

DEBTOR/CREDITOR

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Receiver's Powers Limited

On December 11, 2008, at 6:42 P.M., United States District Judge Louis Stanton appointed Lee Richards receiver over all of the assets of Bernard L. Madoff Investment Securities LLC located outside the United States. However, Mr. Richards started his receivership with less powers than federal equity receivers appointed in prior years.

In June 2008, a federal appeals court in New York ruled that a federal equity receiver does not have authority to recover the fraudulent transfer of assets by the corporation for which he or she is appointed receiver. The court explained that a receiver "stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted." A corporation cannot sue to recover its own fraudulent transfers.

The court noted that receiverships were not to be used as a substitute for bankruptcy, where a trustee has authority to recover fraudulent transfers.

Eberhard v. Marcu, 530 F.3d 122 (2d Cir. 2008).

Preferential Lease Termination

A tenant whose business had declined negotiated a termination of its lease in order to escape its obligation to pay rent for an additional two years. In exchange for the lease termination, the tenant paid the landlord \$87,172.50. The tenant filed a bankruptcy petition less than 90 days later.

The tenant's bankruptcy trustee sought to recover the lease termination payment from the landlord as a preferential payment on an existing debt. The landlord argued that the future rent was not yet legally collectible, making the payment an exchange for a future obligation rather than a past debt.

The Georgia federal court disagreed with the landlord. The obligation to pay the rent for the entire term of the lease

arose at the beginning of the lease, whether the remaining payments were presently collectible or not. The lease termination fee extinguished that existing debt.

Midwest Holding #7, LLC v. Anderson, 387 B.R. 892 (N.D. Ga. 2008).

Debt Collection as Racketeering

The Fair Debt Collection Practices Act ("FDCPA") prohibits certain actions by a creditor trying to collect a debt. Recently, a federal judge in Baltimore ruled that a single violation of the FDCPA may subject a creditor to liability under the Racketeering Influenced and Corrupt Organization Act ("RICO").

RICO makes it illegal to conduct the affairs of an enterprise "through a pattern of racketeering activity or collection of unlawful debt." The question before the court was whether the requirement of a pattern applied only to the racketeering activity or to both the racketeering activity and the unlawful collection of debt. Based on its analysis of other parts of the RICO statute, the court concluded that a single act of unlawful debt collection is sufficient.

Because a single act in violation of the FDCPA can also violate RICO, a creditor that is not careful in its debt collection practices may find itself liable to treble damages under the RICO statute.

Eyler v. 3 Vista Court LLC, 2008 U.S. Dist. LEXIS 66660 (D. Md. Aug. 26, 2008)

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This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.

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