CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

POSSESSION. The plaintiffs acquired their land by inheritance and the defendants purchased the neighboring land in 2004. Between the properties in the disputed wooded area was a barbed wire fence erected by the plaintiffs' parents in 1977. The fence was erected "tree-to-tree" along a diagonal line crossing over the disputed area. The plaintiffs sued for title to the disputed area after the defendants removed the fence which was in disrepair. The plaintiffs claimed title to the disputed area by adverse possession in that the fence was a boundary fence. The plaintiffs claimed that their parents kept cattle on the farm, including the disputed area and the plaintiffs constructed a fire lane around the disputed area, removed some of the trees, repaired the fence, and pastured two horses on the area. The defendants claimed that the fence was in disrepair when they purchased their property, the fence was constructed solely as a convenience fence, and the plaintiffs' actions on the land were too sporadic to amount to continuous and open possession of the disputed area. The trial and appellate courts agreed, holding that the plaintiffs' and their predecessors' activities in the disputed area were not continuous enough to sufficiently give notice to the defendants or their predecessors that the plaintiffs considered the land theirs. **Lafferty v. Everett, 2014 Ark. App. LEXIS 439 (Ark. Ct. App. 2014)**.

ANIMALS

COWS. The plaintiff's decedent was killed when the motorcycle driven by the decedent struck a cow owned by the defendant. The cow had escaped from the defendant's farm and wandered onto the highway where the accident occurred. The plaintiff filed a wrongful death action alleging that defendant was negligent in failing to control, care for, and supervise the cow. The trial court granted the defendant summary judgment because the plaintiff had failed to show that the cow had any vicious propensities. The appellate court reversed and held that suits in ordinary negligence are not barred for injury or damage caused by an animal which has wondered onto a roadway, whether or not the plaintiff has shown that the animal has any known vicious propensities. **Sargent v. Mammoser, 2014 N.Y. App. Div. LEXIS 3337 (Sup. Ct. N.Y. 2014)**.

The plaintiff was injured when the plaintiff's vehicle struck a cow on an interstate highway. The evidence showed that the state had constructed a wire fence along the highway but did not fence the intersections. In addition, the evidence showed that the fence along the highway where the accident occurred was in disrepair. The plaintiff sued the owner of the cow and the state in negligence. The trial court granted the state summary judgment on the basis that the state was immune from such actions. Under Minnesota law, the state is not liable for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736(3)(b). The testimony of several state employees supported the trial court's finding that the state agency's decisions as to maintenance of the fence involved the prioritization of maintenance activities and were protected by statutory immunity from negligence actions; therefore, the action against the state was properly dismissed. **Schmitz v. Rowekamp, 2014 Minn. App. Unpub. LEXIS 497 (Minn. Ct. App. 2014)**.

MULES. The plaintiff was injured when a car the plaintiff was riding in struck a mule on a highway. The plaintiff sued the driver and the owner of the mule in negligence. The evidence indicated that the mule had escaped through an open gate on a corral. The defendant owner testified that the gate was properly latched that day and that the mules had never attempted to escape before. The plaintiff presented expert testimony that the corral fence and second gate were insufficient for fencing in mules; however, the expert based the testimony on pictures of the fencing two years after the accident and after the defendant had left the farm. The trial court granted the mule owner summary judgment and the appellate court affirmed, holding that the plaintiff had failed to provide evidence of how the mule escaped or any negligent act of the mule owner. **Wilson v. McDaniel, 2014 Kan. App. Unpub. LEXIS 509 (Kan. Ct. App. 2014)**.

BANKRUPTCY

GENERAL

EXEMPTIONS

EARNED INCOME TAX CREDIT. The debtor received a federal income tax refund prior to filing for bankruptcy. A portion of the refund was attributable to the earned income tax credit (EITC). The debtor deposited the refund in a checking account and transferred the EITC portion to a savings account. The debtor claimed the EITC funds as exempt under the 735 ILCS 5/12-1201 exemption for public assistance benefits. The bankruptcy trustee objected, arguing that the exemption applied only to the right to receive public assistance payments; therefore, once the benefits have been received, they are no longer exempt. The court agreed and held that the EITC funds in the savings account were not exempt. ***In re* Austin, 2014-2 U.S. Tax Cas. (CCH) ¶ 50,375 (Bankr. C.D. Ill. 2014)**.

