National Consumer Bankruptcy Rights Center

Cases in Review
August, 2020

"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).

Adversary procedure—Motion to compel arbitration: Adhering to *In re Anderson*, 884 F.3d 382 (2d Cir., March 7, 2018) in a consolidated appeal of two cases, the Second Circuit Court of Appeals held that the alleged violation of a bankruptcy court's discharge order is not an arbitrable dispute, and that, in each case, the bankruptcy court did not err in denying the credit card issuer's motion to enforce an arbitration clause in the issuer's agreement with the debtor. While the Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, --- U.S. ---, 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018) (requiring arbitration of employees' claims under the National Labor Relations Act) described an exacting gauntlet through which a party must run to demonstrate congressional intent to displace the Arbitration Act, that decision never stated an intention to overrule *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) or render any prong of its tripartite test a dead letter. *In re Belton*, 961 F.3d 612 (2d Cir., June 16, 2020) (case no. 19-648).

Adversary procedure—Motion to compel arbitration: Denying a creditor's motion to compel arbitration of the debtor's adversary proceeding, asserting claims for the creditor's violations of the discharge injunction, the court held that inherent conflicts existed between the Federal Arbitration Act and the Bankruptcy Code with respect to the debtor's causes of action. The court explained that bankruptcy cases are different in purpose and scope from most other debtor-creditor matters and two-party disputes in general. Bankruptcy law is collectivist in nature, impacting a debtor and potentially many of her creditors. Its purpose protects the debtor's fresh start while equitably adjusting and enforcing creditor payment rights. Bankruptcy law is a uniform federal law and its prophylactic treatment of the debtor-creditor relationship would be significantly impaired were the contours of discharge dependent upon the source of enforcement of the discharge injunction. Uniform application of the law of discharge

and how its entry is enforced should not depend upon whether the issue is before a judicial officer or an arbitrator and should not vary depending upon whether a creditor has contracted for arbitration or not. *In re Bauer*, 2020 WL 3637902 (Bankr. D. S.C., June 8, 2020) (adv. proc. no. 20-80012).

Chapter 7—Surrender of collateral for secured debt: The bankruptcy court did not abuse its discretion in denying a mortgage creditor's motion to reopen the debtor's Chapter 7 case, which had been closed in 2015, in order to require the debtor to stop contesting the creditor's foreclosure action. While the debtor had stated the intention to surrender his residence in his statement of intention filed during his bankruptcy case, the bankruptcy court was not required to follow *In re Failla*, 838 F.3d 1170 (11th Cir. 2016), which held that such an election bound the debtor in a subsequent foreclosure proceeding. The debtor in the present case was defending on the basis that the statute of limitations had run, and the bankruptcy court stated that it declined to save the creditor from its own failure to abide by the statute of limitations by reopening a case to adopt an out-of-circuit rule that would afford significantly more weight to a checkmark on a several-year-old form than was required in the Second Circuit. *Federal National Mortgage Assn. v. Alarcon*, 2020 WL 3104034 (E.D. N.Y., June 11, 2020) (case no. 19-cv-5079).

Chapter 13—Allowance of administrative expense: The Eleventh Circuit Court of Appeals held that the lessor of heating and air conditioning equipment used in the Chapter 13 debtor's home was not entitled to an administrative expense claim for payments under the lease that the debtor failed to make after assuming the lease in his Chapter 13 plan, where the plan provided for the debtor to make the lease payments directly to the lessor and the Chapter 13 trustee did not also assume the lease. Because, under Code § 503(b)(1)(A), administrative expenses include the actual, necessary costs and expenses of preserving the estate, the determinative question was whether the leased property was property of the estate, and the court concluded that Code § 365(p)(1) spoke directly to the question. That provision states that "[i]f a lease of personal property is rejected or not timely assumed by the trustee ... the leased property is no longer property of the estate." Accordingly, where (as here) the Chapter 13 trustee did not assume an unexpired lease under § 365(a) and § 365(d)(2), the lease dropped out of the estate. *In re Cumbess*, 960 F.3d 1325 (11th Cir., June 3, 2020) (case no. 19-12088).

