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: In a unanimous decision authored by Justice Gorsuch, the Supreme Court held that a debt purchaser is not a "debt collector" subject to the Fair Debt Collection Practices Act, which defines "debt collector" in 15 U.S.C. § 1692a(6) as including any person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." By its plain terms, the Court said, this language seemed to focus attention on third party collection agents working for a debt owner, not on a debt owner seeking to collect debts for itself. Neither did this language appear to suggest, the Court continued, that it mattered how a debt owner came to be a debt owner--whether the owner originated the debt or came by it only through a later purchase. *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 2017 WL 2507342 (June 12, 2017) (case no. 16-349).

Chapter 7—Determination of abuse—Applicability in converted cases: The Eleventh Circuit Court of Appeals held that Code § 707(b), which permits the dismissal of a Chapter 7 case for abuse, applies to a case filed under Chapter 13 and later converted to Chapter 7. While the text of § 707(b) was ambiguous on the issue, the court concluded that the "statutory evolution" of § 707 demonstrated that Congress intended the current version of § 707(b) to be "a potent tool for bankruptcy courts to expeditiously dismiss Chapter 7 petitions filed by debtors with income sufficient to pay their creditors." This goal would be eviscerated, the court reasoned, were the court to adopt the debtor's interpretation, under which a debtor could file a Chapter 13 petition and, the following day, convert it to a Chapter 7 petition and thereby avoid the abuse review Congress incorporated into § 707(b). The court found it "unlikely--indeed inconceivable--that Congress contemplated, much less authorized, such a result." *Pollitzer v. Gebhardt*, 860 F.3d 1334 (11th Cir., June 27, 2017) (case no.

16-11506).

Chapter 7—Revocation of discharge—Timeliness of proceeding: The Ninth Circuit Court of Appeals held that the time limit for seeking revocation of discharge under Code § 727(d)(1) imposed in § 727(e)(1), which provides that specified parties may seek revocation of a debtor's discharge under § 727(d)(1) "within one year after such discharge is granted," is not a jurisdictional constraint. It is an ordinary, run-of-the-mill statute of limitations, the court said, specifying the time within which a particular type of action must be filed. A non-jurisdictional time bar is an affirmative defense that may be forfeited if not timely raised, and here the debtor forfeited the defense by failing to raise it in the bankruptcy court. *Weil v. Elliott*, 859 F.3d 812 (9th Cir., June 14, 2017) (case no. 16-55359).

Chapter 7—Surrender of collateral for secured debt: Denying a motion by the Chapter 7 debtor's mortgage creditor to require the debtor to discontinue a post-discharge state-court action against the creditor, the court said that the debtor's election of the surrender option in her statement of intention filed during her bankruptcy case with respect to her residential property did not effectuate a surrender of the property to the creditor. Code § 521(a)(2) operates as a notice statute with respect to home mortgages, and the debtor was not required to do anything other than file a statement of intention with respect to the property and to "perform," and the creditor's remedy for the debtor's failure to perform was to move for relief from stay. Moreover, the debtor's conduct in now contesting the creditor's lien on the property was not an abuse of the bankruptcy system, and the court did not have authority to enjoin the debtor from pursuing her state-court action, since a court's powers under Code § 105(a) are limited to those necessary to carry out the provisions of Title 11, and the debtor's actions in state court did not implicate any Code provisions. *In re Gregory*, 2017 WL 2589332 (Bankr. W.D. Mo., June 14, 2017) (case no. 5:10-bk-50237).

Chapter 7—Vacating of discharge: Three factors were present in the case that, in combination, rose to the level of "extraordinary circumstances" and supported a finding that vacating the debtor's Chapter 7 discharge under Fed. R. Civ. P. 60(b)(6), for the purpose of allowing the debtor to convert his case to Chapter 13, was necessary to further justice: (1) evidence that the debtor's original counsel gave him inaccurate and incomplete legal advice regarding his choices in bankruptcy, specifically regarding the effect bankruptcy might have on his home; (2) the fact that no creditors had participated in the case, and that the only claims in the case were filed by the Chapter 7 trustee after the entry of the debtor's Chapter 7 discharge; and (3) the debtor's having proposed a Chapter 13 plan that would pay creditors in full. *In re Estrada*, 568 B.R. 533 (Bankr. C.D. Cal., June 13, 2017) (case no. 6:16-bk-17769).

