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).

Actions against mortgage creditor: A $400,000 punitive damages award against the Chapter 13 debtor's mortgage servicer for its "reprehensible" conduct in aggressively pursuing collection, following the debtor's discharge, of a nonexistent deficiency was supported by the evidence and was not constitutionally excessive. Evidence that the servicer acted with a reckless indifference to the debtor's rights was legally sufficient to establish the requisite mental state to support the punitive damages awarded by the jury on the debtor's claim of invasion of privacy, where the debtor contacted the servicer repeatedly to demand that it resolve the issues with her account, but rather than suspend its efforts, the servicer posted the debtor's home for foreclosure and conducted repeated inspections of her residence, and the debtor suffered physical ailments from the stress caused by the servicer's conduct. *May v. Nationstar Mortgage, LLC*, 852 F.3d 806 (8th Cir. March 29, 2017) (case no. 16-1285).

Avoidable transfers—Preferential transfer under Code § 547: A debtor's wages cannot be transferred until they are earned. Thus, a creditor's collection of garnished wages earned during the 90-day preference period in Code § 547(b) is an avoidable transfer even if the garnishment was served prior to that period. *In re Jackson*, 850 F.3d 816 (5th Cir. March 13, 2017) (case no. 16-30274).

Chapter 13—Allowance of attorney's fees: Affirming *In re Cripps*, 549 B.R. 836 (Bankr. W.D. Mich., May 13, 2016), the district court held that, where the Chapter 13 debtors' attorney filed his final fee application after the Chapter 13 trustee had filed a notice of plan completion, the bankruptcy court did not err in concluding that the fees would be allowed, but not as an administrative expense, since there were no funds available to pay the award and it was too late to modify the debtors' plan. Nor did the bankruptcy court err in concluding that the fee award did not survive the

debtors' discharge. *In re Cripps*, --- B.R. ----, 2017 WL 1190554 (W.D. Mich. March 31, 2017) (case no. 1:16-cv-744).

Chapter 13—Confirmation of plan—Treatment of secured claims—Modification of claim: Where the Chapter 13 debtor co-owned a 910-day vehicle with a nondebtor, the debtor's plan could modify the creditor's claim by paying interest at the *Till* rate rather than the contract rate. The debtor's plan could also provide for the elimination of the creditor's lien from the debtor's interest in the vehicle upon her discharge. However, the plan could not provide for the elimination of the creditor's lien on the nondebtor's one-half interest in the vehicle, which would continue to secure the creditor's right to collect the unpaid contractual interest. *In re Flournoy*, 2017 WL 1207511 (Bankr. E.D. Wis. March 31, 2017) (case no. 2:16-bk-21984).

Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification: A claim for unpaid prepetition assessments held by the Chapter 13 debtors' homeowners' association was secured by two separate liens, a consensual lien and a statutory lien, so that the claim was not protected by the anti-modification provision in Code § 1322(b)(2). *In re Keise*, 564 B.R. 255 (Bankr. D. N.J., March 2, 2017) (case no. 3:16-bk-22678), appeal filed, *Shark River Island Homeowners Association, Inc. v. Keise*, Case No. 3:17-cv-1832 (D. N.J. filed March 17, 2017).

Chapter 13—Effect of plan confirmation: The confirmation of the Chapter 13 debtors' plans did not preclude, under the doctrine of res judicata, the debtors' subsequent objections to claims for admittedly time-barred debts filed by an unsecured creditor prior to confirmation of the plans. The specific statutory structure for the adjudication of objections to claims in the Bankruptcy Code led to the conclusion that Congress had made Chapter 13 plan confirmation and allowance of contested unsecured claims to be separate and distinct actions within a debtor's bankruptcy proceeding. When the bankruptcy court confirmed the debtors' Chapter 13 plans, it only considered treatment of unsecured creditors as a single class. There was no adjudication of the claim of any individual unsecured creditor as part of plan confirmation. *LVNV Funding, LLC v. Harling*, 852 F.3d 367 (4th Cir. March 30, 2017), amended (April 6, 2017) (case nos. 16-1346, 16-1347).

