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—Confirmation of plan—Treatment of secured claims—Permissibility of modification: The anti-modification provision in Code § 1123(b)(5), which is identical to § 1322(b)(2), did not apply where a mortgage creditor's claim was secured by a lien on real property owned by the debtor and containing not only the debtor's residence but a 1,600-square-foot addition rented to the debtor's brother-in-law. While the debtor built the addition after taking out the mortgage, the better view is that the applicability of the anti-modification provision is determined as of the bankruptcy petition date rather than the loan origination date. *In re Berkland*, 582 B.R. 571 (Bankr. D. Mass. April 6, 2018) (case no. 1:17-bk-10821).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): The 39-year-old debtor, who had been in almost constant treatment for epilepsy and his affective disorders for 30 years, established undue hardship, permitting the discharge of the debtor's student loan debt, under the totality-of-the-circumstances test. *In re Smith*, 582 B.R. 556 (Bankr. D. Mass. April 4, 2018) (adv. proc. no. 1:16-ap-1079).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): The debtor, a 64-year-old single woman with no dependents who had been diagnosed with a bilateral severe and profound hearing loss that made it difficult for her to hear her counseling clients, even with the use of adaptive hearing equipment, established undue hardship, permitting the discharge of her more than $107,000 in student loan debt, as the debtor's age and her professional trajectory belied any notion that she would be able to generate sufficient income in the coming years to repay her student loans while maintaining a minimal standard of living. Despite working five to six days per week, the debtor could barely fund her own minimalist lifestyle. *In re Erkson*, 582 B.R. 542 (Bankr. D. Me. April 3, 2018) (adv. proc. no. 2:16-ap-2018).

Adversary procedure—Motion to compel arbitration: Affirming *In re Anderson*, 553 B.R. 221 (S.D. N.Y. June 14, 2016), the Court of Appeals held that the bankruptcy court did not err in refusing to compel arbitration in the debtor's proposed class action to recover for the defendant credit card issuer's alleged violation of the discharge injunction in continuing to report, as charged off, credit card debt that had been discharged in bankruptcy. Concluding that arbitration of a claim based on an alleged violation of Code § 524(a)(2) would seriously jeopardize a core bankruptcy proceeding, the Court of Appeals reasoned that (1) the discharge injunction was integral to the bankruptcy court's ability to provide debtors with the fresh start that was the very purpose of the Bankruptcy Code; (2) the claim involved an ongoing bankruptcy matter that required continuing court supervision; and (3) the equitable powers of the bankruptcy court to enforce its own injunctions were central to the structure of the Code. The fact that the debtor's claim came in the form of a putative class action did not undermine this conclusion. *In re Anderson*, 884 F.3d 382 (2nd Cir. March 7, 2018) (case no. 16-2496).

Judicial estoppel—Application under circumstances: The district court abused its discretion in applying judicial estoppel where the Chapter 13 debtors failed to disclose that, shortly before the debtors made their final plan payment, the debtor husband was diagnosed with mesothelioma, a cancer caused by the inhalation of asbestos fibers. Because the debtors' plan already required the debtors to repay their creditors in full, disclosing the husband's diagnosis to the bankruptcy court would have affected the couple's bankruptcy proceeding only if their creditors were able to convince the bankruptcy court to raise the applicable interest rate under the plan. Given that the debtors were mere weeks away from completing repayment at the time of the husband's diagnosis, and were already paying interest at a standard rate, this scenario seemed more than implausible. While there might be unusual circumstances in which the need to safeguard the integrity of the courts would tip the equities in favor of judicial estoppel even when the inconsistency in question made no material difference, this case was surely not of that sort. *Clark v. AII Acquisition, LLC*, 886 F.3d 261 (2d Cir. March 30, 2018) (case no. 17-1727).

