

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Creditors' Rights  
Professor Richard E. Flint

FINAL EXAMINATION  
Fall, 1996

INSTRUCTIONS

1. This examination consists of twelve (12) pages, including this page as the first and three sections described more particularly below.
2. You will have three (3) hours in which to complete the examination.
3. St. Mary's Law School prohibits the disclosure of information that might aid a professor in identifying the author of an examination. Any attempt by a student to identify himself or herself in an examination is a violation of this policy and of the Code of Student Conduct.
4. A student should not remove a copy of this examination from the room during the exam time.
5. The only material permitted in the room is a copy of the Bankruptcy Code and Rules with YOUR annotations.
6. There are three sections of this examination. The first section contains ten statements. You are asked to either agree or disagree with each one and then to support your reason(s) by logical analysis. Each of your answers is worth ten(10) points for a total of 100 points. The second section of the exam is identification. You are either asked to explain the significance in the law of creditors' rights and consumer bankruptcy of each term or phrase or you are asked to give a brief outline of the holding and reasoning in selected significant bankruptcy cases. Each of your answers is worth five (five) points for a total of 25 points. The third section of the examination contains two longer essay questions. Each of these is worth 25 points [for a total of 50 points]. Thus, there are a total of 175 possible raw score points. The organization and conciseness of your answers will be graded, so think before you write. All answers must be written in the appropriate spaces in this booklet. Do not write on the back of any pages and do not go beyond the space allotted for the answer. MATERIAL EXCEEDING THE DESIGNATED SPACE WILL NOT BE READ UNLESS AN EQUIVALENT AMOUNT OF MATERIAL IN THE DESIGNATED SPACE IS MARKED OUT.

ONLY THIS EXAMINATION BOOKLET NEEDS TO BE TURNED IN AT THE END OF THE EXAMINATION PERIOD.

7. After reading the oath, place your examination number in the space below. If you are prevented by the oath from placing your exam number in the space below, notify the student proctor of your reason when you turn in the examination.

I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.  
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I. Short Essay [100 points]  
[each of the answers is worth ten points]

THE FOLLOWING SECTION IS COMPOSED OF TWENTY STATEMENTS. YOU ARE REQUIRED TO STATE WHETHER YOU AGREE OR DISAGREE WITH EACH OF THE FIFTEEN STATEMENTS. THEN YOU ARE REQUIRED TO CONCISELY EXPLAIN THE REASON(S) FOR YOUR ANSWER IN THE SPACE PROVIDED. NO CREDIT WILL GIVEN FOR THAT PORTION OF YOUR ANSWER WHICH CONSISTS OF MERELY STATING WHETHER YOU AGREE OR DISAGREE. CREDIT WILL ONLY BE GIVEN FOR THE EXPLANATION AND ANALYSIS GIVEN IN SUPPORT OF YOUR AGREEMENT OR DISAGREEMENT.

1. The power of a trustee as a hypothetical judicial lien creditor is identical to his power as a hypothetical bona fide purchaser for value.

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I disagree. For a judicial lien creditor, under 544(a)(1)(C) to exercise its strong arm powers requires that the debtor owns more than a mere legal interest. The debtor must also own some equitable interest. The trustee as a hypothetical BFP is limited to being a BFP of real property, other than fixtures, from the debtor. This is a much narrower scope than that of a judicial lien creditor under 544(a)(1). A BFP in real property does not require that the debtor have both legal & equitable interests in property. In Belisle v. Plunkett the trustee acting as BFP for value under 544(a)(3) was able to reach the property held in constructive trust. But in Bett Teltronics, the trustee acting as judicial lien creditor was not able to reach the property held in constructive trust. The debtor ~~had both legal & equitable interests in property~~ did not have both legal & equitable interest in property in either case. 544(a)(1) & 544(a)(3) have distinct powers.

2. The foreclosure sales price received at a judicial foreclosure on real estate belonging to a individual who subsequently files a Chapter 7, proceeding is always considered to be "reasonable equivalent value" under the Bankruptcy Code.

