BANKRUPTCY AND YOU

If you declare Chapter 7, are your instruments protected?

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By HARVEY MARS AND PAULO ALVES

SADLY, SOME MUSICIANS are forced to file bankruptcy petitions to deal with the insurmountable debt they find themselves buried under. Though bankruptcy law is not one of my usual practices areas, in response to a question from a Local 802 member concerning the bankruptcy code's application to musical instruments, I thought the answers I obtained would be of general interest.

As a practical matter, there are two basic forms of bankruptcy petitions a musician may file. The first is a petition to reorganize debt under Chapters 11 or 13 of the U.S. Bankruptcy Code. Chapter 13, which is the chapter of the code that refers to the adjustment of debts of an individual with regular income, involves the reorganization of an individual's personal debt. Chapter 11 pertains to the reorganization of a business entity's debt, and would apply to a musician who conducts business through either a limited liability company, a partnership, or a corporation (such as a Subchapter S corporation).

In either of these cases, the debtor voluntarily develops a plan to pay off his or her creditors while he or she retains possession of his or her property or company. This process involves the input of the debtors' creditors and requires their consent as well as the consent of the Bankruptcy Court to the reorganization plan. Of course when considering options, this is the preferable form of bankruptcy one can engage in.

The other form of petition, Chapter 7, involves the complete liquidation of the debtor's assets. In this more extreme proceeding, the debtor's possessions are amalgamated by a trustee. This is called the creation of a bankruptcy estate. This trustee then sells the property to satisfy the outstanding debts that resulted in bankruptcy. Often this is an involuntary process in which creditors file a petition to place the debtor in bankruptcy so they can get paid something.

One major concern for musicians in the event that they file for protection under Chapter 7 is what happens to their musical instruments. Is it considered property of the estate, which would be subject to sale?

Normally, musical instruments of high value would indeed be considered part of the bankruptcy estate subject to liquidation. However, for professional musicians, since they rely upon their musical instruments to earn a living, the instruments qualify for an exemption known as a "tool-of-the-trade" under Section 11 U.S.C. Section 522(d)(6). The purpose of this exemption is to let debtors support themselves and their families.

To be entitled to this exemption, the petition must specifically state that the debtor is a professional musician. However, it is not essential that this be the debtor's sole profession.

One case I examined concluded that the debtor was entitled to a tool-of-the-trade exemption for his musical instruments even though he also worked as a farmer.

Further, a debtor is entitled to take a

tool-of-the-trade exemption for a musical instrument even if he or she temporarily ceases employment as a musician.

Furthermore, since only a human being may take an exemption, a musical instrument owned by a company does not qualify and will be forfeited.

In New York, the exemption value that may be claimed for a tool-of-the-trade is presently $3,000. This value is based upon the market value of the property at the time the bankruptcy filing is made.

The tool-of-the-trade exemption may be combined with other permissible exemptions (such as an unused homestead exemption or the so-called generic exemption) so that the total actual value of the exemption may be much higher than the tool-of-the-trade limitation alone. See *In re Ronald D. Washington, 42 Bankr. 67 (1984)*. This is important for musicians to be aware of.

On the bankruptcy petition, the exemption must be listed as well as the actual current market value of the instrument. In the event that a musical instrument's value is much greater than even the maximum exemption amount permissible (which is roughly $15,000), it is likely, at the bankruptcy trustee's request, that the Bankruptcy Court would order its sale. In this event, it may be possible for the debtor to make arrangements to buy the instrument back from the estate or try to make arrangements with the trustee to lease the instrument.

This means that musicians must be careful when obtaining an appraisal of an instrument's market value when the appraised value is going to be used in support of a bankruptcy exemption.

It is also possible that the instrument will be repossessed if it has not been paid for in full and the seller retains an interest (lien) in its value that exceeds its total exemption value.

Bankruptcy counsel should be consulted to discuss these issues in greater depth.

Ultimately, either Congress or the New York State legislature should be pressured to increase the tools-of-the-trade exemption value for musical instruments.

UPDATE ON THE NLRB

Those of you who are news junkies probably already know what I'm about to report. The D.C. Circuit Court of Appeals has invalidated a National Labor Relations Board ruling on the grounds that the recess appointee members of the board who had issued this decision had been improperly appointed.

The decision, issued on Jan. 25, 2013 in *Noel Canning v. National Labor Relations Board, No. 12-1115*, held that the Obama recess appointments of three NLRB members were unconstitutional.

This decision concerns us all since it has the potential of invalidating hundreds of labor board decisions rendered by the recess appointees as well as hamstringing the NLRB and other federal agencies.

As we are all aware, these recess appointments were made by President Obama to keep the board functioning while the Congress attempted to prevent appointments by feigning the appearance of being in session.

Recess appointments have been the norm under similar circumstances and is a practice engaged in by both Republicans and Democrats alike.

The court premised its ruling on a very mechanistic construction of the words "The Recess" in the U.S. Constitution without giving much weight to the current construction and application of this term.

It is inevitable that the Supreme Court will address this issue, as they did in *New Process Steel*, the decision in which the Supreme Court found that the NLRB had issued decisions while lacking a quorum. In that case, the newly constituted board had to review the past determinations and re-determine them. In the vast majority of instances, these decisions were upheld.

While we await the ultimate adjudication of this issue, several facts must be borne in mind.

First, it is very likely that other circuit courts will issue rulings finding the recess appointments to be valid. As of yet, D.C. is the only circuit court to directly rule on this issue. Second, the NLRB chairman has made it clear that the board will continue functioning and issuing decisions despite the ruling. In fact, on the very day the circuit court's decision was rendered, the NLRB issued its own decision finding that an employer's handbook rules regarding social media communications violated NLRA Section 7. DirecTV, 359 NLRB No. 54. In other words, workers have the right to post on Facebook in ways that resemble collective action. More on that later. Stay tuned.