Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a9694cd8-1af5-4885-aacb-4ba85008ea17

Marc S. SternOverstreet
1825 NW 65th Street
Seattle, WA 98117
206-448-7996
mstern@abanet.org

Hon. Karen A. Overstreet
Chapter 13
Hearing Date February 21, 2007
Hearing Time 9:30
Response Date: February 14, 2007

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

,	03-13595
Debtor,	
______________________________	ADVERSARY NO. 05-1255
Plaintiff,	RESPONSE TO MOTION TO QUASH AND MOTION FOR ENTRY OF JUDGMENT AGAINST GARNISHEE DEFENDANT
vs.	
FAIRBANKS CAPITAL OR ITS SUCCESSOR IN INTEREST,	
Defendant.	

_________by and through counsel, responds to the Trustee's Motion to Quash and moves the court for entry of Judgment against K. Michael Fitzgerald as trustee, as the Garnishee Defendant. This response is based upon the records and files herein. The plaintiff submits the following:

FACTS

1. **This court** entered a **Judgment** against Fairbanks Capital.

2. A Writ of Garnishment directed to the bank where the Chapter 13 Trustee's payments were negotiated was served on the bank. The bank returned an answer showing no funds. Plaintiff was faced with two options; 1) Controvert the answer and risk a potentially long and expensive evidentiary proceeding with the bank or 2) find another source of funds to satisfy his judgment. The plaintiff is not in a position to start lengthy, expensive litigation with the bank. Consequently, another source of funds in this jurisdiction was required.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a9694cd8-1af5-4885-aacb-4ba85008ea17

3. This Writ of Garnishment followed.

4. The trustee has answered the writ showing that he holds sufficient funds to satisfy this judgment and pays the judgment debtor on a regular basis.

ISSUES PRESENTED

1. Is the trustee a fiduciary immune from garnishment of funds that are directed to the judgment debtor simply by virtue of the fact that he is a fiduciary?

2. Is a Trustee in a bankruptcy proceeding holding property of the estate for distribution to the creditors subject to garnishment by persons who are themselves creditors of a debtor's creditor.

LEGAL ARGUMENT

Fiduciary status does not create an immunity from garnishment.

The trustee argues that he is the fiduciary owing a duty to numerous debtors whose estates he administers and that consequently he should be immune from garnishment. Not surprisingly he cites no authority for this proposition because there is none. A bank is a fiduciary for all of its depositors. Its conduct is regulated by statute. Nevertheless, a bank may be garnished for funds owed by its depositor.

Similarly, an employer owes duties to pay its employees. There are sanctions, both civil and criminal for the wilful failure to pay an employee. Nevertheless, in Washington, an employee's wages may be garnished by complying with the statute and serving a Writ of Garnishment on the employer. Virtually any garnishee defendant owes a duty to the defendant garnished.

The Chapter 13 trustee in this case is no different. He is in possession of funds that are directed to the defendant/estate creditor. His fiduciary status does not erect a bar of immunity from garnishment from creditors of that judgment debtor. That the garnishee defendant is a fiduciary is no reason to exempt the garnished creditor from the collection actions of his creditor. There is no fiduciary defense to a writ of garnishment.

Document hosted at JDSUPRA™
http://www.jdsupra.com/post/documentViewer.aspx?fid=a9694cd8-1af5-4885-aacb-4ba85008ea17

Funds in the hands of a bankruptcy trustee that are being held for distribution to a creditor are subject to garnishment by persons who are themselves judgment creditors of the debtor's creditor.

The trustee has an obligation to honor orders of the court and is subject to garnishment and/or levy for obligations owed to the debtor's creditor (judgment debtor) persons who are themselves creditors (judgment creditor) of the judgment debtor. The most recent 9th Circuit case on point is *U.S. v. Hemmen,* 51 F.3d 883, (9th Cir.(Wash.), Apr 07, 1995) (NO. 93-35643) an appeal arising out of this district. In *Hemmon*, the trustee disregarded an IRS levy on funds due an administrative "judgment debtor" in a bankruptcy he was administering. The IRS sought to hold the trustee personally liable for the funds he paid out that were subject to the levy. The court at 888 first determined that the "judgment debtor's" allowed claim for an administrative expense was property subject to levy.

