

This is the twentieth in my series of newsletters. Due to your great interest, I plan to continue this quarterly report for my clients.

## **BANKRUPTCY AND YOUR DRIVERS LICENSE**

After the US Supreme Court decided Seminole Tribe of Florida v Florida, 517 U.S. 44, 116 S Ct 1114, 134 L. Ed.2d 252 (1996), there were serious questions whether bankruptcy courts have subject matter jurisdiction over States.

Prior to Seminole, when a debtor filed Chapter 13 for motor vehicle surcharges, The Division of Motor Vehicles would restore the driver's license if it were only due to surcharges.

Presently, the Division of Motor Vehicles will restore your license but there are serious issues regarding the State of NJ's sovereign immunity.

Since Seminole even though The Division of Motor Vehicles will give back the license, they refuse to file proofs of claims in bankruptcy court and may challenge the discharge down the line.

A very recent decision decided by Honorable William H. Gindin USBJ is In Re Havens, 229 B.R. 613 (Bankr. DNJ 1998). The Havens case dealt with 3 major issues, but that major issue in my opinion is whether a federal bankruptcy case can discharge State of NJ DMV surcharges.

Judge Gindin concluded as follows: The Bankruptcy Court is barred from exercising jurisdiction over a state or its agencies; however, the Supremacy clause imposes a duty on a state court to apply federal bankruptcy law in determining the validity of the discharge of the DMV claims despite the asserted sovereign immunity defense of the DMV. 229 B.R. at 630.

Havens says that a debtor has no ability to bring the State of NJ into the Bankruptcy Court. However, surcharges are dischargeable in Chapter 13 and a debtor may have to go into state court to enforce the Bankruptcy Code under the Supremacy clause.

Currently, the moment you file Chapter 13, your license will be restored if it is only for surcharges.

Please note other judges have held that the Bankruptcy Court lacked subject matter jurisdiction to order either a Municipal Court or DMV to reinstate debtors driving privilege. See, In re Burkhardt, 220 B.R. 837 (Bankr. DNJ 1998). In Burkhardt, the debtor's plan proposed discharge of fines and surcharges plus the goal of rescinding a driver's license suspension order.

However, Judge Tuohey held that the court had subject matter jurisdiction to confirm the debtor's plan even though the DMV failed to participate by filing a proof of claim or otherwise entering an appearance.

Please note that Judge Tuohey's position is a minority position denying subject matter jurisdiction over municipal courts.

Please note Judge Gindin, Judge Stripp and Judge Wizmur have questioned the ruling in Burkhardt regarding sovereign immunity of municipalities.

In, In re Raphael, 1999 Bankr Lexis 130 (Feb 4, 1999), Judge Wizmur held that the Bankruptcy Court had subject matter jurisdiction over Clementon Municipal Court and that a suit against a municipal court is not a suit against the State of New Jersey.

Judge Gindin supports Judge Wizmur's rationale in In re Havens, supra where he stated the following:

"The Eleventh Amendment immunity extends only to states, arms of the state or state officials or agents and does not extend to counties, Municipal corporations or other independent agencies."

Remember that surcharges are non-dischargeable in Chapter 7 In re Kish, 221 B.R 118 (Bankr DNJ 1998). Thus, surcharges are only dischargeable in Chapter 13. Thus, you can get your license back ONLY in Chapter 13 regardless of whether DMV participates in the bankruptcy by filing a proof of claim. Based on Havens, if the State fails to participate then the debtor may have to enforce the discharge in State Court.

Finally, a recent case was decided by Judge Stripp in an unpublished opinion is In Re Egan, 97-51181 (March 31, 1999). In Egan the debtor was fined \$1805 for traffic violations and proposed payment of fines as unsecured debt. The township neither filed a claim nor raised an objection at the Confirmation Hearing.

After the debtor's petition was filed he sought reinstatement of his license; however, DMV would not reinstate the debtor's license until the Township issued a release as to the fines. After the debtor paid the fine, his license was reinstated and he filed a Motion for Turnover of Fines Paid plus sanctions and counsel fees Id. at pps 2-3.

Judge Stripp found that motor vehicle violations are quasi criminal in nature and fines imposed are punitive. Judge Stripp relied on In re Cuevas, 205 B.R 457 Bankr. CD NJ 1997) holding that fines are excepted from 11 USC 362 (b)(1), since they are quasi criminal in nature Id. of 3.

Since fines are criminal in nature, they are excepted from discharge under section 1328 (a)(3).

