

Business Law Section

Insolvency Law Committee

August 6, 2018

Dear constituency list members of the Insolvency Law Committee, the following is a case update analyzing a case of interest, *In Re Deborah Lynn Partida*, 862 F.3d 909 (9th Cir. 2017):

SUMMARY

In a case of first impression, the U.S. Court of Appeals for the Ninth Circuit held that the federal government's collection of criminal restitution under the Mandatory Victims Restitutions Act ("MVRA") does not violate the automatic stay provisions of 11 U.S.C. §362(a).

FACTS

The facts of this case are not in dispute. The debtor, Deborah Lynn Partida, pled guilty in 2002 to one count of embezzlement and theft of labor union assets. She served eighteen months in prison and agreed to pay \$193,337.33 in criminal restitution. She failed to pay the restitution and filed Chapter 13 bankruptcy on March 5, 2013. At the time of her filing, Partida reportedly owed \$218,500.77 in criminal restitution.

Post-petition, the government sent the debtor notices that because the restitution had not been paid that it intended to offset her income and apply it to the restitution obligation. On March 1, 2014, the government provided the debtor notice that it had in fact her income and would continue to do so.

After the debtor's Chapter 13 plan was confirmed on March 6, 2014, she filed a motion to hold the government in contempt for violating the automatic stay resulting from its collection efforts. The bankruptcy court denied the motion on the ground that the Government's actions were excepted from the automatic stay under 11 U.S.C. § 362(b)(1).

The debtor appealed to the Bankruptcy Appellate Panel ("BAP") which affirmed the decision on the ground that the MVRA enforcement provision overrode the automatic stay (and in reaching that conclusion further held that it did not need to determine whether an exception to the automatic stay applied). The BAP recognized that the MVRA was in direct conflict with the automatic stay provision of 11 U.S.C. §362 because the MVRA allowed for collection where the automatic stay would otherwise prevent it. This conflict was resolved by the BAP in favor of the MVRA because the MVRA was enacted several decades after the automatic stay provision that was passed in the Bankruptcy Reform Act of 1978, and that the broad language of the MVRA provided for enforcement of its collection actions "notwithstanding any other federal laws." The debtor appealed the BAP's decision to the Ninth Circuit which reviewed, *de novo*, whether the automatic stay had been violated by the government's actions. The Ninth Circuit agreed with the BAP that there had been no violation because the MVRA "trumps the automatic stay".

REASONING

The relevant language of the MVRA provides as follows:

The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for enforcement of a civil judgment under Federal law or State law. Notwithstanding any other Federal law (including Section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined...

18 U.S.C. §3613(a).

The Ninth Circuit compared the MVRA with the automatic stay provisions of the Bankruptcy Reform Act. At the outset, it noted that the MVRA was enacted several decades after the automatic

stay, and that while the automatic stay provided the debtor with a breathing spell, the drafters were mindful that the automatic stay would not be a “haven for criminal offenders.” The Ninth Circuit explained that the purpose of the MVRA was to insure that criminals pay full restitution to their victims for all damages caused as a result of the crime. As a result, the Ninth Circuit concluded that the automatic stay did not apply to collection efforts undertaken in the “continuation of a criminal action or proceeding against the debtor” was incorporated into 11 U.S.C. §362(b)(1). This case was described by the Ninth Circuit as an “excellent example” of how the MVRA operates “[n]otwithstanding any other Federal law.”

On appeal, the debtor made a novel argument that the foregoing provision only applied to substantive Federal laws (laws relating to property, subject to collection, and not procedural laws that relate to the timing of collection). The debtor argued that the phrase “notwithstanding any other Federal law” applied only to laws determining what property is available for collection and not a restriction on collection activity. In support of its rejection of this argument, the Ninth Circuit relied on the plain language of the MVRA which makes clear that the government may collect restitution notwithstanding any Federal laws to the contrary. That is the function and purpose of the “notwithstanding” clause, thus eliminating any potential conflict with the automatic stay. The fact that the MVRA was passed nearly two decades after the automatic stay provided further support for this interpretation. The debtor also incorrectly contended that the first sentence of the MVRA was a limitation of the “notwithstanding” clause. To the contrary, the legislative history of the MVRA demonstrated that Congress envisioned the MVRA’s language broadened rather than curtailed the government’s collection powers.

The MVRA expanded the government’s collection powers, allowing the government to collect under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §1692 et seq., in addition to individual state laws. This interpretation is a significant change because prior to the passage of the MVRA there was uncertainty as to whether the government could only collect restitution using the laws of the state from which the judgment issued. However, incorporation of the FDCPA into the government’s collection tools pursuant to the MVRA was in accord with the congressional intent to consolidate and strengthen collection efforts.

The Ninth Circuit also noted that it was not alone in reaching this conclusion, and that it was consistent with decisions in both the Sixth Circuit, *In Re Robinson*, 764 F. 3d 554 (6th Cir. 2014) and the Second Circuit, *United States v. Colasuonno*, 697 F. 3d 164 (2d Cir. 2012).

AUTHOR’S COMMENTARY

This case is an excellent example of how the exception to the automatic stay for the collection efforts in a criminal act or proceeding is interpreted and applied. In affirming the BAP’s decision, the Ninth Circuit correctly determined that in this case the automatic stay must succumb to the government’s collection efforts under the MVRA.

Although the case is one of first impression, its outcome is solid and should not be a surprise. The plain meaning and legislative history of the MVRA supports the correctness of how the criminal restitution enforcement provision overrides the automatic stay.

These materials were written by Gary Rudolph of Sullivan Hill Lewin Rez & Engel, in San Diego (rudolph@sullivanhill.com). Editorial contributions were provided by Christopher D. Hughes of Nossaman LLP in Sacramento (chughes@nossaman.com).

Best regards,

Insolvency Law Committee

Co-Chair

Radmila A. Fulton

Law Offices of Radmila A. Fulton

radmila@rfultonlaw.com

Co-Chair
John N. Tedford, IV
Danning, Gill, Diamond & Kollitz, LLP
jtedford@dgdgk.com

Co-Vice Chair
Marcus O. Colabianchi
Duane Morris LLP
mcolabianchi@duanemorris.com

Co-Vice Chair
Rebecca Winthrop
Norton Rose Fulbright US LLP
rebecca.winthrop@nortonrosefulbright.com