> Washington defines "property" very broadly. *See, e.g., Lee & Eastes, Inc. v. Public Serv. Comm'n,* 52 Wash.2d 701, 328 P.2d 700, 702 (1958) (defining the term "property" as "embracing everything that has exchangeable value"). *Accord Little v. United States,* 704 F.2d 1100, 1106 (9th Cir.1983) (concluding that a right of redemption is "property" under § 6321 when it represents an "economic asset" that has "pecuniary worth," notwithstanding its characterization as a "privilege" under California law). A party who holds an allowed claim against a bankruptcy estate clearly holds something of "exchangeable" value. The fact that an allowed claim can be satisfied only after certain events have transpired, such as the determination that the estate has sufficient assets to satisfy the claim, does not negate the character of the holding as "property" under Washington's broad definition of this term. *Accord Leuschner v. First Western Bank & Trust Co.,* 261 F.2d 705, 708 (9th Cir.1958) (*cited in St. Louis Union Trust Co. v. United States,* 617 F.2d 1293, 1302 (8th Cir.1980)).

The court concluded at 890:

> We conclude that an allowed administrative expense claim against a bankruptcy estate is "property" under Washington law subject to a Federal tax levy and that Hemmen, as trustee, was obligated with respect to a "fixed and determinable" liability at the ***891** time the notice of levy was served on him. We are aware that our conclusion imposes an added burden on bankruptcy trustees . . .

The court went on to reverse the district court and hold the trustee personally liable for failure to honor the levy even though he had an Order signed by the Bankruptcy Judge Skidmore approving

MARC S. STERN
ATTORNEY AT LAW
1825 NW 65TH STREET
SEATTLE, WA 98107
(206)448-7996

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a9694cd8-1af5-4885-aacb-4ba85008ea17

1 his distribution scheme that was entered after notice to the IRS that he did not intend to pay them.
2 A similar result was reached by the 11th Cir in *In Re Ruff*, 99 F.3d 1559 (11th Cir 1996)
3 The leading case on holding Chapter 13 Trustees subject to levy for amounts owed to
4 judgment creditors of "judgment debtors" is *Laughlin v. U.S. I.R.S.* 912 F.2d 197 (8th Cir 1990).
5 The court held at 198:

6–17
> We agree with the bankruptcy court and the district court that the IRS has not violated the automatic stay in this case. The debtors, estates, and creditors-those entities the automatic stay is designed to protect-are unaffected by the levy. *In re MacDonald,* 755 F.2d 715, 717 (9th Cir.1985) (the "automatic stay gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment"); *see also H & H Beverage Distrib. v. Department of Revenue of Pa.,* 850 F.2d 165, 166 (3rd Cir.), *cert. denied,* 488 U.S. 994, 109 S.Ct. 560, 102 L.Ed.2d 586 (1988); *Hunt v. Bankers Trust Co.,* 799 F.2d 1060, 1069 (5th Cir.1986); *In re Stringer,* 847 F.2d 549, 551 (9th Cir.1988); *Pursiful v. Eakin,* 814 F.2d 1501, 1504 (10th Cir.1987); 2 L. King, *Collier on Bankruptcy* ¶ 362.01, at 362-7 (15th ed. 1990). The IRS is simply levying on money each bankruptcy estate owes Michael Elsken, as determined and approved for payment by the bankruptcy court. The IRS levy no more interfered with the purposes of the automatic stay under these circumstances than it would have had the notice of levy been served upon the bank in which the estate checks were deposited had they been sent to and received by the Elskens in ***199** due course. It is really the administrative burden created by the notice of levy to which the trustee objects. As indicated below, we, like the bankruptcy court, do not minimize the extent of that burden.