FEDERAL FARM PROGRAMS

CROP INSURANCE. The FCIC has adopted as final regulations which amend the Common Crop Insurance Regulations, Pear Crop

Provisions to improve coverage available to pear producers, to clarify existing policy provisions to better meet the needs of insured producers, and to reduce vulnerability to program fraud, waste, and abuse. Changes are also proposed to the Optional Coverage for Pear Quality Adjustment Endorsement to broaden coverage available to producers to manage their risk more effectively. The changes will be effective for the 2015 and succeeding crop years. **79 Fed. Reg. 43593 (July 28, 2014)**.

FEDERAL ESTATE AND GIFT TAXATION

GROSS ESTATE. Upon the death of the decedent's predeceased spouse, a revocable trust was divided into a survivor's trust and a family trust. The decedent served as the trustee and was also the unlimited income and principal beneficiary of the survivor's trust. As to the family trust, the decedent served as the trustee and was also the income and principal beneficiary, as limited by an ascertainable standard and the decedent held a 5 or 5 power over the assets in the Family Trust. The decedent's estate claimed that the decedent received incorrect legal advice and did not fund or administer the trusts separately. On the basis of later advice, the decedent funded the trusts separately and identified the distributed assets which should have been in each trust to properly allocate the property to each trust. The IRS ruled that the assets of the family trust were not includible in the gross estate of the decedent, with the exception of the value of the 5 or 5 power held by the decedent at death. **Ltr. Rul. 201429009, March 18, 2014**.

SALE OF RESIDENCE. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16 enacted I.RC. § 121(d)(11) as § 121(d)(9). Section 121(d)(11) provided that for property acquired from a decedent, or the decedent's estate or trust, the inheriting taxpayer may take into account the ownership and use by the decedent for determining eligibility to exclude gain on the sale or exchange of the property. This provision was effective for estates of decedents dying after December 31, 2009. In addition, EGTRRA, at Section 901, provides that Section 121(d)(11)) does not apply in taxable years beginning after December 31, 2010. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, retroactively repealed § 121(d)(11), as if it "had never been enacted." However, Section 301(c) of the 2010 Act allows the executor of an estate of a decedent who died in 2010 to elect to apply I.R.C. § 121(d)(11) as though the 2010 Act did not apply with respect to chapter 11 of the Internal Revenue Code (the estate tax). Thus, in a Chief Counsel Advice letter, the IRS ruled that, if the executor made the proper election to subject the estate to the estate tax, I.R.C. § 121(d)(11) could be used by the inheriting taxpayer to determine eligibility to exclude gain on the sale of a residence inherited from a decedent who died in 2010. **CCA 201429022, May 27, 2014**.

STATUTE OF LIMITATIONS. The decedent's estate filed the estate tax return in November 1998 and the IRS assessed the estate tax in September 1999. The estate tax return included a protective election to preserve the estate's ability to elect to pay estate taxes in installments. In May 2002 the IRS issued a Notice of Deficiency which the estate appealed to the Tax Court. A stipulated decision was entered in the case in December 2004 and the IRS assessed the deficiency in April 2005. In December 2006 the IRS issued a Final Notice of Intent to Levy under which the estate requested a collection due process hearing. In June 2013 the estate filed the present case, arguing that the IRS was barred by the ten year statute of limitations from collecting on the original estate tax amount. The parties agreed that the limitations period was tolled by the Tax Court appeal and the due process hearing, but the IRS argued that, under I.R.C. §§ 6166 and 6503(d), the protective election for installment payments also tolled the limitations period. The court held that, under Treas. Reg. § 20.6166-1(d), the protective election did not toll the limitation period because no installment payment election was actually made. **United States v. Baileys, 2014-1 U.S. Tax Cas. (CCH) ¶ 60,674 (C.D. Calif. 2014)**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. The taxpayer was a limited liability company which had been a subsidiary of another company which became the only member of the LLC. The taxpayer did not made the election under Treas. Reg. § 301.7701-3 to be taxed as a corporation, thus, the LLC was not regarded as an entity separate from the company for federal income tax purposes but was instead treated as a division of the company. In a Chief Counsel Advice letter, the IRS ruled that the determinations as to whether the LLC and company were distinct and separate trades or businesses was a factual determination and the information provided was insufficient to prove that the LLC and company were not separate trades or businesses. The IRS noted: "The fact that LLC has failed to make an election to be taxed as a corporation and is thus, disregarded as an entity separate from Company for federal income tax purposes, does not mean that LLC can never be a separate and distinct trade or business." Yet, the IRS concluded that the LLC and company were separate and distinct trades or businesses for purposes of I.R.C. § 446(d) (dealing with a different method of accounting for different trades or businesses). **CCA 201430013, March 24, 2014**.

