

Cases in Review
June, 2014

“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 7—Abandonment of property of estate: Addressing an issue on which the court found little precedent, the bankruptcy court held that the circumstances did not warrant the court’s “ordering otherwise” under Code § 554(c) and authorizing the closing of the Chapter 7 case without the trustee’s abandonment of the estate’s sole asset, the debtor husband’s one-half remainder interest in certain real property in which the husband’s mother held the life estate. *In re Jarrett*, 2014 WL 1393954 (Bankr. M.D. N.C. April 9, 2014) (case no. 2:12-bk-11453).

Chapter 7—Assumption of lease of personal property: The filing of a reaffirmation agreement is not an appropriate way to obtain court approval of a lease assumption in a Chapter 7 case. Instead, for a debtor to assume an unexpired lease of personal property, the debtor must follow the procedures in Code § 365(p) and, when applicable, Bankruptcy Rule 6006. *In re Hayden*, 2014 WL 1612164 (Bankr. D. Vt. April 22, 2014) (case no. 5:13-bk-10865).

Chapter 7—Notice to file claims: Because the Bankruptcy Code and Rules do not address subsequent solicitations, by whomever, to creditors in a Chapter 7 asset case in the event few, if any, creditors timely file proofs of claim, a second solicitation for claims emanating from the court or clerk of court should not be issued absent extraordinary circumstances, and the expense of any subsequent solicitation should not be borne by the judiciary. However, because tardily-filed proofs of claim generally may share in a distribution from a bankruptcy estate after the trustee satisfies timely-filed proofs of claim, the Chapter 7 trustee may keep an asset case open for a reasonable period of time and solicit tardily-filed proofs of claims from creditors, in the sound business judgment of the trustee, so long as the trustee does not use court

personnel or judicial resources in making subsequent solicitations to creditors. *In re Collins*, 2014 WL 1682868 (Bankr. N.D. W.Va. April 29, 2014) (case no. 3:13-bk-545).

Chapter 7—Trustee fees: On a matter of first impression, the Court of Appeals held that, absent extraordinary circumstances, Chapter 7 trustees must be paid on a commission basis, as required by Code § 330(a)(7). *In re Rowe*, --- F.3d ----, 2014 WL 1663329 (4th Cir. April 28, 2014) (case no. 13-1270).

Chapter 13—Disposition of funds held by trustee: Affirming *In re Williams*, 488 B.R. 380 (Bankr. N.D. Ill. March 13, 2013), the district court held that the bankruptcy court did not err in ruling that plan payments made by the Chapter 13 debtors to the trustee following the confirmation of the debtors' plan, and not disbursed by the trustee when the debtors subsequently voluntarily dismissed their case, should be returned to the debtors. *Williams v. Marshall*, 2014 WL 1457828 (N.D. Ill. April 11, 2014) (case no. 1:13-cv-02326).

Chapter 13—Early payoff of plan: Under the plain language of Code § 1329, a Chapter 13 debtor's motion for early payoff of the payments required under his or her confirmed plan constitutes a modification of the plan and must comply with § 1329. *Winnecour v. Refosco*, Case No. 2:13-cv-1219 (W.D. Pa. April 9, 2014).

Chapter 13—Eligibility for discharge: Taking the extreme minority view on the matter, the bankruptcy court held that, under Code 1328(f), the chapter under which a Chapter 13 debtor's prior case was originally filed, not the chapter under which the debtor received a discharge, controls. Thus, here, the debtor was eligible for a discharge although his prior case was filed under Chapter 13 but later converted to Chapter 7. *In re Wilkinson*, 507 B.R. 742 (Bankr. D. Kan. April 4, 2014) (case no. 2:13-bk-21855).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): Although holding that the debtor did not establish undue hardship for the purpose of discharging her student loan debt, the court rejected the notion that a debtor must fall below the federal poverty line to discharge a student loan. Reasoning that “a more thoughtful, analytical approach should be taken,” the court said that a minimal standard of living lies somewhere between “poverty and mere difficulty.” *In re Wright*, 2014 WL 1330276 (Bankr. N.D. Ala. April 2, 2014) (case no. 2:12-bk-5206; adv. proc. no. 2:13-ap-25).

Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of “return”: Reversing the bankruptcy court, the district court applied the majority approach under the *Beard* test and concluded that the debtor's tax debt, arising from a

late return filed several years after the IRS had assessed a tax for the year in question, was nondischargeable under Code § 523(a)(1)(B)(i) because the debtor's return did not constitute a "return" for the purpose of that provision. The bankruptcy court had held the debt dischargeable after applying the minority approach under the *Beard* test. Interpreting the hanging paragraph of § 523(a) as referring to the *Beard* test, the district court noted that neither party advocated the application of the *McCoy* rule, under which a late-filed return rarely qualifies as a "return." *In re Smith*, --- B.R. ----, 2014 WL 1727011 (N.D. Cal. April 29, 2014) (case no. 4:13-cv-871).

Property of the estate—Exemptions—Under state law: Affirming *In re Sharp*, 490 B.R. 592 (Bankr. D. Colo. Feb. 22, 2013), the Bankruptcy Appellate Panel held that the bankruptcy court did not clearly err in finding that firearms, boats, a camper, an all-terrain vehicle, trailers, and fishing poles acquired by the Chapter 7 debtor for use in a fledgling outfitting business that he had been actively promoting were all necessary for use in a "gainful occupation," and thus could be claimed as exempt under Colorado law as tools of the trade, even though the business had yet to operate at a profit, and the debtor's principal employment was as a grocery store employee. *In re Sharp*, --- B.R. ----, 2014 WL 1400073 (B.A.P. 10th Cir. April 11, 2014) (case no. 13-53).