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).

Supreme Court: Fair Debt Collection Practices Act: The Supreme Court, in a 5-3 decision, held that a creditor's filing a proof of claim that is obviously time-barred in a Chapter 13 bankruptcy proceeding is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act. The majority reasoned that the FDCPA and the Bankruptcy Code have different purposes and structural features, and to find the FDCPA applicable under these circumstances would upset that "delicate balance." From a substantive perspective, it would authorize a significant new bankruptcy-related remedy in the absence of language in the Bankruptcy Code providing for it. The dissent replied that "[p]rofessional debt collectors have built a business out of buying stale debt, filing claims in bankruptcy proceedings to collect it, and hoping that no one notices that the debt is too old to be enforced by the courts" and that this practice was both "unfair" and "unconscionable." *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 197 L.Ed.2d 790 (May 15, 2017) (case no. 16-348).

Adversary procedure—Motion to compel arbitration: Denying a loan servicer's motion to compel arbitration of the debtor's adversary proceeding, which sought a determination that a $20,750 loan to pay for expenses associated with studying for a bar examination did not come within Code § 523(a)(8), the bankruptcy court concluded that permitting an arbitrator to decide the issue inherently conflicted with the goals of centralized resolution of bankruptcy issues and the prevention of piecemeal litigation, as well as the power of a bankruptcy court to enforce its own orders. Moreover, the adversary proceeding presented only questions of law that a bankruptcy court should decide. *In re Farmer*, 567 B.R. 895 (Bankr. W.D. Wash., May

4, 2017) (adv. proc. no. 2:16-ap-1254), appeal filed, *Farmer v. Navient Solutions LLC*, Case No. 2:17-cv-764 (W.D. Wash., filed May 18, 2017).

Authority of the court—Imposition of sanctions—On creditor: Where a secured creditor violated Bankruptcy Rule 9011(b)(3) in two cases by making factual contentions regarding the value of the debtors' collateral in proposed reaffirmation agreements without having made a reasonable inquiry into the accuracy of those contentions, the court sanctioned the creditor by ordering it to modify its corporate training manual for reaffirmation agreements to include language specified by the court. *In re Velazquez*, 2017 WL 2473280 (Bankr. M.D. Fla., May 17, 2017) (case nos. 8:15-bk-1712, 8:15-bk-1585).

Chapter 13—Confirmation of plan—Full payment of unsecured claims: On an issue as to which the courts and commentators disagree, the bankruptcy court held that, under Code § 1325(b)(1)(A), a Chapter 13 plan that pays 100% of allowed unsecured claims is not required to also pay interest on the claims. *In re Gillen*, 568 B.R. 74 (Bankr. C.D. Ill., May 19, 2017) (case no. 1:16-bk-81595).

Chapter 13—Dismissal of case under Code § 1307(c): The Chapter 13 debtors violated both their plan and the court's confirmation order. They flouted their duties to the Chapter 13 trustee, the government, and the court throughout the case. Yet, despite there being ample cause to convert or dismiss the case under Code § 1307(c), § 1328(a) required the court to grant the debtors a discharge because the debtors completed the payments under their plan before trial of the pending motions to dismiss the case. *In re Holman*, 567 B.R. 599 (Bankr. D. Kan., May 9, 2017), (Bankr. D. Kan., July 14, 2017) (case no. 6:11-bk-13418), appeal filed, *Davis v. Holman*, Case No. 6:17-cv-1118 (D. Kan., filed May 23, 2017).

Class proceedings: The Bankruptcy Court for the Southern District of Texas, operating as a unit of the District Court for the Southern District of Texas, has the authority to adjudicate all matters that fall within the district court's bankruptcy jurisdiction. Accordingly, because the district court has jurisdiction over a nationwide class of debtors, the bankruptcy court concluded that it likewise had authority to exercise jurisdiction over a nationwide class of debtors. *In re Jones*, Case No. 4:15-bk-34818, Adv. Proc. No. 4:16-ap-3235 (Bankr. S.D. Tex. May 19, 2017).

Current monthly income—Deduction of business expenses: Although Official Form 122C–1 directs Chapter 13 debtors to use net rental income in calculating current monthly income, the form conflicts with Code § 1325(b)(2)(B), which expressly provides that "business" deductions are to be taken from current monthly income in calculating disposable income. Accordingly, a Chapter 13 debtor must use

gross, rather than net, rental or other self-employment income in calculating the debtor's current monthly income, which determines the debtor's applicable commitment period. Expenses are then deducted in calculating the debtor's projected disposable income. *In re Clark*, 2017 WL 2266795 (Bankr. W.D. Mo., May 23, 2017) (case no. 6:17-bk-60160).

Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return": Joining its sister circuits in applying *Beard v. Commissioner of Internal Revenue* in determining whether a document constitutes an income tax "return" for the purpose of Code § 523(a)(1), the Third Circuit Court of Appeals said that the *Beard* test sets forth the requirements of "applicable nonbankruptcy law" for the purpose of the hanging paragraph defining "return" added by BAPCPA to § 523. The court said that, under *Beard*, a document must meet four requirements to be a tax return: (1) it must purport to be a return, (2) it must be executed under penalty of perjury, (3) it must contain sufficient data to allow calculation of tax, and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. Here, only the fourth factor was at issue, but forms filed after their due dates and after an IRS assessment rarely, if ever, qualified as an honest or reasonable attempt to satisfy the tax law. The court declined to embrace the more lenient minority version of the *Beard* test articulated in *In re Colsen*, 446 F.3d 836 (8th Cir. 2006); the court also said that it did not need to reach the question of whether the one-day-late rule (*McCoy* rule) is correct. *In re Giacchi*, 856 F.3d 244 (3rd Cir., May 5, 2017) (case no. 15-3761).

Property of the estate—Cause of action: The proceeds of a settlement received by the Chapter 7 debtor 10 years after her bankruptcy discharge were not sufficiently rooted in the debtor's prebankruptcy past, and therefore were not property of her bankruptcy estate. While the settlement was offered due to potential defects in a mesh "pelvic sling" with which the debtor had been implanted prepetition, the debtor received the settlement only because of postpetition events, namely, the issuance by the Food and Drug Administration of an advisory opinion regarding possible defects with the mesh and the debtor's awareness of this advisory opinion. *Mendelsohn v. Ross*, --- F.Supp.3d ----, 2017 WL 1900288 (E.D. N.Y., May 9, 2017) (case no. 2:16-cv-2071).

Required schedules and information—Tax returns: Under the plain language of Code § 521(e)(2)(A)(i), a Chapter 13 debtor is required to provide the Chapter 13 trustee with a copy of the debtor's federal income tax return only for the tax year that ended immediately prior to the commencement of the debtor's bankruptcy case. *In re Coppess*, 567 B.R. 893 (8th Cir. B.A.P., May 16, 2017) (case no. 17-6010).