18 These principals were applied to allow judgment creditors to garnish bankruptcy trustees
19 in *In re Brickell* 292 B.R. 705 (Bkrtcy .S. D. Fla.,2003), *aff'd* 142 Fed.Appx. 385, 2005 WL
20 1684935 (11 th Cir. 2005) in which Judge Schermer addressed the specific issue of a
21 garnishment of the trustee at 709

22–25
> [W]here the claims against the estate creditor (judgment debtor) have been reduced to final judgment and a garnishment judgment has been issued prior to bankruptcy distribution, the sole burden on the trustee is the substitution of one creditor's name and address for that of another. Perhaps this creates a minor inconvenience for the trustee, but it hardly hampers the efficient administration of the estate nor introduces a parasite upon the bankruptcy process

26
> * * *

27–28
> This result is consistent with the bankruptcy process. The bankruptcy system recognizes the substitution of creditors in the claim transfer process embodied in Bankruptcy Rule 3001(e).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a9694cd8-1af5-4885-aacb-4ba85008ea17

> Garnishment imposes no greater burden on the trustee than the transfer of a claim pursuant to Rule 3001(e).

This position was affirmed by the 11th Cir. in an unpublished opinion:

> [There is] no reason to impose a per se ban on the garnishment of bankruptcy trustees. The bankruptcy system recognizes the substitution of creditors. *See* Fed. R. Bankr.P. 3001(e) (allowing a claim against the bankruptcy estate to be transferred from a creditor of the estate to a third-party). While garnishment should not be allowed if it unnecessarily complicates the administration of the bankruptcy estate, the only burden on the trustee in this case was the substitution of one creditor's name and address for another. The claims giving rise to the writs of garnishment had been reduced to final judgments, and the garnishment judgments had been issued before the distribution of the debtor's estate had begun.[1]

As Judge Schermer found, the vast majority of the decisions dealing with garnishment of bankruptcy trustees took place early in the last century under the Bankruptcy Act of 1898

> and is split. Compare *Priestly v. Hilliard & Tabor (In re Argonaut Shoe Co.),* 187 F. 784 (9th Cir.1911)(disallowing garnishment) with *In re Kranich,* 182 F. 849 (E.D.Pa.1910)(allowing garnishment). For a discussion of early cases addressing garnishment, see *Grant v. Burns (In re Am. Elec. Tel. Co.),* 211 F. 88 (7th Cir.1914)

The modern trend is in favor of allowing the judgment creditor of an judgment debtor to garnish the trustee to collect the judgment. Since the advent of computers, the pains taking process of searching paper records to determine who is owed and making arithmetical calculations can all be done by pushing a few buttons[2]. The trustee has filed an answer in which he agrees that he pays the judgment debtor thousands of dollars every month and has on hand sufficient fund of money due and owing to the judgment debtor to pay the garnishment judgment in full.

---

[1] In Re Brickell, *supra,* 11th Cir. Opinion - unpublished and of questionable precedent.

[2] At lease one would expect that the calculations could be done this easily. However, having dealt with mortgage servicing companies with claims in this court, this may be gross over simplification of the accounting function.

MARC S. STERN
ATTORNEY AT LAW
1825 NW 65TH STREET
SEATTLE, WA 98107
(206)448-7996

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=a9694cd8-1af5-4885-aacb-4ba85008ea17

1 CONCLUSION

2 The trustee's claim that he is a fiduciary and thus immune to garnishment is frivolous at
3 best. It is not supported by any case law and does not present any lawful basis for immunity. It
4 should be summarily stricken by the court.

5 The prevailing law is that when the amount has been determined to be a sum certain by a
6 court or taxing agency and the trustee's only duty is to substitute the name and address of one
7 judgment debtor/creditor for the name and address of another, the trustee is subject to a writ of
8 garnishment for funds owed to the judgment debtor. This court should so rule and allow Brent
9 Sparks to collect his judgment against Fairbanks, the judgment debtor.

10 Respectfully submitted this January 26, 2007

11 */s/ Marc S. Stern*
12 Marc S. Stern
WSBA 8194
13 Attorney for ___________________

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28