

CONSUMER BANKRUPTCY

Effect of Consumer Bankruptcy on Frequent Flyer Miles and Rewards Points

By Craig D. Robins

Note: This is the second part of a two part series. The first appeared in the Jan. 2012 issue of The Suffolk Lawyer.

Most consumers these days have an assortment of frequent flyer miles and credit card rewards points, whether they earn them from airlines for flying, or acquire them from banks for credit card spending.

These miles and rewards points can have a substantial value to the consumer as they can be used to obtain expensive plane tickets or months of hotel lodging. They can also be used to purchase goods, or gift certificates redeemable in a variety of retail stores.

I once represented an executive who previously earned six figures, but was now without a job. He had over 800,000 American Express Membership Rewards points – enough to redeem on airlines for several international first class trips, among other things. What happens to these valuable points and miles when a consumer files for bankruptcy relief? Can they be protected?

We start by looking at what kind of assets they are. A consumer who files for bankruptcy must list all assets in the bankruptcy petition. However, there is an issue as to whether frequent flyer miles are an asset that must be listed.

All frequent flyer programs have fairly comprehensive terms and conditions that uniformly indicate that the miles and award points have no monetary value whatsoever. These programs also state that miles are personal and cannot be assigned, traded, willed or otherwise transferred, except with consent of the program.

In addition, most programs state that membership terminates upon a member filing personal bankruptcy. Also, all airline programs vigorously prohibit the sale of award tickets.

Many frequent flyer loyalty programs and point programs, such as the popular American Express Membership Rewards program, expressly state that miles or points are not property of the member, and are not transferable by operation of law to



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any person or entity. Some actually state that the miles are owned by the program.

If a program states that the miles have no value and that they are not owned by the consumer, I would argue that the consumer does not have an asset that must be listed in the bankruptcy petition.

In my 26 years of practicing bankruptcy, and having attended many thousands of meetings of creditors in bankruptcy court, I have never once seen any case where a trustee has even asked about frequent flyer miles. This is true for two reasons.

First, trustees recognize that it would be very difficult to administer miles as an asset considering they are very illiquid, and secondly, even if they did have value, most consumers who file for bankruptcy, and who have frequent flyer miles, would have miles worth so little in relative terms, that it would not be viable for the trustee to administer them as an asset.

However, let's suppose a creative and aggressive Chapter 7 trustee did learn that

a debtor had a substantial cache of miles. Keep in mind that a trustee certainly could not sell an airline ticket. Could the trustee compel the debtor to redeem those miles for gift certificates, which the trustee could then try to sell?

I would argue that if the frequent flyer program stated that the miles were not the property of the debtor, then the miles never became an asset of the bankruptcy estate, and the trustee has no right to control that asset.

A trustee would also have great difficulty pursuing them because of the standard provision in most frequent flyer programs that the debtor's membership in the program terminates upon the filing of bankruptcy. Technically, upon filing bankruptcy, all miles would then be lost.

However, I believe the frequent flyer programs include this provision to protect the consumer from creditors, similar to a spend-thrift provision, rather than punish a consumer for filing bankruptcy. Thus, it is unlikely that an airline's frequent flyer program would terminate benefits to a consumer for filing bankruptcy, absent any med-

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dling by a bankruptcy trustee. Nevertheless, consumers should not be parading this fact to the frequent flyer program, nor do they have any obligation to do so.

Frequent flyer programs have no incentive to become embroiled in a fight over miles. Consumers should therefore be able to emerge from bankruptcy with their miles in airline frequent flyer programs intact.

Let's suppose, however, that the consumer has points in a credit card program such as American Express Membership Rewards. The consumer cannot use those points if the account is in default. That would certainly be the case once the bankruptcy petition is filed if there is any balance owed on the account.

If you had a client come to you a bankruptcy consultation, and they were current with their credit card account, should you advise the client to quickly cash out the rewards points before the account goes into default?

The argument the credit card company can conceivably make if the debtor cashes in the points just prior to filing bankruptcy is that the debtor engaged in some kind of bad faith conduct of sorts. However, the credit card company would have great difficulty proving this as the debtor would argue that the points were already earned, and that the debtor had the full right to use them regardless of any plan to file for bankruptcy. The bigger issue is not about the points, but whether the debtor incurred the credit card debt at a time when the debtor knew or should have known that they would not be able to pay their debts.

Accordingly, I would feel comfortable advising a debtor to immediately redeem the points or transfer them to an airline's frequent flyer program, assuming there was no larger issue that the debtor incurred the debt to the credit card company under fraudulent pretenses. From a practical perspective, I have never heard of any case in

which a credit card company complained that a debtor used their rewards points prior to seeking bankruptcy relief.

Let me leave you with an anecdote. Jim Kennedy, a 46-year-old California man, lost his six-figure corporate development job. At the time, he had about a million frequent flyer miles and rewards points in various loyalty programs including 125,000 American Express Membership Rewards, 85,000 Starwood Preferred Guest points, 400,000 Hilton Honors points, 100,000 Delta Sky Miles, 120,000 American AAdvantage miles, and 200,000 United Mileage Plus miles.

After running out of funds, losing his home to foreclosure, and having no luck finding a job, he filed for Chapter 7 bankruptcy. He emerged from bankruptcy with his miles intact. Thereafter, he lived for months in Holiday Inns and Motel 6's by converting his frequent flyer miles into hotel points. This also helped his food budget because the motel provided free breakfast to its guests.

He regularly reported his plight on his blog and on Twitter. His story was publicized by a number of newspapers and TV stations on the West Coast. Last year, when he was down to just a month's worth of free motel nights, he found a job. The lesson is that frequent flyer miles can sometimes really help, even after bankruptcy.

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