

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

## **LANDLORD TENANT LAW AS IT AFFECTS BANKRUPTCY**

Under New Jersey law if a tenant doesn't pay his rent on a timely basis a landlord may move to evict a tenant under N.J.S.A. 2A:18-53, 2A:18-61.1 See In re Dicamillo, 206 B.R. 64 (Bankr. D.NJ 1997)

The tenant has until the Court date to pay his rental arrears or a judgement of possession is entered. The landlord is then statutorily allowed to have a warrant of removal issued three days later pursuant to N.J.S.A. 2A 18-57. The warrant thereafter may be executed three days after its issuance. N.J.S.A 2A:42-10.16.

Many people do not seem to realize that if they don't have all the funds by the Court hearing, the landlord obtains a judgement of possession. Many tenants think that everything is fine since they have a verbal agreement with their landlord. However, this is not the case. Unless there is something protecting the tenant in writing the landlord can then apply for a warrant of removal and hold it over the tenant's head.

The only REAL protection is a bankruptcy Stay unless the tenant has all the money and can make the necessary hardship Stay of eviction under N.J.S.A. 2A:42-10.6 which buys the tenant up to an additional 6 months. But, THE TENANT MUST HAVE ALL THE BACK RENT. However, winning a hardship application doesn't revive the lease since the tenant "may nullify the judgement of possession only if he pays the amount found due and owing on the day judgement is entered." Stranger v Ridgeway, 171 N.J. Super 466 at 473 (App. Div 1979) quoted in 206 B.R. 64 at 67.

After a lengthy analysis Judge Wizmur concluded that even after a lease is terminated under New Jersey State Law, a tenant still has a possessory interest and may assume his unexpired lease under section 365(a) of the bankruptcy code. 206 B.R. at 71. Finally, the lease cure must be prompt and there must be adequate assurance that the default would be promptly cured ld. at 72.

My biggest concern is that tenants call me on a regular basis and just don't realize that there is nothing binding with their landlord (unless a detailed written agreement is entered into) after a Judgement of Possession is entered.

Only a bankruptcy Stay will prevent the landlord from executing the warrant of removal. The Chapter 13 bankruptcy will not only put the tenant on an even footing with the landlord but will allow the tenant to get all creditors off his back.

Remember, Chapter 13's goal is not to wipe out the debt but to restructure your debt and pay back rent arrears owed over a bankruptcy Plan. If you are behind on your rent or being sued, DO NOT DELAY. The earlier you call my office, the quicker we can protect you from your landlord or any other creditors.

### **HOW BANKRUPTCY CAN HELP YOU RESTORE YOUR DRIVER'S LICENSE AND BE A DEFENSE TO NJSA 39:3-40.**

Over the past several years I have discussed the development of sovereign immunity and license restoration. Under the present state of the law, if your driver's license is suspended solely due to insurance surcharges, Chapter 13 will help you restore your license.

The procedure is as follows: As soon as you file a Chapter 13 Petition, you take the entire petition to the Division of Motor Vehicles and pay your restoration fee. If there is no other reason your driver's license is suspended, you will immediately get your license restored.

Another very important point to understand is that Chapter 13 bankruptcy may help you if you are ever pulled over by a policeman for driving on the revoked list.

Driving on the revoked list, N.J.S.A 39:3-40, is an extremely serious charge since you may lose your license for up to six months and be fined \$500 plus court costs. A second offense carries the same maximum six month license suspension and a \$750 fine plus court costs: Finally, a third or subsequent offense carries up to six month loss of license, \$1,000 fine plus costs and a MANDATORY TEN DAYS IN JAIL. If your license was suspended for an insurance surcharge, there is an additional \$3,000 fine. If you are involved in an accident with an injury to another party there is a MANDATORY 45 DAYS IN JAIL.

Finally, if your license was suspended due to a conviction for drunk driving (N.J.S.A 39:4-50), or no insurance (N.J.S.A 39:6B-2) there are serious enhanced penalties with addition license suspension, fine and jail in the case of a 39:4-50, or possibility of jail for 39:6B-2.

