

Creditors, Stay Alert! You May be Able to Collect Undistributed Funds from the Trustee
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In a recent case, decided by the Bankruptcy Court, Middle District of Florida, In re Fischer, 432 B.R. 863 (Bankr. M.D. Fla. 2010), the Court held that a creditor in a Chapter 13 bankruptcy case could garnish undistributed funds in the Chapter 13 trustee's possession. A summary of the Fischer case is discussed below.

In Fischer, the debtor filed a Chapter 13 bankruptcy case and the Court entered an order (referred to as the "Dismissal Order"), dismissing the debtor's Chapter 13 case when the debtor could no longer make timely monthly payments to the Chapter 13 trustee and directing the Chapter 13 trustee to turn over to the debtor any undistributed funds in the Chapter 13 trustee's possession. Id. at 864. After the Dismissal Order was entered by the Court, a creditor of the debtor, Chase Bank, received a Writ of Garnishment from a Florida state court as a result of being a judgment creditor and served the Writ on the Chapter 13 Trustee, seeking to garnish the undistributed funds in the Chapter 13 trustee's possession. Thereafter, the debtor filed a notice with the Court, requesting to convert the Chapter 13 case to a Chapter 7 case and the Court granted the conversion. Id.

The Chapter 13 trustee then filed a Motion to Determine Whether an Order of the Court to Turn Over Funds to the Debtor Can be Superseded by a Writ of Garnishment Issued by Another Court (referred to as the "Trustee's Motion"). Id. In its consideration of the Trustee's Motion, the Court in Fischer explained that section 1326(a) of the Bankruptcy Code requires a Chapter 13 trustee to forward to the debtor any remaining funds upon dismissal of the bankruptcy case, absent any exceptions. Id. at 865. The Court in Fischer also noted that the bankruptcy courts are split as to whether a creditor can garnish funds intended for the debtor but in the possession of the trustee. The bankruptcy courts prohibiting such garnishment reason that it should not be allowed pursuant to the plain meaning of section 1326(a)(2) of the Bankruptcy Code and public policy concerns. Id. Section 1326(a)(2) provides in pertinent part: "the trustee shall return any such payments not previously paid and not yet due and owing to creditors...to the debtor." *See*, 11 U.S.C. § 1326(a)(2). To the contrary, the bankruptcy courts permitting such garnishment reason that it should be allowed because the automatic stay in place upon the filing of the bankruptcy case lifts upon the dismissal of the bankruptcy case, the bankruptcy estate terminates upon the dismissal of the bankruptcy case, and the bankruptcy trustee retaining any funds belonging to the debtor becomes "in effect a debtor of the debtor." Fischer, 432 B.R. at 865.

The Court in Fischer agreed with the reasoning set forth by the courts allowing the garnishment. Id. The Court reasoned "[i]f the trustee is holding funds that belong to the debtor, viz-a-viz a third party creditor with a writ of garnishment, the trustee is just like any other 'debtor of the debtor,' and a creditor should not be prevented from garnishing such funds." Id. The Court also explained that nothing in the Bankruptcy Code prevents garnishment nor prohibits a trustee from complying with a writ of garnishment. Id. The Court held that the Bankruptcy Code permits garnishment of funds held by a Chapter 13 trustee after dismissal of a case, concluding "[i]f a diligent creditor's attorney serves a writ of garnishment on the trustee between

dismissal and the time it takes for the trustee to administer the estate and return any leftover funds to the debtor, the creditor should be allowed to garnish such funds." Id. at 865-6.

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