The two conclusions to draw from these cases are as follows: Motor vehicle surcharges are dischargeable in Chapter 13 and you can get back your license if the only basis is surcharges: however, based on Cuevas and Egan since fines are quasi criminal, they are not dischargeable. Some judges may allow you to pay the fines in full in your Chapter 13 Plan; however, other judges may not allow this classification. Thus, my answer is to take care of the fines outside of the bankruptcy and put the surcharges in the plan to reinstate your driver's license.

## **BANKRUPTCY ALERT FOR TENANTS**

When you are behind in your rent, the landlord will file a complaint to evict you in Superior Court.

If you appear in court and don't have the money to catch up on the rent arrears, the landlord will get a Judgment of Possession.

If you are behind and can't catch up on the back rent, you should immediately file a Chapter 13 bankruptcy before the court date in Superior Court; however, you can still file a petition even after a Warrant of Removal has been issued until you are locked out.

Most of my clients put themselves in a terrible position by allowing the landlord to obtain the Judgment of Possession and then make a payment arrangement. This leaves no protection for the tenant since the landlord is in the driver's seat and can continue with the eviction, if the tenant doesn't meet the Landlord's payment arrangement.

Chapter 13 will get the landlord off your back immediately. You should file if you cannot come up with the back rental arrears.

A Bankruptcy Stay will stop the eviction proceeding and then you will resume your rent payment the month after the filing and start your Trustee payments to catch up on the rent arrears.

Also, the Chapter 13 can help you deal with all other creditors from credit cards, car payments and even motor vehicle surcharges to get back you license.

Remember most landlord's have attorneys representing their interest; shouldn't you call me to find out how I can help you stay in your residence.

If you have any questions, feel free to contact me.

## WHICH OPTION IS BETTER —CHAPTER 7 OR CHAPTER 13

The whole purpose behind Chapter 7 is to help honest people to get a fresh start. However, you do not want to be in Chapter 7 if you are behind on your mortgage, rent, car payments or have too many assets. Also, if your monthly net income exceeds your monthly expenses then you won't be able to do a Chapter 7.

Under the exemptions, a debtor is allowed \$16,150 exemption for real estate. What this means is if you have more than \$16,150 equity in your home after doing a liquidation analysis, the Chapter 7 Trustee would sell the home. So you don't want to file a Chapter 7 since you would lose your home.

Also, if you are behind on car payments, or rent payments, a Chapter 13 will allow you to catch up on the arrears.

Also, if you have motor vehicle surcharges, only by filing a Chapter 13 will you get back your license. In Chapter 7 motor vehicle surcharges cannot be discharged. The authority of the case law in our District has established that the motor vehicle surcharges may also be discharged in Chapter 13.

Another situation where a Chapter 13 would be beneficial is if you are behind on the taxes to the IRS, State of NJ or the Township. I find Chapter 13 much more effective to deal with IRS problems than Chapter 7 since tax debts over 3 years old are not automatically dischargeable without getting a court order.

Also, you do not want to do Chapter 7 if you own too much property since the Chapter 7 Trustee will sell any of your property over the exemptions.

Please note: In Chapter 13 you will not lose any property if you are over the exemptions; you will only have to pay unsecured creditors what they would receive in a Chapter 7 case. However, you are only eligible for Chapter 13 if your secured debt is less than \$807,750 and they are noncontingent, and liquidated. You must have noncontingent, liquidated unsecured debts of \$269,250 on the date of filing.

Also, if not counting credit card debts, you have excess income over expenses, Chapter 7 will not be permitted. Under the proposed legislation, if you make over a certain income, (means test), you will have to file Chapter 13.

Finally, since Chapter 13 has a broader discharge than Chapter 7, you may want to consider Chapter 13 if you've been running up your credit cards to live when you really didn't have the ability to pay back the debt.

If you have any other questions, regarding the differences between Chapter 7 and Chapter 13, please feel free to contact me.

## **LET ME ANSWER ALL YOUR QUESTIONS**

As my law practice continues to grow, I hope to help you in all areas of the law where I have helped my other clients. Remember, even if I am not familiar with a specific area of the law, I work with other lawyers who are well qualified to handle these matters. Therefore, if you have any question on any legal matter whatsoever, please ask me about it.

## **IF YOU LIKE MY WORK, SPREAD THE WORD.**

I appreciate the confidence my clients show by referring new business to me. Such referrals are my largest and best source of new clients. Please let me know if you have a friend or relative who needs legal assistance or who would like to receive one of my quarterly newsletters.

I sincerely appreciate all the referrals from so many of you over the past several years. Thank you for your continued confidence and good will.

If you would like me to speak at your organization or place of worship, feel free to contact me.