affirmed. The Supreme Court of Texas granted review.
HOLDING: Reversed and remanded.
REASONING: The court held that an insured's agreement to reimburse insurer for settlement of a suit against insured is implied in law or quasi-contractual if an insured demands and expressly agrees that insurer accept a settlement offer within policy limits and the insurer notifies the insured that it intends to seek reimbursement, even absent an express agreement of reimbursement. Further, when there is a coverage dispute and insured demands that its insurer accept a settlement offer within policy limits, the insured is deemed to have viewed the settlement offer as a reasonable one. If the offer is one that a reasonable insurer should accept, it is one that a reasonable insured should accept if there is no coverage. Frank's Casing is thus estopped from taking the inconsistent position that a settlement paid by Lloyd's is reasonable, and yet the same settlement is unreasonable if the cost is ultimately born by Frank's Casing. The court stated that from the insured's point of view, it is in exactly the same position it would have been in absent any insurance policy, except that the insurer is now the insured's creditor, rather than the injured third party.

The Court clarified its prior ruling in *Matagorda County* stating that an insurer can seek reimbursement from an insured when 1) there exists an express agreement that there is a right to seek reimbursement, or 2) when there is a coverage dispute and the insured has expressly agreed the third party's settlement offer should be accepted and the insurer has notified the insured that it intends to seek reimbursement.

DEBT COLLECTION

IN BANKRUPTCY, OUT-OF-STATE HOMESTEAD EXEMPTION CAN BE APPLIED TO DEBTOR'S NEW HOME

In re Drenttel, 403 F.3d 611 (8th Cir. 2005).

FACTS: The Drentells lived in Minnesota until June of 2003 when they sold their Minnesota residence and purchased an Arizona home. On July 17, 2003, the Drenttels filed for Chapter 7 bankruptcy in Minnesota. They claimed that their unencumbered Arizona property, valued at $181,682, was exempt from the bankruptcy estate under Minnesota's statutory homestead exemption. The trustee objected, claiming that the Minnesota homestead exemption may not be applied to real property located outside of Minnesota. The bankruptcy court sustained the objection. The Drenttels appealed to the Bankruptcy Appellate Panel, which reversed the bankruptcy court's decision. The trustee appealed.
HOLDING: Affirmed
REASONING: Debtors are permitted to exempt from the bankruptcy estate property that is exempt under Federal law or State law or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition. 11 U.S.C Section 522(b)(2)(A). Minnesota permits an exemption of up to $200,000 for a house owned and occupied by a debtor as the debtor's dwelling place. Minn. Stat. Section 510.01-.02.

The trustee argued that the Minnesota exemption is unavailable to the Drentells because their homestead is located outside of Minnesota. The trustee pointed not to the statutory language of Minnesota's homestead exemption, but to Minnesota's choice of law principles. Following this approach, the bankruptcy court determined what exemption to apply by asking whether Minnesota courts would apply the Minnesota homestead exemption or another state's exemption to the property. Congress does not invoke state choice of law rules with this provision. References to state exemption statutes do not invoke the entire law of the state. The federal bankruptcy statute requires the debtor to file in the designated district, stating that the debtor is entitled to federal exemptions or the exemptions provided by the law of the state where the petition is filed. 11 U.S.C. Section 522(b)(2)(A). While the trustee suggested that its proposed rule is required to avoid forum shopping, the danger is actually increased if debtors benefit from the homestead exemptions in the state where they relocate. Under the current federal scheme, a debtor's domicile for bankruptcy does not change immediately when the debtor relocates. Creditors can force a debtor into bankruptcy proceedings in the state they have moved from. If the trustee's interpretation were adopted, it is not clear why they would bother since the homestead exemption from the new residence would still apply. The question is thus whether the Minnesota exemption can be applied to an Arizona homestead. Minnesota courts have historically construed the homestead exemption liberally in favor of the debtor. *Kipp v. Sweno*, 683 N.W.2d 259, 263 (Minn. 2004). The Minnesota statue does not preclude use of the homestead exemption for an out of state property. *In re Arrol*, 170 F.3d 934, 936 (9th Cir. 1999). Thus, the Minnesota exemption can be applied to the Drenttels' Arizona homestead.