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I disagree. A "reasonable equivalent value" for foreclosed is the price paid for at a foreclosure sale, as long as the requirements of the states foreclosure law has been complied with. This was the holding of the Court in BFP v. Resolution Trust. Thus, under § 548(a)(2)(A) a trustee may not avoid any transfer of interest of the debtor when the price received at the foreclosure sale is less than the FMV.

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3. A debtor in a Chapter 7 may "strip down" a creditor's lien on non-exempt real property to the value of the collateral, as judicially determined, when the value is less than the amount of the allowed claim secured by the lien.

I disagree. A creditor's lien stays with real property until foreclosure, ~~despite~~ despite the fact the debtor files for ch. 7. In Dewsnap v. Timm, the court held that a ch. 7 debtor may not "strip down" a creditor's lien on real property to the value of the collateral as judicially determined. This was dependent on the creditor's claim being secured ~~and~~ by lien and had been fully allowed. However, if the value of the collateral is less than the amount of the allowed claim, the difference between the two is deemed an unsecured claim, as stated by § 506(a).

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4. A ERISA-qualified pension plan is property of the estate.

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I disagree, once again. According to the courts decisions in Patterson v. Shumate, a debtors interest in employment retirement plan, that was ERISA qualified, was excludable from property of the estate. ERISA qualified pension plans also carry restrictions on the transfer of ~~that~~ the beneficial interest of the debtor, which is enforceable under non-bankruptcy law. Such restrictions bring ERISA pension plans under the scope of § 541 (c)(2) which excludes debtors interest in ERISA-qualified pension plans from falling under property of the estate.

5. A Chapter 13 debtor can "strip down" a mortgage on his homestead to the amount of the allowed secured claim.

I disagree. This would directly conflict with the courts holding in Nobelman v. American Savings Bank. Said court held that § 1322 (b)(2) prohibits a ch 13 debtor from relying on § 506 (a) to reduce an undersecured homestead mortgage to the FMV of the mortgaged homestead. § 1322 does allow a plan to modify the rights of holders of secured claims, but not holders of secured claims with security interests in ~~the debtors~~ real property which happens to be the debtors homestead or principal residence.

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6. Under the Texas Turnover Statute, a judgment creditor may obtain a court order to compel a judgment debtor to turnover the money in his savings account. 4<sup>th</sup>

I agree. A judgement creditor may obtain a court order (under turnover statute) to compel a judgment debtor to turnover all non-exempt property to the court. However, ~~if~~ if the Bank has any claims against debtor, they can exercise their right ~~of~~ of Setoff (3553). This must be done by Bank requesting a relief from Stay pursuant to § 362 (b) and also must be done before court order granting turnover. This will at least allow Bank to freeze the account. IF Bank has no claim, court will issue a writ of garnishment which will make a bank liable if the disobey court order.

5g

7. "An interest of the debtor in property" under Section 547 has the same meaning as "property of the estate" under Section 541.

I disagree. § 547(b) allows the trustee to avoid any interest of the debtor in property if 5 requirements are met. This can mean just a legal interest or any kind of a small equitable interest. IF transfer of interest qualifies as preference and lacks ~~safe harbors~~

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safe harbors of 547(c), then trustee can avoid the whole transaction. This interest only needs to be a small one. Under §541 (property of the estate) the estate will only acquire interest in which debtor holds under nonbankruptcy law. If interest is only legal then estate only gains legal interest. §541 does not allow any small interest like §547, except for the fact that the small interest will fall under property of the estate.

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8. All valid liens pass unaffected through a Chapter 7 bankruptcy on exempt property.

I agree. If the debtor wants to keep his or her exempt property then he or she must pay for it. §362 places an automatic stay on secured creditors by valid liens, unless their successful in getting a relief from stay, during the bankruptcy proceeding. They cannot enforce their security interest until bankruptcy case is closed. In effect the valid lien passes unaffected (except for automatic stay stopping creditor from enforcing security interest) through a Ch 7 proceeding on exempt property. As mentioned written earlier, the court in Dewsnup v. Timm stated that creditors lien stays with real property until foreclosure, despite debtor filing petition for Ch 7 proceedings. Although this does not apply to all valid liens on exempt property, it does include a majority.

