National Consumer Bankruptcy Rights Center

Cases in Review
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"Cases in Review" highlights recent cases that may be of particular interest to consumer bankruptcy practitioners. It is brought to you by Consumer Bankruptcy Abstracts & Research (www.cbar.pro) and the National Consumer Bankruptcy Rights Center (www.ncbrc.org).

Automatic stay—Exception for police or regulatory power: A city's postpetition conduct, in placing a parking boot on the Chapter 13 debtor's vehicle due to the debtor's numerous unpaid motor vehicle tickets and parking citations, came within the stay exception in Code § 362(b)(4) for the exercise of the city's "police or regulatory power" and therefore did not violate the stay. *In re Hicks*, --- B.R. ----, 2018 WL 704365 (Bankr. N.D. Ill. Feb. 1, 2018) (case no. 1:17-bk-3663).

Avoidable transfers—Interest of debtor in property: The debtor did not have an interest in, or control over, payments made to a university pursuant to a Parent PLUS loan taken out by the debtor to fund tuition costs at a college attended by the debtor's child, so that the payments were not avoidable under Code § 544(b) or § 548(a). *In re Ladipo*, 2018 WL 1121590 (Bankr. D. Conn. Feb. 27, 2018) (adv. proc. no. 2:16-ap-2002); *In re Demitrus*, 2018 WL 1121589 (Bankr. D. Conn. Feb. 27, 2018) (adv. proc. no. 2:17-ap-2036).

Chapter 7—Dismissal for cause: The bankruptcy court did not abuse its discretion in finding a lack of cause to dismiss the Chapter 7 debtor's case under Code § 707(a). Even if a $1.275 million judgment debt that accounted for roughly 90% of the debtor's total debt was the catalyst for his bankruptcy filing, the debtor also owed $150,000 to two law firms for unpaid legal fees, and his wife was totally incapacitated and required expenses for her care that averaged $12,000 per month. And, while the debtor had more than $5 million in assets, most were exempt. A debtor's ability to repay debts did not alone amount to cause for dismissal, and forcing a debtor to repay his debts using exempt assets before resorting to bankruptcy would undercut the

exemption scheme designed by Congress. *Janvey v. Romero*, 883 F.3d 406 (4th Cir. Feb. 21, 2018) (case no. 17-1197).

Chapter 13—Confirmation of plan: In a Chapter 13 case in which the debtors' proposed plan provided for full payment of unsecured claims rather than payment of the debtors' full projected disposable income, the court did not have authority under Code § 105(a) to impose, as a requirement for confirmation as requested by the Chapter 13 trustee, that if the plan was modified following confirmation to pay less than 100% to unsecured creditors, the debtors would provide a minimum pool to those creditors in an amount equal to the difference between their disposable income at confirmation and their actual plan payment, multiplied by the number of months between confirmation of the plan and its subsequent modification. Nothing in the Bankruptcy Code required the debtors to make that pledge, and the court could not use its equitable powers under § 105(a) to impose the pledge as a condition of confirmation. Using § 105(a) to impose further confirmation requirements—thereby modifying the Code's provisions governing Chapter 13 plan confirmation—was clearly prohibited by *Law v. Siegel. In re Eubanks*, --- B.R. ----, 2018 WL 947646 (Bankr. S.D. Ill. Feb. 16, 2018) (case no. 4:17-bk-40227).

Chapter 13—Confirmation of plan—Treatment of secured claims—Surrender of collateral: The court could not confirm, over the mortgage creditor's objection, a Chapter 13 plan that provided for the surrender of the debtor's residential property when the debtor's son graduated from high school; the deferred surrender of collateral is inimical to the concept of "surrender." *In re Thompson*, 581 B.R. 1 (Bankr. D. Mass. Feb. 14, 2018) (case no. 1:17-bk-11318).

Chapter 13—Effect of plan confirmation: While the majority view and more recent trend seemed to favor an interpretation of Code § 1325(a)(5)(C) that precludes confirmation over a secured creditor's objection of a Chapter 13 plan that vests title to collateral in the creditor, here, the Chapter 13 debtor's condominium association was bound by the terms of the debtor's confirmed plan, which vested title to the debtor's condominium in the first-priority mortgage lender under Code § 1322(b)(9) upon entry of the plan confirmation order. Accordingly, while the association could recover from the debtor personally postpetition assessments imposed through the plan confirmation date, the association could not recover assessments imposed after that date. *In re Peterson*, --- B.R. ----, 2018 WL 793685 (Bankr. D. Md. Feb. 7, 2018) (case no. 1:16-bk-13521).

Chapter 13—Violation of plan or plan confirmation order: An award of attorney's fees under Code § 105(a) may be appropriate when a party violates the terms of a Chapter 13 plan and the court's confirmation order, and here the court would award

the Chapter 13 debtor $16,317 in attorney's fees and costs incurred as a result of the failure of the debtor's student loan servicer to apply the debtor's direct payments as provided for under the debtor's confirmed plan. The court noted that the debtor had previously settled with the student loan creditor, which agreed to pay the debtor $6,000 in attorney's fees. *In re Berry*, Case No. 2:16-bk-1460 (Bankr. D. S.C. Feb. 2, 2018), appeal filed, Case No. 2:18-cv-444 (D. S.C. filed Feb. 15, 2018).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): The failure to discharge the 50-year-old debtor's $230,000 in student loan debt would cause the debtor an undue hardship under the totality of the circumstances test, so that the debt was dischargeable under Code § 523(a)(8), where (1) the debtor had been unable to find work since 2008, despite having earned Juris Doctorate and Master of Public Administration degrees and having applied for hundreds of jobs, both law- and non-law-related; (2) the debtor and her family depended entirely on the income of the debtor's 66-year-old husband, but the debtor could not reasonably rely on her husband to continue earning at even his current modest level for a time sufficient to make substantial payments on her student loan; (3) a majority of the debtor's time was taken up caring for her two adult children, one of whom suffered from obsessive-compulsive disorder and the other of whom had a learning disability; (4) if the debtor were to sign up for an income-based repayment plan, she would be 70 or 75 years old when her debt was ultimately canceled, and the tax liability could wipe out all of her assets; and (5) the debtor had made good faith efforts to repay her loan. *In re Martin*, 2018 WL 942193 (Bankr. N.D. Iowa Feb. 16, 2018) (adv. proc. no. 5:16-ap-9052).

Proof of claim—Secured claim—Existence of security interest: Case law is clear that the existence of collateral is necessary to support the allowance of a secured claim. Thus, here, the Chapter 13 debtor's motor vehicle creditor did not have a secured claim, although the debtor purchased the vehicle less than 910 days before his bankruptcy filing, where, during the debtor's prior bankruptcy case, the debtor's vehicle was impounded by the City of Chicago due to postpetition parking tickets and, because the debtor lacked the funds to recover the vehicle from the impound, the city completely crushed the vehicle in order to dispose of it. *In re Hill*, 2018 WL 1075860 (Bankr. N.D. Ill. Feb. 22, 2018) (case no. 1:17-bk-27598).

Property of the estate—Cause of action: The Chapter 7 debtor's causes of action to recover for injury resulting from defective transvaginal mesh implanted prepetition were not property of the estate where, under Vermont law, the causes of action accrued when the debtor discovered the injury postpetition, and the causes of action were not sufficiently rooted in the debtor's pre-bankruptcy past to become property of the estate despite their postpetition accrual. *In re Vasquez*, 581 B.R. 59 (Bankr. D. Vt. Feb. 23, 2018) (case no. 5:10-bk-10806).