As you can see, these penalties can be rather serious.

HOW DOES CHAPTER 13 HELP YOU? From my experience, even if you were “technically” guilty of driving while your license was suspended, most police officers will downgrade the offense to unlicensed driver if you get your license restored.

As I previously explained, if your license was only suspended because of surcharge, Chapter 13 will get your license restored.

Thus, Chapter 13 will not only get your license restored but may save you substantial penalties under N.J.S.A 39:3-40.

If you are charged with N.J.S.A. 39:3-40, please contact me immediately to see how I can help you with the charge and possibly get back your license.

**THERE IS NO PROHIBITION AGAINST FILING CHAPTER 13 EVEN IF YOU HAVE PREVIOUSLY FILED BANKRUPTCY.**

Many of my clients, due to circumstances outside of their control, incur financial problems after they are discharged from Chapter 7 or continue to be in default on their mortgage since their Chapter 13 was dismissed for non-payment.

If there is a positive change of circumstances, you are allowed to file another Chapter 13 after one case is dismissed for non-payment or completed. In addition, you may file a Chapter 13 after a Chapter 7. PLEASE NOTE, currently the US House of Representatives and the Senate have passed new Bankruptcy bills which still haven't become Law. If the new law passes, substantial changes will go into effect.

Many clients have been discharged from a prior Chapter 7 where they stayed current with their mortgage or car payments and now suddenly fall behind. At present, there is no prohibition against saving the home or car by filing a subsequent Chapter 13.

Also if you successfully completed a prior Chapter 13 and have fallen on hard times, you can file a new bankruptcy petition.

The ONLY current prohibition is that you cannot file consecutive Chapter 7 petitions until six years from your previous discharge. For example, if you filed a Chapter 7 on January 28, 1994 and received a discharge on May 10, 1994, you would not be eligible to file another Chapter 7 until May 11, 2000, since you have to wait six years from the date of DISCHARGE to refile. However, if you had a creditor really pressing you, you would be allowed to file a Chapter 13 after May 10, 1994.

Thus, if you received a Chapter 7 discharge on May 19, 1998 and the mortgage company began to foreclose in February 2000, currently there is no prohibition against filing a new Chapter 13 petition to stop the foreclosure.

Similarly, if you had a prior Chapter 13 petition which was dismissed on January 26, 2000, and your home is scheduled for Sheriff Sale on April 6, 2000, you are allowed to file Chapter 13 again as long as your circumstances have improved. Please note you cannot just refile to delay when you have no intention or ability to comply with your Chapter 13 Plan.

I have had other clients who were discharged from Chapter 7 in 1998 and have incurred substantial credit card debt again. The clients were discharged from Chapter 7 on May 26, 1998 and now Sears is ready to garnish their wages. Since the discharge was granted within the last six years, they are not eligible to file another Chapter 7 in 2000; however, they can pay a small percentage of their unsecured debt back under Chapter 13 and stop the wage garnishment.

If you have any other questions regarding you eligibility to refile bankruptcy always feel free to contact me.

**BANKRUPTCY LAW ALERT. MOTOR VEHICLE SURCHARGES ARE TREATED AS UNSECURED RATHER THAN PRIORITY DEBTS.**

As previously discussed if your drivers license is suspended only for motor vehicle surcharges, filing a Chapter 13 bankruptcy will allow you to restore your license.

The major legal issue that was confronting courts for months was how motor vehicle surcharges were to be treated. Should they be treated as a priority claim and be paid in full which is required under the bankruptcy code; or could they be treated as general unsecured claims and be paid nothing or a small percentage of a debtor's disposable income?

Two very recent cases were decided by Judge Wizmur and Judge Burns holding that motor vehicle surcharges are not "excise taxes" under 11 USC 507(a)(8)(e) but rather general unsecured claims.