Chapter 13—Dismissal of case under Code § 1307(c): Bankruptcy courts retain discretion under the Bankruptcy Code to grant a reasonable grace period for Chapter 13 debtors to cure an arrearage after the expiration of the debtor's plan term, and the bankruptcy court here did not abuse its discretion in permitting the Chapter 13 debtors to do so, where the debtors made consistent monthly payments for 60 months, paying a total of $174,104, slightly exceeding their projected plan base, yet still owed $1,123, apparently due in most part to an increase in the Chapter 13 trustee's fee during the term of the plan. *In re Klaas*, 858 F.3d 820 (3rd Cir., June 1, 2017) (case nos. 15-3341, 16-3482).

Chapter 13—Effect of plan confirmation: The Chapter 13 debtors' mortgage creditor was bound by the debtors' confirmed plan where the creditor had actual notice of, and failed to object to, the debtors' proposed plan, which clearly provided for pro rata payment of $23,320 at 5.25% interest in full satisfaction of the creditor's claim, and which further provided that the creditor was to retain its lien only until its claim was paid and the debtors received their discharge. Accordingly, the creditor would be ordered to record a satisfaction of its lien upon the debtors' discharge, even though the creditor contended that the amount of its claim exceeded the amount stated in the proof of claim filed by the debtors on the creditor's behalf after the creditor failed to file a proof of claim. *In re Shank*, --- B.R. ----, 2017 WL 2859757 (Bankr. S.D. Tex., June 30, 2017) (case no. 1:11-bk-10480).

Chapter 13—Modification of confirmed plan: Where the Chapter 13 debtors had failed to make all required postpetition payments to their mortgage creditor and therefore were not entitled to a discharge, the debtors' motion to modify their plan so as to provide for surrender of their residence to the creditor was timely, although barely so, as the debtors filed their modification motion on February 23, 2017, which was prior to both the temporal completion of the debtors' Chapter 13 plan on February 28 and the posting of the debtors' final payment to the Chapter 13 trustee, also on February 28. *In re Coughlin*, 568 B.R. 461 (Bankr. E.D. N.Y., June 15, 2017) (case nos. 8:11-bk-76202, 8:12-bk-71109).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Establishing undue hardship: Closely examining the second prong of the *Brunner* test, which requires the court to determine if the debtor would remain at the margins of a minimal standard of living "for a significant portion of the repayment period" for the debtor's student loan, the court held that, notwithstanding a debtor's potential eligibility for an extended-term repayment program, if a debtor chose not to enter such a program in good faith, the applicable repayment period was the remaining contractual term of the debtor's loan. Thus, here, the debtor established undue

hardship, and her student loan debt would be discharged, although the debtor was young and healthy with an objectively decent occupation and eventual, long-term future prospects, where the debtor's involuntary underemployment, her marital separation and likely eventual divorce, and her obligations as the primary custodian of three young children made it more likely than not that her present financial difficulties would continue for at least a substantial portion of her remaining seven-year contractual repayment term. *In re Price*, --- B.R. ----, 2017 WL 2729073 (Bankr. E.D. Pa., June 23, 2017) (adv. proc. no. 2:16-ap-11), appeal filed, *Price v. DeVos*, Case No. 2:17-cv-3064 (E.D. Pa., filed July 10, 2017).

Property of the estate—Exemptions—Amendment of exemptions—Denial of amendment—On basis of state law: The Chapter 7 debtor was not equitably estopped, under California law, from amending her exemptions to claim a homestead exemption. The bankruptcy court found that the debtor's First Amended Schedules were a representation, under oath, that she was not claiming a homestead exemption in her residential property. But the First Amended Schedules could not form the basis of an estoppel, the Ninth Circuit Court of Appeals reasoned, because they set forth all of the existing facts known to the debtor. Those same facts were readily available to the Chapter 7 trustee, and the trustee was fully aware of them. The trustee also knew that, in the event circumstances changed, Bankruptcy Rule 1009(a) permitted the debtor to amend her exemptions as a matter of course at any time before the case was closed. Moreover, nothing in the debtor's First Amended Schedules could be deemed a representation that she would not amend her exemptions again if circumstances changed. In fact, circumstances changed almost three years later when, at the request of the trustee, the bankruptcy court entered an order finding that the property was 100% community property, providing the debtor a new factual basis on which to claim a homestead exemption. *In re Lua*, --- Fed. Appx. ----, 2017 WL 2799989 (9th Cir., June 27, 2017) (case no. 15-56814).