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### Summary of Rickard v. Montgomery Ward & Co., 120 Nev. Ad. Op. 54

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*Nevada Law Journal*

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## **CIVIL LAW – CIVIL PROCEDURE**

### **Summary**

On January 23, 1993, appellant David Rickard was involved in an incident at the Montgomery Ward store. On April 20, 1993, he filed a complaint in the Clark County District Court alleging various claims against the store. Approximately four years after the complaint was filed in court, Ward filed a chapter 11 bankruptcy proceeding with the United States Bankruptcy Court in the District of Delaware. In accordance with federal bankruptcy law, Rickard's action in the Nevada district court was stayed.

On August 25, 1998, Rickard filed a motion for relief from stay in order to further his action against Ward. The bankruptcy court granted Rickard's motion and on January 27, 1999, Rickard notified Ward that he had received relief from the stay. Rickard then filed a motion for a trial with the district court. The motion was unopposed and the district court entered its order setting a jury trial for August 3, 1999.

On July 23, 1999, Ward filed a motion to dismiss based on Rickard's failure to bring the matter to trial within five years as required by NRCP 41(e).<sup>2</sup> The motion was denied and Ward never took any further action on that motion.

On January 23, 2001, at a status check for Rickard's case, the district court judge requested that the parties file points and authorities indicating all significant dates to help explain why the five-year rule had not run on Ward. On April 19, 2001, the district court heard argument regarding dismissal of Rickard's action pursuant to NRCP 41(e) and concluded that the five-year period had run as to Ward and dismissed Rickard's case. This appeal followed.

On appeal, Rickard asserted the primary theory that, pursuant to 11 U.S.C. § 108(c)<sup>3</sup>, the five-year prescriptive period in NRCP 41(e) was tolled of the time period during which Ward was under the protection of the bankruptcy court. The Nevada Supreme Court concluded that although 11 U.S.C. § 108(c) in itself does not toll the five-year period, there is no reason to distinguish between a court ordered stay and the automatic stay imposed by federal bankruptcy law under 11 U.S.C. § 362(a). Therefore, Rickard's claim was not tolled under NRCP 41(e).

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<sup>1</sup> By Amanda Yen

<sup>2</sup> NEV. R. CIV. P. 41(e) (2000) provides in pertinent part:

Want of Prosecution...Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended.

<sup>3</sup> 11 U.S.C. § 108(c) (2000) states in pertinent part:

[I]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay.

## **Issue and Disposition**

### **Issue**

Is the five-year prescriptive period under NRCP 41(e) tolled for the period that a stay is imposed by a debtor's bankruptcy?

### **Disposition**

Yes. There is no distinction between a court order stay which tolls the prescriptive period and the automatic stay imposed by federal bankruptcy law pursuant to 11 U.S.C. § 362(a).

## **Commentary**

### **State of the Law Before *Rickard***

Prior to *Rickard*, the Nevada Supreme Court had firmly established the purpose of the mandatory<sup>4</sup> language of NRCP 41(e) which is to compel expeditious determinations of legitimate claims.<sup>5</sup>

In *Boren v. City of North Las Vegas*<sup>6</sup>, the court considered the issue of whether a court ordered stay tolled NRCP 41(e)'s five-year prescriptive period. The court determined that "[a]ny period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of Rule 41(e)."<sup>7</sup>

Therefore, the court established that although the prescriptive period provided by NRCP 41(e) is mandatory, it can be tolled by a court ordered stay.

### **Effect of *Rickard* on Current Law**

The court in *Rickard* disagreed with appellant's argument that NRCP 41(e)'s five-year period was tolled due to 11 U.S.C. § 108(c). Yet, the court determined that any action based on a creditor's liability can be tolled due to a different section of the bankruptcy code, 11 U.S.C. § 362(a).

The court determined that section 108(c) is an exclusive provision of the bankruptcy code which deals with the effect of a bankruptcy filing on the running of statutes of limitation. It further stated that Congress had enacted the section to prevent debtors who file bankruptcy in order to let the statute of limitations run, from using the expiration of the limitations period as a complete defense.<sup>8</sup> By its terms, section 108(c) does not toll any applicable limitations period (i.e. NRCP 41(e)). The court found that the section's language "merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes."<sup>9</sup>

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<sup>4</sup> *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002) (declaring "[t]he language of NRCP 41(e) is mandatory").

<sup>5</sup> *Baker v. Noback*, 112 Nev. 1106, 1110, 922 P.2d 1201, 1203 (1996).

<sup>6</sup> *Boren*, 98 Nev. 5, 638 P.2d 404 (1982).

<sup>7</sup> *Id.* at 6, 638 P.2d at 405.

<sup>8</sup> *In Re Morton*, 866 F.2d 561, 566 (2d. Cir. 1989).

<sup>9</sup> *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993).

The court then determined that another section of the bankruptcy code, 11 U.S.C. § 362(a) did toll the prescriptive period. Section 362(a) imposes an automatic stay of any action to collect on liability of a debtor. The court came to this equitable conclusion based on previous case law which stated that a court ordered stay can toll the prescriptive period required in NRCP 41(e). The court saw no reason why a court ordered stay and the automatic stay imposed by federal bankruptcy law should be treated differently.

### **Survey of the Law in Other Jurisdictions**

The court's conclusion is consistent with holdings in other jurisdictions which have held that actions filed by creditors against a debtor are tolled due to the automatic stay entered in the debtor's bankruptcy proceedings by 11 U.S.C. § 362(a).<sup>10</sup>

### **Conclusion**

Although the five-year prescriptive period required by NRCP 41(e) is not tolled by 11 U.S.C. § 108(c), the time period is tolled by the automatic stay of actions imposed by 11 U.S.C. § 362(a). This decision was based on current court decisions which have held that the prescriptive period is tolled by a court ordered stay. The Nevada Supreme Court determined that there are no differences between a court ordered stay and the automatic stay imposed by federal bankruptcy law.

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<sup>10</sup> See *Kertesz v. Ostrovsky*, 115 Cal. App. 4th 369 (2004); *Lucas v. Integrated Health Servs. of Lester, Inc.*, 2004 Ga. App. LEXIS 748 (2004).