ATTORNEY CAN BE HELD IN CIVIL CONTEMPT AND SANCTIONED FOR ADVISING CLIENT TO VIOLATE COURT-ORDERED JUDGMENT BY PAYING OTHER BILLS FIRST

Chicago Truck Drivers, et al. v. Brotherhood Labor, et. al., 406 F.3d 955 (8th Cir. 2005).

FACTS: The Chicago Truck Drivers, Helpers, and Warehouse Workers Union Pension Fund (the "Fund") and its trustees brought a suit against four trucking companies owned by Steven Gula to collect interim payments for withdrawal liability under ERISA. The law firm Dysart Taylor represented the trucking companies during part of the underlying action which gave rise to a finding of contempt. On December 4, 1996 the district court granted the Fund's motion for summary judgment which found the defendants liable for withdrawal of interim payments under

ERISA. The Fund then filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.Proc. 59(e). The district court granted Taylor leave to withdraw from the case on June 13, 1997. On June 25, 1997 the district court entered an amended judgment against the trucking companies. This amended order clarified the amount owed and the schedule of payments which should commence on August 1, 1997. The Fund did not receive any payments by November 1998. The Fund moved to hold the corporate defendants in contempt. The district court denied the motion and the Fund appealed. The appellate court remanded after concluding the district court improperly placed the burden on the Fund. The Fund amended the petition to join all the attorneys who had represented the corporate defendants.

Following a hearing, the district court held that Steven Gula and Dysart Taylor acted in contempt of the court's directives. The court also found Taylor was aware that the corporations' assets were insufficient to pay both the Fund and the other creditors. It also found the law firm provided legal advice regarding whom to pay. Specifically, the district court found Taylor aided and abetted Gula's failure to pay the Fund. The district court ordered, as a sanction, that Taylor pay the Fund the amount the law firm had received in payment from the corporation.

HOLDING: Affirmed

REASONING: The court held that where an attorney advises a client to violate a summary judgment order under ERISA and advises them to pay other bills first, the attorney can be held in civil contempt and given sanctions. The court can weigh good faith and fair dealing as well as a granted leave to withdraw as counsel prior to issuance of amended order but these factors are not dispositive. The court explained further that a summary judgment order can be construed as an injunction, so that defendant's attorney's advice to defendants to pay other bills first supports contempt.

CIVIL ATTORNEYS MUST INVESTIGATE SOURCE OF FUNDS CLIENT USES TO PAY FEE

F.T.C. v. Assail, Inc. 410 F.3d 256 (5th Cir. 2005).

FACTS: On January 9, 2003, the Federal Trade Commission (FTC) filed a complaint in the United States District Court for the Western District of Texas. The complaint alleged that defendants engaged in a telemarketing scheme in violation of 5(a) of the Federal Trade Commission Act (FTCA) and the FTC's Telemarketing Sales Rule. At the FTC's insistence, on the day the complaint was filed, the court issued an ex parte temporary restraining order barring the defendants from continuing their scheme and freezing their assets. The order stated that the provisions should be binding on the defendants and their attorneys. On February 4, 2003, the district court issued a preliminary injunction restating the terms of the temporary restraining order. The district court refused to award attorneys' fees to two attorneys whose clients had their assets frozen as part of a civil case brought by the FTC. After the district court entered an asset freeze order, the two clients paid substantial retainers to their attorneys. In separate orders, the district court ordered the attorneys to turn all or substantially all of the funds over to the court appointed receiver. The attorneys appealed.

HOLDING: Affirmed

REASONING: An attorney has a duty to inquire as to the source of his fee when he is put on notice that his fee may derive from a pool of frozen assets. Accepting a fee from a pool of assets frozen by a court order is similar to accepting a fee from the proceeds of criminal activity. Geoffrey C. Hazard, Jr. & William Hodes, The Law of Lawyering Section 9.32, at 9-136 (3d ed. Supp. 2005). An attorney must audit a client sufficiently as to avoid becoming part of a criminal scheme. Even though criminal charges did not materialize, Kimoto committed multiple violations of the FTCA.

