



**National Consumer Bankruptcy Rights Center
Year in Review
2016**

Overview: The National Consumer Bankruptcy Rights Center (NCBRC) is a 501(c)(3) nonprofit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. Created in 2010, NCBRC was founded by the Board of the National Association of Consumer Bankruptcy Attorneys (NACBA) to provide assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. This work is of the utmost importance in preserving options for vulnerable individuals and families struggling with overwhelming debt during the challenging economic times.

Organizational Background and Information: NCBRC was created in 2010 as an independent nonprofit 501(c)(3) non-profit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. While legal services organizations represent low-income debtors, and numerous programs throughout the country offer pro bono assistance to debtors in bankruptcy court, there are few programs with the resources or expertise to handle bankruptcy appeals. NCBRC, and its predecessor the Amicus Project the National Association of Consumer Bankruptcy Attorneys, have been working almost exclusively on bankruptcy appeals for more than a decade.

What We Do: Each year, millions of individuals and families across the country struggle to pay their bills. Often financial distress follows on the heels of other unanticipated events such as job loss, divorce, substantial out-of-pocket medical expenses and natural disasters. Bankruptcy may provide these debtors with the opportunity for a fresh start. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the proper functioning of the bankruptcy system as a whole. However, bankruptcy debtors, lacking both financial resources and exposure to the bankruptcy system, often do not have the ability to protect the integrity of the bankruptcy system and preserve the bankruptcy rights of consumer debtors more generally. The National Consumer Bankruptcy Rights Center was created to fill that vacuum.

Program Elements: NCBRC fulfills its mission through its Amicus Program, Pro Bono Appellate Program, and its Educational Programs. Each is described more fully below.

Amicus Briefs

NCBRC provides assistance either by working directly with debtors' attorneys or by filing amicus briefs in courts throughout the country. In cases with the potential to affect consumer debtors throughout the country, NCBRC amicus curiae briefs address broader issues so that the larger legal effects of courts' decisions do not depend solely on the parties directly involved in the case. As part of its amicus program, NCBRC received more than **300 hours** of pro bono support from leading bankruptcy attorneys around the country.

Recent examples of NCBRC amicus briefs include:

Protecting Debtors and the Bankruptcy System from the Onslaught of Stale Claims:

Since 2013, NCBRC has been working on the systemically important issue raised by the business model professional debt collectors use to collect time-barred debts in consumer bankruptcy cases. Pursuit of time-barred debts imposes costs on debtors, other creditors, professionals, and institutions operating in the consumer bankruptcy system. Lawsuits to collect these stale debts in court would violate the Fair Debt Collection Practices Act (FDCPA), and NCBRC has argued that it makes no sense to allow debt collectors to evade this federal prohibition on litigating stale claims to collect the same debts through the federal bankruptcy courts. NCBRC filed amicus briefs in *Midland Funding v. Johnson*, No. 16-348 (U.S., decision pending), *Nelson v. Midland Credit Management*, 828 F.3d 749 (8th Cir. 2016), and *Owens v. LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016).

Preventing the Misapplication of Judicial Estoppel: The equitable doctrine of judicial estoppel is no longer about equity but has become a “get out of jail free” card for defendants seeking to defeat claims against plaintiffs that are or have been bankruptcy debtors. Recently, courts have adopted a bright line rule that precludes debtors or trustees from pursuing pre-petition tort claims not listed on the debtor’s schedules. Courts have extended this rule to apply to chapter 13 debtors that do not amend schedules to reflect claims that arise post-petition, even though chapter 13 debtors do not have a freestanding duty to disclose the acquisition of any property interest after the confirmation of a chapter 13 plan. NCBRC has filed amicus briefs in the following cases: *Slater v. U.S. Steel Corp.*, No. 12-15548 (11th Cir., decision pending); *Ingram v. AAA Cooper Transportation*, No. 16-11440 (11th Cir., decision pending); *VPSI v. Padula*, 651 Fed. Appx. 228 (4th Cir. 2016); *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016).

