

April 2020

### *Lis Pendens as a Preference*

A *lis pendens* is a notice filed in the land records that a matter affecting an interest in real property is the subject of pending litigation, and anyone purchasing the property will take it subject to the outcome of that litigation.

The federal bankruptcy statute permits a trustee or Chapter 11 debtor to undo as a preference certain transfers of an interest in property that occur within 90 days before filing of a bankruptcy. A South Carolina bankruptcy judge has decided that filing a *lis pendens* is a transfer of an interest in property which may be undone as a preference. The court explained that filing a *lis pendens* places a cloud on title to the property that prevents the owner from freely transferring it before litigation is resolved. This takes away the owner's normal right to freely sell the property, which constitutes a transfer of an interest in property.

Because the *lis pendens* was filed less than 90 days prior to the bankruptcy, the court voided the *lis pendens* and permitted sale of the property free from the eventual result of the pending litigation.

*Viera v. Whitfield (In re Shiver)*, 598 B.R. 221 (Bankr. D.S.C. 2019).

### *Stay Does Not Require Collateral Return*

An issue which has divided the courts is whether a secured creditor that has repossessed collateral prior to the bankruptcy must return the collateral to the borrower when the latter files a bankruptcy petition. The automatic stay that goes into effect immediately upon filing of a bankruptcy case prohibits any act "to exercise control over property of the estate". Some courts have reasoned that retaining repossessed collateral is an act exercising control over estate property. However, a Federal Appeals Court in Philadelphia

recently ruled that mere retention of the collateral without further action does not violate the automatic stay.

*In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019).

### *Marijuana Busts Chapter 11 Case*

Although use of recreational marijuana in Colorado is legal under state law, it remains illegal under federal law. Last year, a Colorado bankruptcy judge dismissed the Chapter 11 case of a corporation that sold equipment to the Colorado marijuana industry.

Federal law makes it a crime to sell goods with the knowledge that those goods will be used to manufacture controlled substances. Bankruptcy law requires that a plan be proposed in good faith. The court concluded that a plan of reorganization which relied on continuing violation of federal criminal law could not be considered in good faith. Inability to propose a good faith plan was grounds to dismiss the case.

Although Maryland has only legalized medical marijuana, the same reasoning should apply to bar a Maryland business that services the marijuana industry from seeking Chapter 11 protection.

*In re Way to Grow, Inc.*, 610 B.R. 338 (D. Colo. 2019).

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