

Lessons Learned in Recent Bankruptcy Cases - The Power of Words

Amundsen Davis Financial Services Alert

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"Without knowing the force of words, it is impossible to know more."
Confucius

This long standing phrase reminds us that words have power and impose legal obligations. Several recent cases illustrate the risks of taking words lightly.

- A Massachusetts Bankruptcy Court found that a guarantor who pays off a secured lender's claim can step into the position of the secured lender. *In re Morrison*, 2016 WL 4512164 (Bankr. D. Mass. 2016). Paul Serino and Daniel and Julie Morrison took out a loan to finance a small business. After default, the lender asked Mr. Serino to pay the debt, and he did so. The Morrisons filed bankruptcy, and Mr. Serino asserted that he held the status of a secured creditor, having paid off the lender's debt. The bankruptcy court determined that Mr. Serino was entitled to be treated as a secured creditor. **Lesson: paying the bank has its benefits.**
- A secured lender who failed to file a proof of claim in a bankruptcy case could not recover any payments during the course of the case. *In re Jones*, 2016 WL 4691043 (Bankr. N.D. Ind. 2016). Grant County State Bank made a mortgage loan to James and Amy Jones. The Joneses filed bankruptcy and listed their debt to the bank. The bank failed to file a proof of claim. The bankruptcy court held that the bank was not entitled to receive any payments during the case and had to wait until the conclusion of the sixty month plan before it could pursue its rights against the Jones' home. **Lesson: deadlines matter.**
- Another Massachusetts Bankruptcy Court reminded a debtor about the power of waivers. *Burm v. Johnson (In re Burm)*, 554 B.R. 5 (Bankr. D. Mass. 2016). In *Burm*, the debtor asserted several defenses against claims filed by Johnson in her bankruptcy case, including an alleged violation of the Equal Credit Opportunity Act (ECOA). The court waded through the long and tortured history of the parties' dealings to conclude that the ECOA did not apply to the transactions between the debtor and Johnson. Even if the ECOA did apply to the transactions, the court held that the debtor had no right to bring an action based upon the language of an executed forbearance agreement. The agreement provided that the debtor "waive[d] ... each and every defense,

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setoff and/or counterclaim to the payment of the[] liabilities..." and released Johnson from "any and all claims." 554 B.R. at 22. The court found that this waiver prevented any recovery under ECOA and did not provide a defense to enforcement of Johnson's claim. **Lesson: lenders should request the waiver of claims in every forbearance agreement.**

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