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).

Chapter 13—Allowance of attorney's fees: Although *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 192 L.Ed.2d 208 (2015) was a Chapter 11 case, its reasoning applies equally in Chapter 13 cases. Accordingly, Code § 330(a)(4) does not permit an award of attorney's fees to a Chapter 13 debtor's attorney for defending a fee application unless one of the exceptions to the American Rule applies, and neither of the two general exceptions to the rule was applicable here. *In re Rose*, --- B.R. ----, 2016 WL 6993738 (Bankr. W.D. Mich. Nov. 29, 2016) (case no. 1:14-bk-4308).

Chapter 13—Confirmation of plan—Effect on secured claim: The law has long recognized that, when a secured creditor elects to be paid as fully unsecured, that creditor's right to later assert a secured claim is waived. The record here established such a waiver, where the creditor filed a wholly-unsecured proof of claim, the claim was expressly allowed as unsecured, and the claim was treated and paid as unsecured for five years under a confirmed Chapter 13 plan. *In re Barrera*, 2016 WL 6990876 (Bankr. M.D. Fla. Nov. 29, 2016) (case no. 8:10-bk-26730).

Chapter 13—Confirmation of plan—Treatment of secured claims—Cure of default: In a Chapter 11 case that will probably apply as well to Chapter 12 and 13 cases, the Ninth Circuit Court of Appeals held that, where the debtor seeks to cure a default on a secured claim, the amount necessary to cure the default is based on a default interest rate if the debtor's default triggered a default interest rate and state law permits the imposition of such a rate. A debtor may not nullify a preexisting obligation to pay post-default interest solely by proposing a cure, although once a cure is effected, the debtor can return to pre-default conditions as to the remainder of the loan obligation. *In re New Investments, Inc.*, 840 F.3d 1137 (9th Cir. Nov. 4, 2016) (case no. 13-36194).

Chapter 13—Confirmation of plan—Treatment of unsecured claims—Payment of interest: Addressing an issue as to which the courts and commentators disagree, the bankruptcy court held that, when a Chapter 13 plan pays unsecured claims in full under Code § 1325(b)(1)(A), the plan is not required to pay interest on those claims. *In re Egger*, 560 B.R. 797 (Bankr. W.D. Wash. Nov. 22, 2016) (case no. 3:16-bk-43428).

Consumer debts: The Chapter 7 debtor's student loan debt, incurred in undertaking a doctorate program in business administration, was not consumer debt, although the debtor's employer did not require that he take the courses and did not pay for the program, where the debtor undertook the program with a profit motive, in that his personal goal in undertaking the program was to advance his business knowledge and, ultimately, own and run a profitable business. The debtor's education could properly be characterized as a business investment in himself. *Palmer v. Laying*, 559 B.R. 746 (D. Colo. Nov. 15, 2016) (case no. 1:15-cv-2856).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Establishing undue hardship: The debtor showed, under the *Brunner* test, that repayment of the non-Stafford portion of her student loan debt would impose an undue hardship on her and her family, warranting the discharge of that portion of her debt under Code § 523(a)(8). The debtor, a 36-year-old single mother of two daughters, was in her fourth year as an elementary school teacher and earned $35,300 annually. Unless she returned to school for graduate classes (an expense her budget showed no ability to fund), her salary was capped by her school district's pay scale, and the debtor's realistic budget demonstrated that it was difficult for her to cover her reasonable living expenses, leaving her without funds to make any payments to her student loan creditor. And, while the debtor admittedly had not made any payments on the loans in the last six years, the debtor demonstrated to the court's satisfaction that she was really unable to make anything but a de minimis payment, if at all, on her student loans during those years. *In re Edwards*, 2016 WL 7451337 (Bankr. D. Kan. Nov. 22, 2016) (adv. proc. no. 2:15-ap-6100).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision: The debtor's obligation under a "Financial Agreement" between the debtor and a college, requiring the debtor to pay for tuition, fees and other registration costs at some unspecified future time, did not come within Code § 523(a)(8). Because no "loan" existed, neither § 523(a)(8)(A)(i) nor § 523(a)(8)(B) applied, and, given that no funds were received by the debtor, § 523(a)(8)(A)(ii) had no application either. *In re Tucker*, 560 B.R. 206 (Bankr. W.D. N.Y. Nov. 1, 2016) (adv. proc. no. 1:16-ap-1001).

Property of the estate: Because, on the petition date, a cause of action by the Chapter 7 debtor was barred by the statute of limitations, neither the cause of action nor a payment offered to the debtor in connection to the personal injury he suffered were property of the estate, and the Chapter 7 trustee had no authority to administer the payment on behalf of the debtor's creditors. *In re Cibella*, 560 B.R. 494 (Bankr. N.D. Ohio Nov. 18, 2016) (case no. 4:08-bk-41807).

Property of the estate—Avoidance of lien impairing exemption: Reversing *In re O'Sullivan*, 544 B.R. 407 (8th Cir. B.A.P., Jan. 19, 2016), the Eighth Circuit Court of Appeals emphasized that there is a distinction between an extant but unenforceable lien and a non-existent lien for the purpose of avoidance of the lien under Code § 522(f)(1). When state law does not allow a lien to attach to exempt property, § 522(f) is superfluous and without application. *In re O'Sullivan*, 841 F.3d 786 (8th Cir. Nov. 14, 2016) (case no. 16-1526).

Reopening of case: The bankruptcy court abused its discretion in denying the debtor's motion to reopen a Chapter 7 case that had been closed for nearly four years. While the debtor sought relief—avoidance of judicial liens on his residence—that he could have pursued while the case was open, delay alone did not necessarily constitute prejudice. There had been no objection by the creditors holding the judicial liens, and the bankruptcy court did not find that any prejudice would result from the reopening of the case. *In re McCoy*, 560 B.R. 684 (6th Cir. B.A.P., Nov. 29, 2016) (case no. 15-8056).