If a Debtor Fails to Disclose a Pre-Petition Lawsuit, Is it an Asset of the Bankruptcy Estate?
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Scenario: A debtor files for bankruptcy and does not disclose on his bankruptcy schedules that he filed a pre-petition lawsuit. After the bankruptcy case closes, the debtor is awarded a judgment in his favor in the lawsuit. Is that judgment deemed an asset of the bankruptcy estate or does the judgment belong to the debtor?

You may be surprised by this answer, but according to the applicable case law, the judgment in the above scenario will likely be deemed an asset of the bankruptcy estate, even though the bankruptcy case has already been closed. Upon learning of the judgment in the debtor's favor, the bankruptcy trustee may move to reopen the bankruptcy case to administer assets of the bankruptcy estate.

In order for said judgment to belong to the debtor, the bankruptcy trustee would have had to abandon the bankruptcy estate's interest in the pre-petition lawsuit.

According to the applicable case law, there are 2 types of abandonment: 1) "express abandonment" which is sought by motion of a party in interest directed to the bankruptcy trustee, or through a general notice issued by the bankruptcy trustee - in either case, notice and a hearing, or an opportunity for a hearing, is required, in accordance with 11 U.S.C. §§ 554(a) and (b); or 2) "technical abandonment" whereby property of the bankruptcy estate is properly scheduled by the debtor but not administered by the bankruptcy trustee by the time of closing, in accordance with 11 U.S.C. § 554(c). *See*, In re Davis, 2002 WL 33939739, 4-5 (Bankr. D. Idaho 2002).

In In re Davis, 2002 WL at 4-5, the debtor filed for bankruptcy and the debtor's Schedule B did not disclose any assets in the nature of suits or causes of action; however, the debtor's Statement of Financial Affairs disclosed the existence of four lawsuits against the debtor. Following the closing of the bankruptcy case, a number of developments occurred in the state court cases. As a result, the bankruptcy case was reopened. The Bankruptcy Court held that there was no express abandonment of any of the debtor's causes of action or claims against creditors or other parties, and the Court held that there was "no technical abandonment of any of the claims, counterclaims, or causes of action because no such assets were ever scheduled." Id. at 5. The Bankruptcy Court in Davis also stated that "[t]he Trustee's knowledge of some of these claims through means other than the schedules is not sufficient to trigger the technical abandonment provisions of § 554(c)." Id. at 6. The Bankruptcy Court concluded that the "debtor never scheduled, and the Trustee did not expressly, technically or otherwise abandon any prepetition claims, causes of action…or similar assets as to any other parties. Such claims remained property of the estate despite the closing of the case." Id. at 8.

Other cases have provided similar reasoning with respect to abandonment by a bankruptcy trustee. In In re Bryson, 53 B.R. 3, 4 (Bankr. M.D. Fla. 1985), the Bankruptcy Court held that "property is not deemed abandoned where the property is unscheduled by the debtor, thus preventing the trustee from having knowledge…of its existence." In In re Miller, 347 B.R. 48, 53 (Bankr. S.D. Tex. 2006), the Bankruptcy Court opined that "an asset that is not listed in a debtor's schedules or otherwise disclosed and administered remains property of the estate. It is

not abandoned when the case is closed." The Court in Miller stated further "[i]t would be truly unjust, and a source of endless mischief, if a debtor could deny to the trustee the right to pursue assets merely by failing to list the assets in Bankruptcy Schedules." Id. at 53-4.

In the above scenario, the bankruptcy trustee could not have technically abandoned the pre-petition lawsuit because it was never disclosed by the debtor on the debtor's bankruptcy schedules; moreover, the bankruptcy trustee did not expressly abandon the lawsuit since no notice of abandonment was filed with the court because while the bankruptcy case was open the bankruptcy trustee had no knowledge of the lawsuit. Therefore, with respect to the above scenario, the judgment entered in the debtor's favor would likely be deemed an asset of the bankruptcy estate, despite the closing of the bankruptcy case. As a result, if a debtor hopes to retain any assets or interests he or she may have when they file a bankruptcy case, it is imperative that the debtor disclose all assets and interests on their bankruptcy schedules, so that the bankruptcy trustee has the opportunity to abandon those assets and interests if the trustee chooses to do so, or alternatively, the debtor may buy back the assets from the bankruptcy estate.

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