

Before filing bankruptcy, realize it is a liquidation and take the power of the trustee seriously.

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When people file for bankruptcy, their focus is usually entirely on getting rid of their debts. They typically fail to realize that there is another side of bankruptcy, **the liquidation of non-exempt assets**.

What most need to realize is that when they file bankruptcy, a bankruptcy estate is created that contains all of their property (with some rare exceptions). The bankruptcy trustee then essentially takes legal title to the property and the debtor is not free to do what he pleases with the property. (If this is not explained to you by your bankruptcy attorney, get a different one.) Although debtors *generally* have some right to use their (former) property during the bankruptcy, and there are complexities and subtleties on this subject that extend beyond the scope of this post, for now, understand that the trustee takes title to your property and has significant power.

Take the case of *In re Gentile*, where the debtors were sued for damages resulting from a car collision caused by their grandson while driving their car. *In re Gentile*, 1st Cir. B.A.P. No. 12-071 (decided May 20, 2013). They had a million dollar plus pre-judgment attachment issued against their real estate before the trial and then lost the case at trial resulting in a million dollar plus judgment being issued against them. Id. Then they appealed the decision and filed bankruptcy. Id.

Again, while the debtors were appealing the state court judgment and their bankruptcy case was open, the trustee moved for authority to sell the debtor's real estate properties, which were non-exempt assets in the bankruptcy. Id. The debtors argued that the state court judgment was on appeal and that if it was successful, that debt would no longer exist and their remaining debts could be satisfied by a different non-exempt asset that the selling of which would not cause them the harm as the sale of the real estate would. Id. However, the bankruptcy court found the appeal did not have enough of a chance of success to justify making the trustee wait to sell the property. Id. The debtors appealed the bankruptcy court's decision and the bankruptcy appellate panel found that the debtors did not have standing, which means they do not have enough interest in the matter to be able to raise legal arguments. Id. Why, you ask, since after all the property was theirs (you may still think)?

The panel relied upon existing precedent, namely, the case of *In re Spenlinhauer*, which stands for the proposition that a debtor does not have standing to appeal a bankruptcy court order allowing the sale of non-exempt property unless it is likely that the debtor will

realize a surplus after paying creditors. Id. What that means is that unless the liquidation of the asset would pay all of the debtor's creditors in full (including expenses of the estate) and there would be a surplus that could go to the debtor, then the debtor could not argue against the sale of the property. This is because, as *In re Spenlinhauer* holds, (which is the main point of this post), the debtor does not have an interest in non-exempt property any longer, only the trustee in bankruptcy. *In re Spenlinhauer*, 261 F.3d 113 (2001).

Both *In re Spenlinhauer* and *In re Gentile* demonstrate the main point here, again, once you file bankruptcy you essentially do not own your property anymore, the trustee does on behalf of the bankruptcy estate. 11 U.S.C. §§ 541(a) and 704. This may seem odd, but it is the legal reality upon filing for bankruptcy. Although it is true that most consumer debtors filing chapter 7 retain all of their property despite filing for bankruptcy, it is not always the case. This is why filing should not be taken lightly, you should get an idea of what to expect, and you should be adequately prepared for the possible ramifications. This means getting advice from a competent bankruptcy attorney.

In the event that you are considering bankruptcy, please do your best to avoid being one of those debtors that do not realize what they have subjected themselves to until too late. (Understand that this is not the only subject that should be understood prior to filing bankruptcy.) In the event that you desire to look before you leap or have a different legal need related to this subject matter, feel free to give the author a call.

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