Avoidable transfers—Preferential transfer under Code § 547: The prepetition transfer of the Chapter 13 debtors' real property, with an estimated value of $335,000, in satisfaction of a tax debt of roughly $45,000 clearly enabled the tax sale purchaser's transferee to receive more than it would otherwise have received in a hypothetical Chapter 7 liquidation, and was thus avoidable as a preference under Code § 547(b), even though the tax sale was regularly conducted in accordance with state law. *In re Hackler*, 2018 WL 1440326 (D. N.J. March 22, 2018) (case no. 3:17-cv-6589), appeal filed, Case No. 18-1650 (3rd Cir. filed March 30, 2018).

Proof of claim—Unsecured claim—Status as tax debt: Agreeing with *In re Chesteen*, 2018 WL 878847 (Bankr. E.D. La. Feb. 9, 2018), the court held that the individual shared responsibility payment for which the Chapter 13 debtor was liable, based on her failure to purchase health care insurance as mandated by the Affordable Care Act, was a penalty, rather than a tax, for the purpose of Code § 507(a) and therefore was not entitled to priority status. *In re Parrish*, 583 B.R. 873 (Bankr. E.D. N.C. April 6, 2018) (case no. 5:17-bk-2341), appeal filed, *USA v. Parrish*, Case No. 5:18-cv-173 (E.D. N.C. filed April 20, 2018).

Chapter 13—Stripping unsecured lien: Because the ability of a Chapter 13 debtor to strip off an unsecured lien stems from Code § 1322(b) rather than Code § 506(d), a Chapter 13 debtor may strip off a wholly-unsecured junior lien regardless of whether a proof of claim has been filed for the debt secured by the junior lien. *Burkhart v. Grigsby*, 886 F.3d 434 (4th Cir. March 29, 2018) (case no. 16-1971).

Chapter 13—Allowance of attorney's expenses: Advances by a Chapter 13 debtor's attorney of filing fees, credit counseling fees, and credit report fees are not reimbursable under Code § 330(a), § 503(b)(1)(A) or § 503(b)(2) because they are not administrative expenses of the debtor's estate. *McBride v. Riley*, 2018 WL 1768602 (W.D. La. April 12, 2018) (case no. 1:17-cv-1302), appeal filed, Case No. 18-30535 (5th Cir. filed April 30, 2018).

Chapter 13—Confirmation of plan—Treatment of unsecured claims—Priority claim: Because the definition of "domestic support obligation" under Code § 101(14A) specifically includes interest accruing pursuant to applicable nonbankruptcy law, and because domestic support obligations are priority claims that must be paid in full under a Chapter 13 plan pursuant to Code § 1322(a)(2), postpetition interest that accrues on DSO claims under applicable nonbankruptcy law must be paid through Chapter 13 plans. However, at least under Texas law, only certain types of DSOs accrue interest. *In re Randall*, 2018 WL 1737620 (Bankr. N.D. Tex. April 10, 2018) (case no. 3:17-bk-33322).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): To be excepted from discharge under Code § 523(a)(8)(A)(ii), which encompasses "an obligation to repay funds received as an educational benefit, scholarship, or stipend," a debtor must have taken on an obligation to repay funds that were given in the form of an educational benefit, a scholarship or a stipend; the provision does not encompass all loans used for educational purposes. Thus, here, a bar exam study loan debt owed by one debtor and a career training loan debt owed by a second debtor did not come within the provision. *In re Crocker*, 2018 WL 1626245 (Bankr. S.D. Tex.

March 26, 2018) (adv. proc. no. 4:16-ap-3175), direct appeal filed, *Crocker v. Navient Solutions, L.L.C.*, Case No. 18-20254 (5th Cir. filed April 25, 2018).