In the matter of Anibal DeJesus, 99-14723 (Dec. 21, 1999), Honorable Judith H. Wizmur concluded "that motor vehicle surcharges imposed against the debtor are excise taxes entitled to priority treatment would unfairly elevate the State's claim against the debtor, and serve not to punish the debtor but rather his innocent creditors."

“Debtor’s objection to the proof of claim by the DMV, designating its claim as a priority claim, is sustained. The claim will be reclassified as a general unsecured claim.” Id. at 29.

Similarly in In re Nicholas Marcussi, 99 17406 (Dec. 29, 1999), Honorable Gloria M. Burns held that motor vehicle surcharges do not qualify as “excise taxes.” Id. at p.34 After a thorough analysis, she concluded as follows:

“For the foregoing reasons, the court concludes that the motor vehicle surcharges are penalties which are directly imposed on individual drivers who violate certain motor vehicle laws in New Jersey. The proceeds from the surcharges are then used to fund New Jersey’s merit rating plan which has the purpose of providing affordable motor vehicle insurance to all New Jersey drivers. The surcharges are not “excise taxes” for bankruptcy purposes. Because they are not excise taxes entitled to priority under section 507(a)(8)(e), the surcharges are not excepted from discharge under section 523(a)(1)(a) of the Bankruptcy Code. This court sustains each of the debtor’s objections to the priority proof of claims submitted by the DMV. The claims of the DMV for motor vehicle surcharges are general unsecured claim subject to discharge upon the completion of the debtor’s respective Chapter 13 plans” Id. of 35-36. Both these cases are currently on appeal.

What does all this mean as far as the bottom line? Let’s say that you owe \$10,000 in motor vehicle surcharges. If the State of New Jersey was able to file a priority claim under 11 USC 507 (a)(8)(e) then you would be obligated to pay the entire claim over the life of the Chapter 13 Plan, which can extend to sixty (60) months.

However, based on Judge Wizmur and Judge Burns’ respective opinions you are now given a lot more flexibility since DMV is treated as a general unsecured creditor. This means that all unsecured creditors have to share what a Chapter 7 trustee would get in a liquidation analysis. If you have all exempt property, then you just have to make a good faith payment under the disposable income test.

Thus, whether motor vehicle surcharges are unsecured or priority makes a major difference on your bottom line.

If you have any questions regarding reinstating your license under Chapter 13, please contact me.

## **PENSION LOANS AND BANKRUPTCY**

Many of my clients who file Chapter 13 attempt to discharge all their general unsecured debts but have a pension loan deducted from their paycheck bi-monthly.

After they appear at the creditors meeting they get an objection from the trustee that it is improper to allow the pension loan deduction and the trustee wants this added back into their disposable income.

The Third Circuit Court of Appeals in In re Ames, 195 F. 3d 177 (3<sup>rd</sup> Cir. 1999) held that it is improper for a debtor to use his disposable income for repayment of respective retirement systems without full satisfaction of other unsecured. 195 F.3d at 181

In it's analysis, the Court looked to 11 USC 1325 (b)(1)B which requires that "The plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date the first payment is due under the plan will be applied to make payments under the plan."

The Court concluded that disposable income is income not reasonably necessary to be expended for the maintenance or support of the debtor or dependant." Id. at 180. Since voluntary contributions are not reasonably necessary for the maintenance or support, they must be made from disposable income. Id. at 181. Thus, since the debtors have used their disposable income for repayment of their respective retirement plans without full satisfaction of unsecured creditors, the plan was rejected under section 1325 (b)(1)(B). Id.

In addition, the Third Circuit rejected the debtors' contention that the doctrine of recoupment applied and refused to allow pension plans to deduct loan payments from their paychecks postpetition. Id. at 181-182.

Finally, the Court also held that pension plans could not make postpetition deductions of loan payments from debtors' paychecks on the ground of setoff. Id. at 183.

What does this mean? If you have a pension loan coming out of your paycheck the trustee will add this into your disposable income and you will have to use that payment towards unsecured creditor.

If you have any questions concerning this matter, always 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.