An attorney is an officer of the court who exercises a privilege and owes a duty to the court. *Carroll v. Jacques Admiralty Law Firm, P.C.*, 110 F.3d 290, 294 (5th Cir. 1997). To hold that an attorney has no duty to investigate the source of his fees essentially states that an officer of the court has no duty to investigate whether he himself is violating a valid court order. As an officer of the court, appellant was under a duty to inquire about his client's frozen assets before depositing the check. *CFTC v. Co Petro Marketing Group*, Inc., 700 F.2d 1279, (9th Cir. 1983). The appellant violated the permanent injunction against transfer of the frozen assets when it deposited the check.

An attorney has a duty to inquire as to the source of his fee when he is put on notice that his fee may derive from a pool of frozen assets.

In addition, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1963 (2000), and the Continuing Criminal Enterprise Statute, 21 U.S.C. Section 853 (2000), serve as important principles. Under both statutes, property (including money) derived from criminal activity is subject to forfeiture whether or not the criminal defendant still possessed the property. These statutes also provided that a third party transferee may defeat forfeiture if the petitioner is a bona fide purchaser for value and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section. An attorney who has been paid with funds tainted under either RICO or the CCE and wants to retain them must demonstrate that he conducted an inquiry sufficient to allow him to believe that the property was not subject to forfeiture.

Based on the above cases and commentary, an attorney is not permitted to be willfully ignorant of how his representation is funded. When an attorney is objectively on notice that his fees may derive from a pool of frozen assets, he has a duty to make a good faith inquiry into the source of those fees.

DEBTOR WHO FAILED TO LIST HER EMPLOYMENT DISCRIMINATION CLAIM AS AN ASSET IN HER BANKRUPTCY CASE IS BARRED FROM PURSUING IT

Jethroe v. Omnova Solutions, Inc., 412 F.3d 598 (5th Cir. 2005).

FACTS: Sharon Jethroe worked for Omnova Solutions, Inc. ("Omnova"), where she was promoted and later urged by her supervisor to return to her previous job since her new position

was a "male job." After refusing, Jethroe was terminated. Jethroe filed a claim with her union and also with the Equal Employment Opportunity Commission ("EEOC") in March 2000. Jethroe later filed a chapter 13 bankruptcy petition in November 2000. In the bankruptcy proceedings, Jethroe, under penalty of perjury, failed to inform the bankruptcy court of her EEOC claim and her title VII suit. Jethroe filed the instant discrimination suit in October 2002 and claimed to have disclosed her pending bankruptcy proceedings to her attorney. The district court held that Jethroe's title VII claim was judicially estopped because of her failure "to disclose her pending EEOC charge and potential lawsuit during the bankruptcy proceedings."

HOLDING: Affirmed.

REASONING: The court previously explained that three conditions must be met for applying judicial estoppel: (1) the party's position is "plainly inconsistent with its prior legal position;" (2) the party convinced a court to accept the prior position; and (3) the party did not act inadvertently. *Browning Mfg. v. Mims*, 179 F.3d 197 (5th Cir. 1999). The court stated that judicial estoppel was especially appropriate in the present case where "a party fail[ed] to disclose an asset to a bankruptcy court, but then pursue[d] a claim in a separate tribunal based on that undisclosed asset." The court further stated that "the obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one."

With regard to the first element, the court found that Jethroe failed to disclose her pending EEOC charge even though she made numerous appearances before the bankruptcy court and filed the instant lawsuit while the bankruptcy case was open. The second condition was met since the bankruptcy court set forth a plan based upon Jethroe's asset and liabilities disclosure. Finally, the court believed that the third condition was met since the proper test was whether Jethroe, at the time she filed her bankruptcy petition, was aware of the facts giving rise to her EEOC claims. The court found that Jethroe possessed the required knowledge and had motivation to conceal the EEOC claim from creditors. Thus, the court affirmed the district court's ruling that Jethroe was barred from pursuing her employment discrimination claim.