Chapter 13—Confirmation of plan—Treatment of secured claims—Requirement of equal monthly payments: Compare *In re Amaya*, 2018 WL 1773096 (Bankr. S.D. Tex. April 11, 2018) (case no. 7:17-bk-70280) (Code § 1325(a)(5)(B)(iii)(I), which provides that "if the property to be distributed" to a secured creditor under a Chapter 13 plan "is in the form of periodic payments such payments shall be in equal monthly amounts," permits full payment of administrative claims in a Chapter 13 case prior to commencing equal monthly payments to secured creditors) with *In re Williams*, 583 B.R. 453 (Bankr. N.D. Ill. April 10, 2018) (case no. 1:17-bk-33186) (a proposed Chapter 13 plan that would provide a secured creditor only with adequate protection payments initially, until administrative expense claims, including that of the debtor's attorney, had been paid in full, with a step-up in the debtor's payments to the creditor after that date, could not be confirmed over the creditor's objection). See also *In re Carr*, --- B.R. ----, 2018 WL 1905047 (Bankr. N.D. Ill. April 10, 2018) (case no. 1:17-bk-29195) (secured automobile lenders had to be regarded as having accepted the debtors' proposed Chapter 13 plans when, despite having received proper notice of the plans, they failed to object to treatment of their claims under the plans, which provided that the creditors would receive only adequate protection payments until the debtors' counsel had been paid in full).

Chapter 13—Calculation of projected disposable income: Affirming *In re Blake*, 565 B.R. 871 (Bankr. N.D. Ill. March 16, 2017), the Court of Appeals held that the approach adopted by the bankruptcy court to calculate the projected disposable income of a below-median Chapter 13 debtor complied with Code § 1325(b). Under this approach, the debtor prorated her annual tax refund (i.e., divided the annual tax refund by 12) and added the resulting amount to her current monthly income. Then, the debtor prorated future expenses that the refund would be spent on over that 12-month period, thus partially or fully offsetting the tax refund income as long as her additional expenses were reasonably necessary. The bankruptcy court adopted this practice for a number of reasons. First, the court wanted to alleviate the burdens that the process of modifying confirmed Chapter 13 plans imposed on trustees, debtors' counsel, and the court. Second, the court sought to promote consistency among Chapter 13 trustees who often had different practices as to whether a debtor could retain a portion of his tax refund. The Court of Appeals concluded that the reasoning of *Hamilton v. Lanning*, 560 U.S. 505 (2010), which adopted a forward-looking approach to the calculation of a Chapter 13 debtor's projected disposable income in a case involving an above-median debtor, applied with equal force to below-median Chapter 13 debtors. *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. March 22, 2018) (case no. 17-2809).

Chapter 13—Eligibility—Debt limits: Even if a Chapter 13 debtor has debt exceeding the debt limits in Code § 109(e), the court has discretion under Code § 1307(c) in deciding whether to dismiss the debtor's case, and, here, the court would decline to dismiss the case even though the debtor's unsecured debts may have exceeded the statutory limit of $394,725. The debtor's disposable income would render a Chapter 7 discharge an abuse, and requiring the debtor to proceed under Chapter 11 would be "absurd for this true consumer debtor." *In re Fishel*, 583 B.R. 474 (Bankr. W.D. Wis. March 30, 2018) (case no. 3:17-bk-14180).

Chapter 13—Eligibility for discharge: A Chapter 13 debtor's direct payments on a non-modifiable, nondischargeable residential mortgage loan, provided for in the debtor's plan under Code § 1322(b)(5), are not "payments under the plan" for purposes of Code § 1328(a). Accordingly, a debtor's failure to make all such direct postpetition payments is not grounds to dismiss the case without a discharge. *In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill. March 5, 2018) (case no. 1:12-bk-81186).

Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification: Affirming *In re Bennett*, 2017 WL 1417221 (Bankr. N.D. Iowa April 20, 2017), the BAP held that the bankruptcy court did not err in ruling that the anti-modification provision in Code § 1322(b)(2) did not apply to a creditor's claim secured by the Chapter 13 debtors' manufactured home, where the home was not sufficiently affixed to the land to have become a fixture, and therefore part of the underlying real property, under Iowa law. *In re Bennett*, 584 B.R. 15 (B.A.P. 8th Cir. April 19, 2018) (case no. 17-6025).