Chapter 13—Confirmation of plan—Calculation of projected disposable income: Considering the four approaches that had developed to the question of whether a Chapter 13 debtor, in calculating projected disposable income, may deduct voluntary contributions to a retirement account specified in Code § 541(b)(7), the Sixth Circuit Court of Appeals, in a 2-1 panel decision, held that the debtor may

deduct the monthly amount that the debtor contributed on a consistent basis prepetition. The majority concluded that, while *In re Seafort*, 669 F.3d 662 (6th Cir. 2012) precluded a conclusion that, consistent with the majority rule, all such contributions are deductible, that decision did not require a conclusion that no deductions are permissible. *In re Davis*, 960 F.3d 346 (6th Cir., June 1, 2020), pet. for reh'g en banc denied (July 15, 2020) (case no. 19-3117).

Chapter 13—Confirmation of plan—Other objections: The Fifth Circuit Court of Appeals held that non-statutory restrictions that the bankruptcy court required in a Chapter 13 plan as a condition of confirmation violated Code § 1329, which governs modification of a confirmed Chapter 13 plan, and were invalid. The restrictions were that: (1) any future modification of the plan had to pay a 100% dividend on unsecured claims, (2) the debtor had to modify the plan should he fail to pay a 100% dividend on unsecured claims, and (3) the debtor would not receive a discharge unless all allowed claims were paid in full. The Court of Appeals said that a bankruptcy court should not limit the availability of § 1329 based on speculation about an as-of-yet non-existent request to modify a Chapter 13 plan. The debtor's plan paid the full amount of unsecured claims over the term of the plan, as permitted under Code § 1325(b)(1)(A), rather than committing the full amount of the debtor's projected disposable income to the plan under § 1325(b)(1)(B), which would have paid unsecured claims more quickly, and the restrictions required by the bankruptcy court were intended to reduce the risk to unsecured creditors of the debtor's failure to complete the payments required under the plan. *In re Brown*, 960 F.3d 711 (5th Cir. June 8, 2020) (case no. 19-50177).

Chapter 13—Confirmation of plan—Plan term: Absent an objection, Chapter 13 of the Bankruptcy Code establishes no minimum duration for a bankruptcy plan. Debtors are thus free to propose a bankruptcy plan lasting any amount of time up to the statutory maximum period of three or five years. Moreover, since no express provision of Chapter 13, even when viewed in the context of its broader structure, prohibits plans with estimated lengths, a Chapter 13 plan is not required to include a fixed--rather than an estimated--duration when no party objects to the plan's confirmation. Only two provisions of Chapter 13 expressly discuss the duration of a bankruptcy plan. First, § 1322 imposes a maximum duration for all plans. Second, § 1325(b)(4) mandates a fixed minimum duration for confirmation--but only if the plan triggered an objection by the trustee or a creditor. The rest of § 1325, which governs the confirmation of all plans, does not include any fixed duration requirement. *In re Sisk*, 962 F.3d 1133 (9th Cir., June 22, 2020) (case no. 18-17445).

Chapter 13—Confirmation of plan—Treatment of secured claims: Because no provision of the Bankruptcy Code requires that a Chapter 13 plan provide for all

allowed secured claims, the court could confirm the debtor's plan, which made no provision for the claim held by his secured motor vehicle creditor. *In re Limon*, --- B.R. ----, 2020 WL 3259418 (Bankr. E.D. Wis., June 16, 2020) (case no. 20-23368).

Chapter 13—Voiding lien under Code § 506(d): The Ninth Circuit Court of Appeals held that a bankruptcy court may not void a lien under Code § 506(d) when the claim secured by the lien is disallowed because the creditor who filed the proof of claim did not prove that it was the party entitled to enforce the debt. The Chapter 13 debtor objected to the claim on the basis that the creditor lacked the right to enforce the note, and the objection was sustained after the creditor failed to respond. The Court of Appeals distinguished *In re Blendheim*, 803 F.3d 477 (9th Cir. 2015) on the ground that, in that case, a creditor's lien had been voided under § 506(d) after the bankruptcy court found that the note giving rise to the claim was invalid, a circumstance not present here. *In re Lane*, 959 F.3d 1226 (9th Cir., June 1, 2020) (case no. 18-60059).

Dischargeability of debt—Tax debt under Code § 523(a)(1)—Filing of "return": Declining to follow *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), and instead applying the *Beard* test to determine whether a document constitutes a "return" for the purpose of Code § 523(a)(1), the court held that the debtor's post-assessment Form 1040 met the definition of a "return" under the *Beard* test, which qualified as "applicable nonbankruptcy law" under the hanging paragraph following § 523(a). *In re Starling*, --- B.R. ----, 2020 WL 3422348 (Bankr. S.D. N.Y., June 19, 2020) (case no. 13-36564).