the AG's statutory authority as the basis for standing. The Consumer Protection Division has offices in Albuquerque and Santa Fe. Its staff is bilingual. Investigations are normally triggered by the submission of a written consumer complaint. More information, including FAQs, is available at:

http://www.ago.state.nm.us/divs/cons/cons_form.htm.

Complaint forms are available from either office, or from the Division's web page. The Division's toll free telephone number is 800-678-1508.



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PO Box 92860
Albuquerque, NM 87199
www.nmbar.org