Protecting Debtors’ Rights to Accurate Credit Reporting: One of the fundamental purposes of bankruptcy is to pave the way to a “fresh start” for consumer debtors who have found themselves in intractable financial distress. Accurate credit reporting is a vital component in any debtor’s ability to make a fresh start. Creditors, employers, insurers, landlords and other entities rely heavily on credit reports in making determinations of whether to extend credit, employment, housing or insurance to consumers. Maintaining financial credibility following a bankruptcy is essential for debtors hoping to start with a clean slate. Creditors and the CRAs alike thus wield a tremendous amount of power in helping to shape the financial futures of consumers. The purpose of a chapter 13 reorganization can be dramatically diluted by misreported information on a credit report. Therefore, NCBRC is participating in several cases involving the intersection of the Bankruptcy Code and the FCRA. *See Abeyta v. Bank of America*, No. 16-15707 (9th Cir., decision pending).

Preserving Debtors’ Homestead from Improper “Carve-Outs”: Chapter 7 trustees are increasingly using ‘carve-out’ agreements with secured lenders under which the trustee sells the debtors’ underwater property, often a homestead, pays the secured lender, pays real estate professional, takes a significant fee, and provides an insignificant distribution to unsecured creditors. Trustees have also sought to capture appreciation of property that is fully exempt as of the date of the petition. NCBRC has filed one brief and is looking to file several more in cases

where the trustee seeks to sell debtors' property with little benefit to the unsecured creditors. See *Brown v. Ellman*, No. 16-1967 (6th Cir).

A complete list of amicus briefs filed is attached.

Pro Bono Appellate Program

In addition to filing amicus curiae briefs, NCBRC also works to encourage, identify and support volunteer attorneys interested in providing pro bono appellate services to debtors. Specifically, NCBRC can train attorneys, provide support in navigating the bankruptcy appellate process, and assist pro bono attorneys in writing appellate briefs and preparing for oral argument by reviewing and commenting on briefs and offering moot argument opportunities.

Stale Claims in Bankruptcy: While NCBRC has filed amicus briefs in several cases, it also recruited pro bono counsel to represent debtor in cases pending in the circuit courts of appeals. The Supreme Court is slated to hear the case originating out of the 11th Circuit—*Midland Funding v. Johnson*, No. 16-348 (U.S., decision pending).

Student Loans: NCBRC also worked on securing pro bono counsel in a recent student loan case on appeal in the Eleventh Circuit—*Acosta v. ECMC*, No 16-12884 (11th Cir.). The bankruptcy court discharged the pro se debtor's student loan debt, but the decision was reversed on appeal.

Vesting Cases: The issue of whether debtors may vest property in secured lenders or otherwise transfer property to secured lenders in satisfaction of their claim has been a growing issue. NCBRC connected pro bono counsel with debtor's counsel for representation of debtors in an appeal to the Second Circuit in *Zair v. HSBC Bank*, No 16-1648 (2d Cir.).

Educational Programs

Project Director, Tara Twomey, regularly participates in educational programs throughout the year both in person and in on-line trainings. Recent trainings include:

- *Lessons from Harris v. Veigelahn*—Webinar for NACBA
- *Hot Topics in Consumer Bankruptcy*—Central California Bankruptcy Association
- *Transferring Underwater Property*—University of Texas School of Law
- *Cutting Edge Topics in Consumer Bankruptcy*—Workshop Webinar for NACBA
- *Sailing the Supreme Court Seas*—Workshop Webinar for NACBA

White Papers: NCBRC is also exploring the possibility of producing a series of white papers on narrow, but important bankruptcy issues. NCBRC is partnering with volunteer students from the University of North Carolina for some of these projects. Currently, the topics include the exemption of EITC and HSA accounts, and the intersection between the FCRA and Bankruptcy Code.



2016 Amicus Briefs

United States Supreme Court

Midland Funding v. Johnson, No. 16-348 (USSCt)

Date: December 21, 2016

Description: Whether filing a proof of claim for a stale debt violates the FDCPA.

Result: Pending

Husky International Electric v. Ritz, No. 15-145 (USSCt)

Date: January 25, 2016

Description: Whether section 523(a)(2)(A)'s exception to discharge for "actual fraud" requires that the debtor make a false representation to the creditor or may be established through fraudulent conveyance.

Result: Reversed and remanded, May 16, 2016.

