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Eighth Circuit BAP Addresses What Is Property of the Estate When There Are Multiple Bankruptcies

Eighth Circuit Bankruptcy Monitor

In *Boisaubin v. Blackwell (In re Boisaubin)*, the Eighth Circuit BAP (Judges Sanberg, Nail, Saladino) affirmed the Bankruptcy Court's (Judge Rendlen) orders approving a compromise and denying motions to file documents under seal. In so doing, the Court addressed whether an asset that was estate property in a prior case by the debtor, but which was never scheduled, becomes estate property in a later case by the same debtor once the first case is reopened and the asset abandoned. The Court answered that the asset becomes part of the second bankruptcy estate even though the asset itself was not the property of the debtor at the time the second case was filed.

In 1990, the debtor and his then-wife filed a voluntary petition for relief under chapter 7 in Illinois. That no-asset case resulted in a discharge in 1990 and the case was closed in 1990.

In 2009, the debtor filed a voluntary petition for relief under chapter 7 in Missouri. That no-asset case resulted in a discharge in 2009 and, apparently, was closed sometime around then as well.

In 2014, the debtor filed an action in Missouri state court against a church organization alleging that he had been sexually assaulted in the 1970s but that he had no memory of the assault until 2012.[1] Naturally, the debtor had not disclosed this claim in his prior bankruptcies because he did not remember he had it. The defendant in the state court action moved for summary judgment based on the debtor's lack of standing, arguing that the claim was and remained property of the bankruptcy estate created in the Illinois case.

In response, the debtor caused the Missouri case to be reopened in June 2017. A month later he sought to reopen the Illinois case. That ultimately was done and he scheduled the claim. The trustee in the Illinois case filed a report of no assets, and the case was again closed. That left only the Missouri case open.

In the Missouri case, the trustee sought to compromise the claim against the church organization. The parties reached settlement and moved for court approval of same. The debtor objected. In the course of briefing, the parties sought to file certain exhibits under seal. The bankruptcy court granted the motion to compromise but denied the motions to seal. The BAP affirmed. The BAP's discussion of the motions to seal and its affirmance of the bankruptcy court's determination that the compromise was within the range of reason broke no new ground and will not be addressed further here.

More interesting is the BAP's ruling on the debtor's primary objection to the motion to compromise: that the claim was not, in fact, property of the estate. He reasoned that because the claim existed back in 1990 but was not scheduled in the Illinois case, it remained property of that estate once that case was first closed and was not at that time deemed abandoned by operation of section 554(c) or (d). The parties agreed on at least that point and so apparently did the bankruptcy court and the BAP. The debtor then argued, however, that once the Illinois case had been re-opened, the claim scheduled, and the case closed without the claim otherwise having been administered, the claim was at that time deemed abandoned to him under section 554(c). And, because the Missouri case had already begun (and been reopened) by the time the claim was abandoned from the Illinois estate, it became his property and not that of the Missouri estate.

The BAP did not reject the debtor's argument wholecloth. It agreed that at the time the debtor began the Missouri case, the claim was property of the Illinois estate and not property of the Missouri estate. The BAP disagreed as to the importance of this fact, though. The BAP found that at the time the Missouri case was filed, the debtor (and thus, upon filing, his Missouri estate) held a "contingent reversionary interest" in the claim "because it had not yet been administered and remained property of the estate" in the Illinois case. Once the trustee "chose not to administer the [claim] in the [Illinois Bankruptcy], however, it revested in the entity that held the contingent reversionary interest" in the claim – the Missouri estate.

This ultimate result – that the claim wound up in the Missouri estate – seems the fair and equitable one. But one could conceive of an alternate path to get there. After all, section 554(c) states that scheduled but otherwise unadministered property is "abandoned to the debtor and administered for purposes of section 350," not that the property is abandoned to the person with the highest priority possessory interest in it. The BAP might have concluded that section 554(c) operates according to its plain language and the claim was abandoned to the debtor, not to his Missouri estate. By that point, though, the estate's contingent reversionary interest would have ripened into a current interest and the trustee could have compelled turnover of the claim from the debtor. While this route potentially would require an extra (and, one would hope, unnecessary) step, it arguably would track closer to the language of section 554(c).

One also could imagine a third route, though. The BAP found the debtor (and then his Missouri estate) had a contingent reversionary interest in the claim while the claim was in the Illinois estate. But did he actually have a property interest in the claim at all while it was part of the Illinois estate? In support of its finding he did, the BAP cited a Supreme Court decision that in turn cited the Restatement (First) of Property. There, a "reversionary interest" was said to be "any future interest left in a transferor or his successor in interest" that arises when the grantor "transfers less than his entire interest" and it is "either certain or possible that [the grantor] will retake the transferred interest at a future date." This all raises some questions.

First, whether something is property, for purposes of bankruptcy, typically is determined with reference to applicable state law. What law would apply to make that determination in this instance, Missouri law or Illinois law? Do Missouri and Illinois adhere to the Restatement (First) of Property on this issue or would they treat the matter differently? It does not appear any party briefed the issue.

Second, what if the BAP had found the debtor had no reversionary interest in the claim that could become a part of the Missouri estate, such as if applicable state law considered the debtor's interest in the claim too remote to amount to a property interest? Does that mean the Missouri estate would be out of luck? Certainly any theory to recover the claim for the Missouri estate would have to be more creative than a simple turnover action.

All things considered, while one reasonably might argue about the particular path the BAP took to reach the outcome here, the outcome itself appears to be absolutely correct under the facts of the case.

This blog post was drafted by Ryan Hardy, an attorney in the Spencer Fane LLP St. Louis, MO office. For more information, visit www.spencerfane.com.

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[1] Missouri has a statute that tolls the statute of limitation on sexual assault claims while the memory of same is repressed. I'm sure there's more nuance to it than that, but this is about bankruptcy.