ACCRUAL ACCOUNTING. The taxpayer operated grocery stores and gas stations. The taxpayer offered grocery customers discounts on gas purchases at the gas stations. The taxpayer used accrual accounting and claimed the unredeemed discounts as paid at the end of the taxpayer's tax year. The court held that the discounts did not meet the "all events" test of Treas. Reg. § 1.461-1(a)(2)(i) because the value of the discount depended on the price of gas at the time of the redemption, leaving an unknown condition pending until the discounts were redeemed. Therefore, the taxpayer liability was not fixed when the discounts were earned but were fixed only when the discounts were redeemed, a time which could occur in the next tax year. **Giant Eagle, Inc. v. Comm'r, T.C. Memo. 2014-146**.

ALIMONY. The taxpayer was divorced and the divorce decree included a separation agreement which included a division of the marital property, including physical property and money to equalize the division of the property. The agreement provided for monthly spousal support payments equal to 40 percent of the taxpayer's income. During the tax year, the taxpayer made the spousal support payments but also paid the former spouse the amount required by the separation agreement to equalize the property division. The court held that the property settlement amount was not deductible alimony because it was made pursuant to the property settlement terms. **Peery v. Comm'r, T.C. Memo. 2014-151**.

DEDUCTIONS. The taxpayers, husband and wife, claimed a variety of deductions for medical expenses, charitable contributions, and unreimbursed employee expenses. The taxpayer failed to provide written records to support the expenses, claiming that the records were destroyed in a flooding of their basement. Although the court expressed some doubt about the flooding, the court noted that, even with the loss of records, the taxpayers still had a duty to attempt any reasonable reconstruction of the proof of the expenses. Because the taxpayers did not make any attempt to provide any evidence of the expenses, the court disallowed the deductions except to the extent allowed by the IRS. **Jermihov v. Comm'r, T.C. Summary Op. 2014-75**.

DEPENDENTS. The taxpayer was divorced and the former spouse was granted custody of the couple's daughter. In the tax year involved, the daughter turned 19 and entered college. During that year the daughter received more than half of her support from family members and lived with the taxpayer's mother most of the year. The taxpayer claimed the daughter as a dependent and claimed the earned income tax credit based on the daughter as a dependent. The court held that because the daughter resided with the taxpayer at her grandmother's house more than half of 2010, the taxpayer was the custodial parent. Because the daughter was 19 and attending college, the daughter also met the age requirement of a qualifying child because I.R.C. § 152(c)(1)(C) set the highest age for dependency at 24 for college students. Thus, the taxpayer was entitled to claim the daughter as a dependent and was eligible for the earned income tax credit. **Davis v. Comm'r, T.C. Memo. 2014-147**.

HEALTH INSURANCE EXCHANGES. On the issue of whether the health insurance premium tax credit under I.R.C. § 36B can be provided to individuals who obtain individual health insurance coverage on the federal exchange, a three-judge panel of the Circuit Court of Appeals for the Fourth Circuit ruled in favor allowing the tax credit; however, a split three-judge panel of the D.C. Circuit Court of Appeals ruled against allowing the tax credit. **King v. Burwell, 2014-2 U.S. Tax Cas. (CCH) ¶ 50,367 (4th Cir. 2014), *aff'g*, 2014-1 U.S. Tax Cas. (CCH) ¶ 50,184 (D. Va. 2014);Halbig v. Burwell, 2014-2 U.S. Tax Cas. (CCH) ¶ 50,366 (D.C. Cir. 2014), *vac'g*, 2014-1 U.S. Tax Cas. (CCH) ¶ 50,138 (D. D.C. 2014)**.