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9. A debtor may receive a discharge of debts otherwise nondischargeable in a Chapter 7 under the terms of a Chapter 13 plan which provides for the use of all disposable income to fund a sixty month plan. 119

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I agree. § 1328 allows the debtor to discharge all of the debts that were non dischargeable ~~under~~ in regards to a ch 7 under § 523, with the exceptions of 523(a)(5), (8), or (9), which include alimony, educational loans, and death or personal injury actions caused by drunk driving respectively. Things that are dischargeable under ch 13 which are not dischargeable under ch 7 include tax for customs ~~and~~ duty, 523(a)(1), credit obtained by fraud 523(a)(2), and 523(a)(3) ~~and~~ (4) just to name a few

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10. The date set for the first meeting of creditors has no significance relating to nondischargeable debts.

I agree disagree. A creditor with a non dischargeable debt ~~with~~ should still want to attend § 341 meeting of creditors governed by Rule 2003. The creditor may want to defend objections to the amount of his or her non dischargeable debt. Creditors who are in attendance and have filed proofs of claims will be entitled to vote. It certainly can't ~~be~~ hurt to attend. For these reasons the date is important, so you know what time to be there.

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II. Identify [25 points]  
[each of the answers is worth 5 points]

This section consists of five terms or phrase or case names. You are required to provide sufficient information so that a person not acquainted with creditors' rights or consumer bankruptcy would understand the significance of the case or the meaning of the term and phrase.

1. The holding in the case of Moore v. Bay.

Moore v. Bay allows the trustee in bankruptcy to acquire the title to all property which has been transferred by the ~~Bank~~ Bankrupt in fraud of creditors, or prior to the petition he could by any means have transferred, or which could even have been levied upon and sold under a judicial process which was against him.

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2. The holding in the case of Owen v. Owen.

A judicial lien may be avoided under § 542(f) of the Bankruptcy Code. To determine application of lien avoidance provisions, the Bankruptcy Court should ask not whether the lien impairs an exemption to which debtor is entitled to, but whether it impairs exemption to which debtor would have been entitled to under state or Fed'l law but for the lien itself. The debtor was not entitled to a exemption on his condo. But when state changed law a year later, he would have been entitled. Thus, the lien <sup>may be</sup> ~~is~~ avoided.

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3. Attachment under Texas law

A writ of attachment is used to seize the debtors property in order to ~~seize~~ secure the <sup>(with lien)</sup> debt or claim. A sheriff is usually used to carry out the writ of attachment. ~~As a matter of~~ This is justifiable if debtor is



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feared to leave the state, or is hiding the property. It is a big gamble to go after this pre-judgment remedy. If you loose, your liable to defendant for atty fees & punitive damages.

4. The personal property exemptions under Texas law

Texas allows you to opt out of § 522(d) fed' exemptions and follow Texas' exemption law. Such law includes exemptions ex personal property like two fire arms, farming or ranching vehicles, a motor vehicle for each member of family with drivers licence, pets, two horses, 12 head of cattle property (per) with aggregate FMV for family of 60,000; 30,000 if single. Current wages <sup>which</sup> ~~are~~ are not included in aggregate, ~~jewelry~~ <sup>Jewelry</sup>, tools used in trade, home furnishings & clothes just to name a few

5. The holding in the case of Sexton v. Dryfus.

Court held that interest on unsecured debt stops at commencement of bankruptcy. Under secured creditors were not allowed to apply the proceeds from sale of their ~~own~~ security to the interest portion of the debt first. Justice Holmes makes an assumption that under-secured creditor would take a year to sell security and would receive the same amount which would still make them undersecured. Only a oversecured creditor is entitled to interest on his debt.

III. Longer Essay [50 points]  
[each of the answers is worth 25 points]

READ THE QUESTIONS CAREFULLY; PLAN YOUR ANSWER; AND ANSWER THE QUESTION(S) ASKED. IF YOU FEEL IT IS NECESSARY TO ASSUME CERTAIN FACTS, PLEASE STATE WHAT FACTS YOU ARE ASSUMING.

