

DEBTOR/CREDITOR

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What Is Defalcation?

The federal bankruptcy statute lists certain exceptions to an individual's ability to discharge obligations in bankruptcy, including debts which arise from "defalcation while acting in a fiduciary capacity."

A fiduciary, such as a trustee or agent, has a legal obligation to act on behalf of another. The United States Supreme Court recently clarified the type of conduct which would constitute nondischargeable "defalcation" by a fiduciary. Earlier cases had enunciated inconsistent standards -- one opining that the conduct "must be due to a known breach of the duty, and not to mere negligence or mistake," while another suggested that defalcation may include mistake or negligence as well.

The Supreme Court explained that "defalcation" requires either (1) an intentional wrong or (2) conscious disregard for (or willful blindness to) a substantial and unjustifiable risk of a violation of a fiduciary duty. Mere careless breaches of fiduciary duty will be dischargeable in bankruptcy.

Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013).

Sale of Collateral Defective

After a borrower defaults on repayment of a secured loan, Maryland law permits the secured creditor to repossess and sell the collateral at either a "public auction" or a "private sale". If the collateral is sold at public auction, the creditor must provide the borrower with a written statement detailing what was paid with the proceeds of the sale. If it is sold at a private sale, the creditor must provide additional information about the purchaser, the number of bids received and the condition of the collateral. Failure to provide this information may prevent the creditor from collecting any deficiency not satisfied by sale of the collateral.

The Maryland Court of Appeals recently decided that an auction that required a \$1,000 admission fee was a "private sale", requiring the more extensive post-sale disclosure. To qualify as a public auction, the procedure required full transparency, which was lacking because the admission fee discouraged those who simply wanted to watch.

Gardner v. Ally Financial, Inc., 61 A.3d 817 (Md. 2013).

Food Fight

The Perishable Agricultural Commodities Act ("PACA") provides strong remedies for an agricultural produce seller to obtain payment. PACA requires a produce buyer to pay the seller and gives the seller an interest in the buyer's assets to secure the payment, which is superior to a prior perfected security interest of a bank lender.

Although an owner of a corporation is not normally liable for a corporate debt, a Maryland federal judge recently decided that where a corporation violated PACA by not paying produce sellers, the sole owner was personally liable for the debt. Grocery store and restaurant owners should take note.

P.L.U.S. Brokerage, Inc. v. Kim, 908 F.Supp2d 711 (D. Md. 2012).



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. Congress has required bankruptcy attorneys to state: "I am a debt relief agency. I help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528. If you wish to receive "Notes on Debtor/Creditor Relations" by email, go to www.jamesolsonattorney.com/newsletter.html and click on the link at the word "here".

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