The IRS has adopted as final regulations relating to the health insurance premium tax credit enacted by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, as amended by the Medicare and Medicaid Extenders Act of 2010, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, the Department of Defense and Full-Year Continuing Appropriations Act of 2011 and the 3% Withholding Repeal and Job Creation Act. These regulations affect individuals who enroll in qualified health plans through Affordable Insurance Exchanges (Exchanges) and claim the premium tax credit, and Exchanges that make qualified health plans available to individuals. *Victims of Domestic Abuse*. The IRS also issued temporary regulations which incorporate the rule in *Notice 2014-23, 2014-1 C.B. 942* for 2014 and subsequent taxable years to provide relief from the joint filing requirement for victims of domestic abuse. The temporary regulations also provide relief to victims of spousal abandonment. Consistent with the comments received, taxpayers may not qualify for relief from the joint filing requirement for a period that exceeds three consecutive years. The temporary regulations define domestic abuse using a definition that is closely based on the definition of spousal abuse in *Rev. Proc. 2013-34, 2013-2 C.B. 397*, for innocent spouse relief. *Allocation of Premium Credit*. The temporary regulations also provide that if a taxpayer (the enrolling taxpayer) enrolls an individual in a qualified health plan, but another taxpayer (the claiming taxpayer) claims a personal exemption deduction for the enrollee (the shifting enrollee), then for purposes of computing each taxpayer's premium tax credit and reconciling any advance credit payments, the premiums and any advance credit payments for the plan in which the shifting enrollee was enrolled are allocated between the enrolling taxpayer and the claiming taxpayer using an allocation percentage agreed to by those taxpayers. If the claiming taxpayer and enrolling taxpayer do not agree on a percentage, the allocation percentage is equal to the number of shifting enrollees divided by the total number of individuals enrolled by the enrolling taxpayer in the same qualified health plan as the shifting enrollees. Allocation rules are also provided for the enrolling taxpayers and claiming taxpayers who become divorced during the tax year or who file separately. *Self-employed Taxpayers*. The temporary regulations provide that a self-employed taxpayer is allowed a deduction under I.R.C. § 162(l) for specified premiums not to exceed the lesser of (1) the specified premiums less the premium tax credit attributable to the specified premiums; and (2) the sum of the specified premiums not paid through advance credit payments and the additional tax imposed (if any) under I.R.C. § 36B(f)(2)(A) with respect to the specified premiums after applying the limitation in I.R.C. § 36B(f)(2)(B). The IRS acknowledged that the premium tax credit and the limitation on additional tax bear a circular relationship to the I.R.C. § 162(l) deduction that may create challenges for taxpayers. Specifically, the amount of the I.R.C. § 162(l) deduction affects a taxpayer's adjusted gross income, which affects both the premium tax credit and the limitation on additional tax. Conversely, both the premium tax credit and the limitation on additional tax affect the amount a taxpayer spends on health insurance premiums, which in turn affects the taxpayer's I.R.C. § 162(l) deduction. A taxpayer may resolve the circularity between the I.R.C. § 162(l) deduction and the premium tax credit by taking any position that satisfies the requirements of I.R.C. § 36B, I.R.C. § 162(l) and other applicable tax law and the regulations issued under those sections, including these temporary regulations. **79 Fed. Reg. 43622 (July 28, 2014)**.

HOBBY LOSSES. The taxpayer owned and operated several successful businesses when the taxpayer started a cattle breeding operation. The operation involved several related entities providing cattle, funding and cattle care. The taxpayer claimed nearly $1 million in losses based on promissory notes used to pay business expenses. The court held that the cattle breeding operation was not engaged in with the intent to make a profit because (1) the activity was not operated in a business-like manner because all parties violated agreements and failed to keep records of their transactions; (2) the taxpayer failed to show any expertise in cattle breeding or use of non-related advisors; (3) the losses were three times greater than the value of the cattle and the taxpayer provided no evidence of expected appreciation of value of the cattle; (4) the taxpayer failed to show the amount of time spent on the activity, which the court found to be minimal because of the substantial other businesses operated by the taxpayer; and (5) the losses offset substantial income from the other businesses. **Gardner v. Comm'r, T.C. Memo. 2014-148**.