STUDENT LOANS CAN'T BE PARTIALLY DISCHARGED ABSENT "UNDUE HARDSHIP"

In re Alderete, 412 F.3d 1200 (10th Cir. 2005).

FACTS: Robert and Linda Alderete filed for Chapter 7 bankruptcy and sought to discharge $78,000 of student loans in an adversarial proceeding under Section 523 of the Bankruptcy Code on the ground the loans created an "undue hardship." After a trial on this issue, the bankruptcy court found the Alderetes failed to establish that the loans established an undue hardship. However, the court then used its equitable power to discharge the interest and fee associated with the loans and required only the principle to be repaid.

The Bankruptcy Appellate Court ("BAP") affirmed the partial discharge without addressing whether the Bankruptcy Court had the power to order a discharge without finding undue hardship. The BAP held that the Bankruptcy Court erred in not finding undue hardship, and had the court properly determined hardship existed, it would have had the authority to order a partial discharge. The defendant Educational Creditor Management Corp. appealed the ruling, arguing the Bankruptcy Court had no authority to grant a partial discharge after it correctly found that no undue hardship existed.

HOLDING: Reversed and Remanded.

REASONING: The court approved of the bankruptcy court's use of the *Brunner* test for establishing an undue hardship under Section 523 of the Bankruptcy Code. Under Brunner, a debtor must prove (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans, (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans, and (3) that the debtor has made good faith efforts to repay the loans. *Brunner v. New York State Higher Education Servs. Corp., 831 F.2d 395* (2d Cir. 1987*).* Under this analysis, if a debtor fails any of the three prongs, then the inquiry to whether a student loan is discharge is ended. The court upheld the bankruptcy court's ruling that the Alderetes failed to meet the *Brunner* test.

Notice to the creditor of the plan's confirmation was sufficient to satisfy the notice requirement of Bankruptcy Rule 2002, but not the summons requirements of Rule 7004.

Section 105(a) of the Bankruptcy Code states, "[T]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Some courts have interpreted this statutory language as authorizing the court to grant a partial discharge of the student loans. Other circuit courts have unanimously rejected this proposition, finding that bankruptcy courts, in order to "carry out the provisions" of the bankruptcy code, may only grant partial discharges when the terms of Section 523(a)(8) have been met.

The court agreed with other circuit courts in their rejection of a partial discharge where the terms of Section 523(a)(8) are not met. "To allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of Section 523(a)(8) mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts." *In re Cox, 338 F.3d 1238, 1243* (11th Cir. 2003). The court reversed the bankruptcy court's partial discharge and remanded the case for reinstatement of the student loans.

A "DISCHARGE BY DECLARATION" OF A STUDENT LOAN IS VOID AND SUBJECT TO BEING SET ASIDE

In re Reuhle, 412 F.3d 679 (6th Cir. 2005).

FACTS: Stephanie Ruehle received $17,000 in unsecured loans from Bank One/Great Lakes Higher Education Corporation (the "Bank") in order to attend the University of Akron between 1990 and 1995. In July 1998, Ruehle filed a Chapter 13 bankruptcy petition which proposed for a repayment of 5 percent of her

student loans over a period of 40 months, and included a provision that purported to discharge the student loan debt without an adversary proceeding, called "discharge by declaration." Because the provisions of the Bankruptcy Code, U.S.C. Section 523(a)(8) and the Federal Rule of Bankruptcy Procedure 7001(6), require the debtor to file a complaint for an adversarial hearing when seeking to discharge a student debt, the Bank failed to file an objection and the debt was discharged in April 2001.

After the student loans had been assigned by the Bank to Educational Credit Management Corporation ("ECMC"), ECMC then filed a motion to vacate the discharge in December 2002, arguing that Ruehle had violated the creditor's due process rights by not filing for an adversarial hearing to give the lender proper notice. The bankruptcy court granted ECMC's Rule 60 motion, finding it failed to receive proper due process. Ruehle appealed the Bankruptcy Appellate Court's affirmation of the bankruptcy court's order.

HOLDING: Affirmed.