Chapter 7—Deferral of discharge: Agreeing with *In re McCray*, 578 B.R. 403 (Bankr. E.D. Mich. 2017) and *In re Williamson*, 540 B.R. 460 (Bankr. D. N.M. 2015), the bankruptcy court held that there was no basis under the Bankruptcy Code or Rules to delay the Chapter 7 debtor's discharge, although the debtor failed to comply with his obligation under Code § 521(a)(2) to file, and then perform, a proper statement of intention regarding a creditor's claim secured by the debtor's mobile home; the debtor stated the intention of retaining the mobile home and continuing to make the required payments on the debt, which was not a permissible option under § 521(a)(2). *In re Templin*, 2018 WL 1864928 (Bankr. D. N.M. April 17, 2018) (case no. 1:17-bk-13196).

Proof of claim—Remedy for filing inaccurate claim: Where the Chapter 13 debtors' mortgage creditor filed a proof of claim and a mortgage proof of claim attachment that overstated the debtors' escrow shortage by over $4,000 despite what the creditor's escrow statement of account stated, the creditor failed to respond to both informal inquiries and formal discovery requests by the debtors' attorney, and

the creditor failed to amend its proof of claim for over 200 days, the court imposed sanctions on the creditor, as provided for in Bankruptcy Rule 3001(c)(2)(D), in the amount of $5,875, representing the reasonable fees and expenses incurred by the debtors' attorney in her effort to get the creditor to properly state the amount of the debtors' escrow shortage. *In re Milliman*, 2018 WL 1475937 (Bankr. D. Kan. March 23, 2018) (case no. 6:17-bk-10393).

Chapter 7—Surrender of collateral for secured debt: The bankruptcy court did not err in granting the Chapter 7 debtors' mortgage creditor's motions to reopen their bankruptcy case and compel the debtors to surrender the mortgaged residential property, where the debtors had neither redeemed the property nor reaffirmed the debt, but instead continued to reside in the property without making mortgage payments while contesting the creditor's state-court foreclosure proceeding. The circuit's case law was clear that Code § 521(a)(2) provides only three options for a debtor who has property that serves as collateral for his debts: redeem the property, reaffirm the debt, or surrender the property; doing nothing is not an option. Moreover, the creditor's motion was not barred by laches, as there was no prejudice to the debtors in requiring them to comply with § 521(a)(2) and their previous representations to the bankruptcy court that they would surrender the property. *In re Woide*, --- Fed. Appx. ----, 2018 WL 1633550 (11th Cir. April 5, 2018) (case nos. 17-10776, 17-10777).

BAPCPA—Duties of attorney: Code § 526(a)(4), which was added by BAPCPA, provides in relevant part that a debt relief agency--including a law firm that provides bankruptcy-related services--"shall not advise" a debtor "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor" in a bankruptcy case. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), the Supreme Court unanimously concluded that the section's first prohibition--on advice to incur additional debt "in contemplation of" a bankruptcy filing--requires proof that the advice was given for an invalid purpose designed to manipulate the bankruptcy process. In a case presenting the question whether the statute's second prohibition--on advice to incur debt to pay for a lawyer's bankruptcy-related representation--likewise entails an invalid-purpose requirement, the Court of Appeals held that it does not, and that an attorney violates § 526(a)(4) if the attorney instructs a client to pay his bankruptcy-related legal fees using a credit card. A bankruptcy attorney's advice that a potential client take on additional debt in order to pay the attorney's fee is inherently abusive in at least two respects: it puts the attorney's financial interest--getting paid in full--ahead of the client's, and it puts the attorney's own interests ahead of the creditors' in that, while ensuring the lawyer's full payment, it leaves a diminished estate on which creditors can

draw. *Cadwell v. Kaufman, Englett & Lynd, PLLC*, 886 F.3d 1153 (11th Cir. March 30, 2018) (case no. 17-10810).