The taxpayer started a Tennessee Walking Horse breeding activity in 1992 and claimed losses in 2003, 2004 and 2005 which were disallowed by the IRS. The court held that the activity was not engaged in with the intent to make a profit because (1) the taxpayer did not keep sufficient financial records to assess the profitability of the activity or to change the activity to make it profitable; (2) the taxpayer made few changes in the activity in order to make the activity profitable; (3) although the taxpayer was personally knowledgeable and hired experts on the horses, the taxpayer did not have expertise or seek experts as to the business of breeding horses; (4) the taxpayer had no experience in changing an unprofitable business to profitability; (5) the activity had losses in all years except one in which a modest profit was achieved; (6) the losses offset substantial income from other sources; and (7) the taxpayer received significant personal pleasure from showing and riding the horses. **Estate of Stuller v. United States, 2014-2 U.S. Tax Cas. (CCH) ¶ 50,379 (C.D. Ill. 2014)**.

INNOCENT SPOUSE RELIEF. The taxpayer and former spouse were separated in May 2010 when the spouse filed for divorce. The divorce became final in 2011. During 2010 the taxpayer received wages and unemployment compensation and the couple received a federal tax refund from 2009 with interest. The couple filed a joint return after hiring an attorney to prepare the return. The taxpayer and spouse each supplied the attorney with separate information. The return did not include the unemployment compensation or refund interest in income and the IRS assessed unpaid taxes based on the unreported income. The taxpayer filed for innocent spouse relief from payment of the assessed taxes. The court held that the taxpayer was not entitled to innocent spouse relief under I.R.C. § 6015(b) or (c) because the taxpayer knew about the unreported unemployment compensation. In addition, the taxpayer was not entitled to equitable innocent spouse relief as to the taxes on the unreported unemployment compensation because that income was attributable to the taxpayer. However, the taxpayer was granted innocent spouse relief as to the unreported interest on the tax refund because there was no evidence that the taxpayer knew about the interest included in the refund. **Farka v. Comm'r, T.C. Summary Op. 2014-73**.

PARTNERSHIPS

START-UP EXPENSES. The IRS has adopted as final regulations concerning the deductibility of start-up expenditures and organizational expenses for partnerships following a technical termination of a partnership. The IRS has found that some taxpayers are taking the position that a technical termination under I.R.C. § 708(b)(1)(B) entitles a partnership to deduct unamortized start-up expenses and organizational expenses to the extent provided under I.R.C. § 165. The regulations amend Treas. Reg. § 1.708-1 to provide that a new partnership formed due to a transaction, or series of transactions, described in I.R.C. § 708(b)(1)(B) must continue amortizing the I.R.C. §§ 195 and 709 expenses using the same amortization period adopted by the terminating partnership. **79 Fed. Reg. 42679 (July 23, 2014)**.

RENTAL PROPERTY. The taxpayers, husband and wife, owned two rental properties in addition to their principal residence. The first rental property was rented for a few years but was not rented for 10 years, including the two tax years involved in this case. The taxpayers made only two inquiries to sell the property but did not list the property with any realtor. The court held that the taxpayers could not deduct any losses from the property because the property was not used in a trade or business or for the production of income. In addition, the losses were passive activity losses because the taxpayer did not spend at least 750 hours managing the property. The second house was owned jointly by the wife and the couple's daughter and was rented to the taxpayers' daughter. The court held that the losses from that house could not be claimed on Schedule E because property was not used in a trade or business or for the production of income by the taxpayers. The court found that the wife's ownership was merely an accommodation to the daughter who could not purchase the house on her own. **Robinson v. Comm'r, T.C. Memo. 2014-120**.