REASONING: The court rejected Ruehle's contention that cases from the Ninth and Tenth Circuits indicated that a confirmed bankruptcy plan may not be overturned on a Rule 60 motion. Other courts have been critical of this approach, because the cases failed to recognize the due process issue underlying the notice and an adversary hearing.

The Fourth Circuit held in *Banks v. Sallie Mae Servicing Corp. (In re Banks),* 299 F.3d 296 (4th Cir. 2002), that notice to the creditor of the plan's confirmation was sufficient to satisfy the notice requirement of Bankruptcy Rule 2002, but not the summons requirements of Rule 7004. Recently, the Seventh Circuit adopted the holding in *Banks* stating that "where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice, due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect." *Hanson v. Educ. Credit Mgmt. Corp. (In re Hanson),* 397 F.3d 482, 487 (7th Cir. 2005). The *Hanson* court also noted that the Ninth and Tenth Circuits appear to be backing away from, or at least narrowing their earlier holdings.

The court concluded that the decisions in *Banks* and *Hanson* represented the evolving majority view that a purported "discharge by declaration" of student loan debt is not only invalid, but void and, therefore, subject to being set aside upon a Rule 60(b)(4) motion. The court adopted the analysis of the bankruptcy court, which noted that the finality analysis proposed in Ruehle's argument embodied many of the dangers inherent in winking at due process; (1) It ignores the clear intent of Congress and the Judicial Conference; (2) It enriches and emboldens those who take what is not theirs and legitimizes it with court sanction; (3) It violates the entitlement to certainty and consistency and the benefits resulting therefrom, not the least of which is the economic efficiency of being able to plan; (4) It strikes at the core of American legal values, procedure. The court affirmed the bankruptcy court's holding that a "discharge by declaration" of a

CONSUMER CREDIT

FAILURE TO DISCLOSE CAR REBATE DOES NOT VIOLATE THE TRUTH IN LENDING ACT

Virachack v. University Ford, 410 F.3d 579 (9th Cir. 2005).

FACTS: On November 18, 2001, the Virachacks bought a Ford Explorer from Bob Baker Ford partly on credit. The day the Virachacks bought the Explorer, Ford Motor Company offered a $2,000 rebate to certain customers buying that model and year vehicle, but did not offer this rebate to customers buying on credit at the 0.9% rate. The rebate option was not noted in the Federal Truth In Lending Disclosure of the contract.

The automobile buyers brought a class action suit against automobile dealer for alleged violations of the Truth in Lending Act ("TILA"). The plaintiffs sought damages, alleging University Ford violated TILA because the $2,000 cash rebate they might have received had they paid cash, should have been disclosed as part of the finance charge. The district court granted dealer's motion for summary judgment and denied buyers' cross motion for partial summary judgment. Both parties appealed.

HOLDING: Affirmed.

REASONING: A "finance charge" is defined by the TILA as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction." 15 U.S.C. Section 1605(a). Thus, the statutory definition does not include a rebate that was withheld; a charge is defined as a request for payment while a rebate was considered a reduction in payment.

The provisions of the TILA are explained by the Federal Reserve Bank's Regulation Z. The regulation notes an example of a finance charge as "discounts for the purpose of inducing payments by a means other than the use of credit." FRB Regulation Z, 12 C.F.R. Section 226.4(b)(9)(2004). Nathaniel Torres, the finance manager at Bob Baker Ford, stated that the inducement to pay with means other than credit was not the purpose of the offer. According to Torres, the rebate was not an index of a hidden credit charge but simply a subsidy from the manufacturer that was available only to those not getting the subsidized interest rate. Thus, the element of a purpose to induce a cash payment, as indicated by Regulation Z, is absent.

Torres' declaration was confirmed in two facts. First, Bob Baker Ford did not determine eligibility for the rebate. If a rebate had been offered, the price of the vehicle for sales tax purposes would not have been affected; the tax would have been paid on the price before the rebate. The price was therefore the same on credit or cash terms. Second, the Virachacks complained that by never being told of the rebate, they never got to choose; that they were not the informed users of credit the law seeks to assure. The TILA, however, does not require them to be informed to this extent. The court finds that the buyers are entitled to only what is required by the TILA and Regulation Z.