1. Mr. and Mrs. Crooked Clinton received a divorce pursuant to an order of a Texas district court in 1996. Under the divorce decree Mr. Clinton was awarded the couples homestead property as his separate property. The homestead was free and clear and had been the community property of the couple before the divorce decree. Mrs. Clinton was

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awarded a judgment in the amount of \$100,000 to equalize the net marital estate against her former husband in the divorce decree and was granted a judicial lien against the former homestead of the couple to secure the payment of the debt. After the state court divorce decree became final, Mr. Clinton filed a Chapter 7 bankruptcy petition. Shortly after the filing of the proceeding, Mr Clinton filed an adversary proceeding to avoid the lien on his separate property. Mr. Clinton filed an appropriate response. You are a clerk for the bankruptcy judge. Write a legal memorandum outline the issues which are involved in the adversary proceeding and what the resolution of those issues should be. Please note whether the resolution of these issues would have been different had all the relevant facts occurred prior to the enactment of the Bankruptcy Reform Act of 1994. Discuss

The main issue presented in this case is whether Mr. Crooked (Bill) Clinton - the debtor under §522 (F)(1) can avoid a lien on the property interest he obtained in the divorce proceeding or decree. The facts of this case are directly on point with those of Farrey v. Sanderfoot. The Court in Farrey interpreted § 522 (F)(1) as permitting the avoidance of a lien only where the lien attached to the debtors interest at some point after the debtor obtained his interest in the property. Mr. Crooked C will probably try to argue as the debtor in Farrey did, unsuccessfully that is. His argument will be that he had a prior interest before the his ex-wifes lien attached. However, Court in Farrey hold that such debtors prior interest is terminated and a new one is created simultaneously with that of his ex-wifes judicial lien. This means that he did not own an interest before the attachment of the judicial lien as §22 (F) requires, which means old Crooked cannot avoid the lien. The ~~Steinballe's~~ debtors attempt to deprive his ex-wife (whatever character she possesses) of her interest is clearly not the goal of such statute he would use in his argument.

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IF this was prior to the Bankruptcy Reform Act of 1994, good ole Crooked C, would probably be successful in his predictive argument. His line of reasoning was followed probably by a majority, which would result in former Mrs Crooked C. in having her judgement lien avoided by the debtor under 522(f).

2. Sam Spade died on June 7, 1989, while under the care of Dr. Sam Killem. Two months later Dr. Killem filed for protection under Chapter 7 of the Bankruptcy Code. His schedules included a claim of the estate arising from the death of Sam Spade. The first meeting of creditors was held on September 10, 1989. No objections to the dischargeability of debts or the discharge of the debtor were filed in the bankruptcy proceeding. In February of 1990, Sam Spade's executor comes to your office. He would like to pursue a lawsuit to recovery for damages resulting from the death of Sam Spade which the executor believes was caused by the intentional tort and negligence of Dr. Killem. What would be your advise to the executor? Assuming that you decide to pursue the lawsuit what steps would be necessary? What would Dr. Killem assert? What should be the results?

§ 523 does not seem to offer any exceptions to the discharge of debtors claim against us. Our malpractice or wrongful death claim needs a grant from the court of a relief from stay so we may better protect our interest in hopefully receiving a judgement against the debtor. ~~As~~ ~~think~~ This would be very tough. IF we could fit our claim under § 523 (a)(6) for willful & malicious injury by the debtor the claim would be non dischargeable. ~~to~~ A wrongful debt action could be non dischargeable. ~~Am~~ In any event, must get claim as non dischargeable or must prove that claim arose post-petition. If we can prove claim arose

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post-petition, we could proceed with cause of action after bankruptcy proceedings are final. (get judicial lien - have it attach to any real prop bought in county). Could also talk D.A. into filing criminal proceedings (if warrants) so debtor cannot discharge by filing ch 13 (1328). Dr. will argue claim arose pre-petition and was not excluded from <sup>discharge</sup> exemption and also no intentional or criminal act performed. IF Doctor was innocent and death occurred by no fault of his own then claim should be discharged. IF NOT, Dr. should not be able to discharge debt, as he would not under non-bankruptcy law. Have a nice holiday season!

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