S CORPORATIONS

SHAREHOLDER BASIS. The IRS has adopted as final regulations amending the regulations governing the determination of shareholder basis in an S corporation. The regulations provide that the term "basis of any indebtedness" of the S corporation to the shareholder means the shareholder's adjusted basis in any *bona fide* indebtedness of the S corporation that runs directly to the shareholder. Whether indebtedness is bona fide indebtedness to a shareholder is determined under general federal tax principles and depends upon all of the facts and circumstances. The regulations also provide that a shareholder does not obtain basis of indebtedness in the S corporation merely by guaranteeing a loan or acting as a surety, accommodation party, or in any similar capacity relating to a loan. However, when a shareholder makes a payment on *bona fide* indebtedness for which the shareholder has acted as guarantor or in a similar capacity, based on the facts and circumstances, the shareholder may increase its basis of indebtedness to the extent of that payment. **79 Fed. Reg. 42675 (July 23, 2014)**.

SALE OF RESIDENCE. The IRS has published information about the taxation of gain or loss from the sale of a home. (1) If a taxpayer has a capital gain on the sale of a home, a taxpayer may be able to exclude the gain from tax if the taxpayer owned and used the house as the taxpayer's main home for at least two out of the five years before the date of sale; (2) some exceptions apply to persons with a disability, certain members of the military, and certain government and Peace Corps workers; see Publication 523, *Selling Your Home*; (3) the most gain taxpayers can exclude is $250,000 ($500,000 for joint returns); the net investment income tax will not apply to the excluded gain; (4) If the gain is not taxable, the taxpayer may not need to report the sale to the IRS on the tax return; (5) taxpayers must report the sale on their tax return if they cannot exclude all or part of the gain and the taxpayer must report the sale if the taxpayer chooses not to claim the exclusion or if the taxpayer receives Form 1099-S, *Proceeds From Real Estate Transactions*; taxpayers reporting gain should also review the Questions and Answers on the Net Investment Income Tax on IRS.gov; (6) generally, taxpayers can exclude the gain from the sale of a main home only once every two years; (7) if a taxpayer owns more than one home, the taxpayer may only exclude the gain on the sale of the taxpayer's main home; the main home usually is the home that the taxpayer lives in most of the time; (8) if a taxpayer claimed the first-time homebuyer credit when the taxpayer bought the home, special rules apply to the sale; for more on those rules see Publication 523; (9) if a taxpayer sells a main home at a loss, the taxpayer cannot deduct the loss; (10) after a taxpayer sells a home and moves, the taxpayer should send the new address to the IRS, using a completed Form 8822, *Change of Address*, to do this. If a taxpayer receives advance payment of the Premium Tax Credit in 2014 it is important that the taxpayer report changes in circumstances, such as changes in income or family size, to the Health Insurance Marketplace. Taxpayers should also notify the Marketplace when they move out of the area covered by their current Marketplace plan. **IRS Summertime Tax Tip 2014-08**.

SECURED TRANSACTIONS

IDENTIFICATION OF COLLATERAL. The debtor purchased by installment sale 58 dairy cows from the defendant. The defendant filed a security agreement granting a security interest in the cows and filed a financing statement which identified the cows by barn name and ear tags. The defendant had registered the cows with the Holstein Association. The registration form included a description of the cow and a drawn picture of the cow's markings. The debtor sold 80 cows and the auctioneer paid the proceeds of 22 cows to the defendant based on the auctioneer's identification of the cows as belonging to the defendant. However, 16 of those 22 cows had missing ear tags or mismatched numbers and the bankruptcy trustee argued that the defendant failed to prove that the defendant had a security interest in those 16 cows. The defendant argued that it was an industry practice to use the description and drawn picture of the cows markings to identify registered cows for purposes of security interests. The Bankruptcy Court originally held that the defendant had sufficiently demonstrated that the cows were identified using industry practices; however, on appeal, the appellate court remanded the case for more evidence as to industry practice. On remand, the Bankruptcy Court held that the defendant failed to demonstrate that the dairy cattle industry had the practice of identifying registered Holstein cows solely by the registration certificate description and drawn picture of the cow's markings; therefore, the auctioned cows were not properly identified as covered by the financing statement, which used barn names and ear tags only as description of the cows. ***In re* Baker, 2014 Bankr. LEXIS 2318 (Bankr. N.D. N.Y. 2014), *on rem. from*, 2013 U.S. Dist. LEXIS 89524 (N.D. N.Y. 2013), *vac'g and rem'g*, 465 B.R. 359 ((Bankr. N.D. N.Y. 2012)**.