Chapter 13—Stripping unsecured lien—Necessity of discharge: In a decision written entirely in verse, the court stated that "Can a debtor not entitled to discharge in a Chapter 13 use 1322(b)(2) to strip a home mortgage lien? Now you no longer have to guess. The answer for this court is decidedly YES." *In re Melendy*, 2017 WL 1169560 (Bankr. N.D. Ind. March 20, 2017) (case no. 2:16-bk-20107).

Property of the estate—Avoidance of lien impairing exemption: On remand from *In re O'Sullivan*, 841 F.3d 786 (8th Cir., Nov. 14, 2016), the bankruptcy court held that a creditor's judgment recorded against property owned by the debtor in tenancy by the entireties was an "extant but unenforceable" lien that could be avoided under Code § 522(f)(1). The court reasoned that, under Missouri law, a judgment against tenancy by the entireties property is a "cloud" that gives rise to an "interest in property" such that it constitutes a "lien" as defined in Code § 101(37) as a "charge against or interest in property to secure payment of a debt or performance of an obligation." *In re O'Sullivan*, 2017 WL 1047228 (Bankr. W.D. Mo. March 17, 2017), appeal filed, Case No. 17-6012 (B.A.P. 8th Cir. filed April 5, 2017).

Property of the estate—Exclusions—Social Security benefits: Agreeing with *In re Carpenter*, 614 F.3d 930 (8th Cir. 2010), the Bankruptcy Appellate Panel held that 42 U.S.C. § 407 operates as a complete bar to the forced inclusion of past and future Social Security proceeds in the bankruptcy estate. *In re Buenviaje*, 2016 WL 8467650 (B.A.P. 9th Cir. March 10, 2017) (case no. 16-1347).

Violation of stay—Damages—Punitive damages: Concluding that "Franz Kafka lives" and that "he works at Bank of America," which held the debtors' mortgage, the bankruptcy court awarded the debtors $1,075,000 in compensatory damages for the bank's multiple violations of the automatic stay and imposed $45 million in punitive damages on Bank of America, with the debtors entitled to $5 million and the balance to be awarded to the National Consumer Law Center and the National Consumer Bankruptcy Rights Center ($10 million each) and the five public law schools of the University of California system ($4 million each). The "mirage of promised mortgage modification," the court said, lured the debtors into a "kafkaesque nightmare of stay-violating foreclosure and unlawful detainer, tardy foreclosure rescission kept secret for months, home looted while the debtors were dispossessed, emotional distress, lost income, apparent heart attack, suicide attempt, and post-traumatic stress disorder," for all of which Bank of America disclaimed responsibility. Under applicable tort concepts, however, damages encompassed all consequences proximately caused by the conduct violating the stay for so long as those consequences continued, regardless of whether the stay had expired. Here, Bank of America engaged in a multi-year dual-tracking game of cat-and-mouse. With one paw, Bank of America batted the debtors between some 20 loan modification requests or supplements that routinely were either lost or declared insufficient, or incomplete, or stale and in need of re-submission, or denied without comprehensible explanation. With the other paw, Bank of America repeatedly scheduled foreclosures. The evidence included an internal Bank of America document in which it conceded that its loan modification process had been a charade. The high degree of reprehensibility, the court said, coupled with the significant involvement by the office of Bank of America's chief executive officer, called for

punitive damages of an amount sufficient to have a deterrent effect on Bank of America and not be laughed off in the boardroom as petty cash or chump change. It was apparent, the court emphasized, that the engine of Bank of America's problem in this case was one of corporate culture. The court specified that the punitive damages award would be reduced to $5 million if Bank of America agreed to donate $30 million in specified amounts to the seven entities identified as recipients of the punitive damages award. Bank of America has filed a motion to amend the judgment and presumably will appeal once that motion has been decided. According to Bank of America's motion, the largest punitive damages award for an automatic stay violation prior to the present case was $3,171,154, affirmed in *Jones v. Wells Fargo Home Mortgage, Inc.*, 489 B.R. 645 (E.D. La. 2013). *In re Sundquist*, --- B.R. ----, 2017 WL 1102964 (Bankr. E.D. Cal. March 23, 2017) (case no. 2:10-bk-35624; adv. proc. no. 2:14-ap-2278).