Smith v. I.R.S., No. 16-497 (USSCt.)

Date: November 14, 2016

Description: Late-filed tax return.

Result: Pending

Circuit Courts of Appeals

VPSI, Inc. v. Padula, No. 15-2114 (4th Cir.)

Date: January 26, 2016

Description: Whether Chapter 13 debtors are required to amend their bankruptcy schedules to reflect post-petition tort actions and whether debtors have standing to bring causes of action in their own name on behalf of the estate.

Result: Affirmed, per curiam, June 9, 2016

Lynch v. Jackson, No. 16-1358 (4th Cir.)

Date: July 5, 2016

Description: Whether the Means Test calculation requires the debtor to use expense deductions, as those amounts are specified in the National and Local Standards published by the Internal Revenue Service (IRS).

Result: Pending

LVNV Funding, LLC v. Harling, No 16-1346, LVNV v. Rhodes, No. 16-1347 (4th Cir.)

Date: August 22, 2016

Description: Whether provision in confirmed chapter 13 plan, which reserved the debtors' right to object to proofs of claim was sufficient to reserve the debtors' right to object to unsecured creditor's proof of claim for time-barred debt.

Result: Pending

Peake v. Ayobami, No. 16-20589 (5th Cir.)

Date: December 20, 2016

Description: Whether post-petition appreciation devolves to a debtor electing federal exemptions when the debtor checks off the 100% FMV box and does not exceed the statutory limitation on exemptions.

Result: Pending

Nelson v. Midland Credit Management, No. 15-2984 (8th Cir.)

Date: January 25, 2016

Description: Whether filing a proof of claim for a time-barred debt violates the FDCPA.

Result: Judgment affirmed, July 11, 2016, Petition for rehearing denied September 15, 2016.

Lua v. Miller, No. 15-56814 (9th Cir.)

Date: July 25, 2016

Description: Whether equitable estoppel under state law may prevent a debtor's amendment of claimed exemptions.

Result: Pending

Abeyta v. Bank of America, No. 16-15707 (9th Cir.)

Date: September 2, 2016

Description: Whether creditor's failure to report to a credit reporting agency that a debt had been treated in the debtor's successfully completed chapter 13 plan stated a cause of action under the Fair Credit Reporting Act.

Result: Pending

Godelock v. Sixty-01 Assoc. of Apt. Owners, No. 16-35384 (9th Cir.)

Date: October 21, 2016

Description: Dischargeability of postpetition HOA dues and assessments in chapter 13.

Result: Pending

Ingram v. AAA Cooper Transportation, No. 16-11440 (11th Cir.)

Date: June 16, 2016

Description: Whether Chapter 13 debtors have a free-standing duty to amend their bankruptcy schedules to reflect the post-petition acquisition of a legal claim. Whether judicial estoppel is appropriately applied against former Chapter 13 debtors who attempt to amend their bankruptcy schedules.

Results: Pending

Acosta Conniff v. ECMC, No. 16-12884 (11th Cir.)

Date: August 22, 2016

Description: Whether the debtor was entitled to hardship discharge of her student loans.

Result: Pending

Slater v. U.S. Steel Corp. No. 12-15548 (11th Cir.)

Date: October 24, 2016

Description: Judicial estoppel in pre-bankruptcy employment discrimination action.

Result: Pending

Wilkerson v. Niklas, No. 15-7152 (D.C. Cir.)

Date: March 8, 2016

Description: Whether the debtor is entitled to a deduction in the amount specified by the IRS Standards or must deduct actual expenses for Housing/Rent and Transportation Ownership.

Result: Voluntarily dismissed, April 5, 2016

District Courts

In re Sagendorph, No. 15-40117 (D. Mass.)

Date: February 17, 2016

Description: Whether a chapter 13 debtor may employ the option of providing for vesting of property in the creditor whose debt is secured by that property.

Result: Pending

Intakes

We worked on over 120 intakes in 2016. Intakes usually involve assistance such a review of a brief or pleadings, or discussion of a legal issue or appeal strategy.

Pro Bono Hours

In furtherance of our amicus efforts, attorneys from leading bankruptcy firms around the country contributed more than 300 hours of pro bono time to the amicus project.