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—Requirement of equal monthly payments: Agreeing with the interpretation of Code § 1325(a)(5) in *In re Cochran*, 555 B.R. 892 (Bankr. M.D. Ga. 2016) and *In re Olsen*, 604 B.R. 790 (Bankr. W.D. Wis. 2019), the bankruptcy court held that there is no requirement in § 1325(a)(5) that all payments to a secured creditor be equal periodic payments. In a "balloon payment" plan, the property to be distributed is part periodic payments and part lump sum payment. That is not prohibited by the subsection. The periodic payments have to be equal under § 1325(a)(5)(B)(iii)(I), but the lump sum payment only has to pay the claim in full. *In re McGrath*, 2020 WL 7663168 (Bankr. D. N.M., Dec. 23, 2020) (case no. 20-11513).

Chapter 13—Order deeming mortgage satisfied: Where the Chapter 13 debtor's plan was a full balance plan that required payment of the full amount of the debtor's mortgage debt through the plan, rather than a cure and maintain plan under Code § 1322(b)(5), the mortgage creditor did not object to the plan, and the debtor made all the payments called for under the plan, the bankruptcy court properly granted the debtor's motion for an order declaring the mortgage satisfied and released even though the amount paid to the mortgage creditor was not the full amount owed to the creditor. The creditor filed a proof of claim stating only the arrearage amount owed on the petition date, and the debtor's plan provided for payment of that amount. While a bankruptcy court cannot eliminate a creditor's enforcement rights absent certain very limited scenarios and proceedings, the court can determine with finality the amounts that are owed and enforceable. And where that determination is made in a confirmed plan that the creditor neither objected to nor appealed, the plan is res judicata on the amount of debt secured by the lien. *In re Bozeman*, --- B.R. ----, 2020 WL 7699842 (M.D. Ala., Dec. 28, 2020), motion to alter filed (Jan. 8, 2021) (case no. 2:20-cv-403).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Establishing undue hardship: The 50-year-old Chapter 7 debtor established that requiring her to repay her $90,000 in student loan debt would impose an undue hardship on her under the totality of the circumstances test. The court found it unlikely that the debtor's current income of roughly $25,000 annually would increase significantly, although her income might decrease if her health interfered with her ability to meet the physical requirements of her employment. The debtor, who worked approximately 53 hours per week at two jobs, had made a good faith effort to maximize her income, and she listed monthly expenses totaling just $24.44 less than her monthly net income. While the debtor took care of her autistic grandson despite having no legal obligation to do so, the court found it entirely inappropriate to suggest that she should not care for her grandson or to weigh undue burden factors against her for doing so. The debtor's medical expenses were higher than budgeted, and she anticipated that her health care costs would continue to rise due to her high cholesterol and diabetes. At the time of trial and for the foreseeable future, the debtor did not have sufficient disposable income to pay her student loan debt. *In re Mudd*, 2020 WL 7330054 (Bankr. D. Neb., Dec. 9, 2020) (adv. proc. no. 19-4048).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Establishing undue hardship: The 40-year-old Chapter 7 debtor established that requiring him to repay more than $8,291.67 of his more than $440,000 in student loan debt would impose an undue hardship on him under the *Brunner* test. While the debtor had graduated from medical school, passed his board examinations and was on his way to success as a physician, he failed to secure a residency placement, which dashed his hopes to become a licensed physician. Since then, he had been unable to find employment in the medical profession, instead taking menial jobs to survive, although he had applied for some 5,000 jobs in nearly every conceivable field since graduating from medical school. Since 2010, the debtor's total annual income from all sources ranged from a low of $3,026 in 2010 to a high of $31,473 in 2017, and the court found that his maximum salary potential was $55,000, which would take him 10 years to achieve. *In re Koeut*, 622 B.R. 72 (Bankr. S.D. Cal., Dec. 4, 2020) (adv. proc. no. 18-90130).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Status of obligation as encompassed by provision: The Chapter 7 debtor's student loans were "qualified education loans" under Code § 523(a)(8)(B) that were nondischargeable in the absence of undue hardship. Subsection 523(8)(B) defined "qualified education loans" by cross-reference to the Tax Code, which in turn defined them as "any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses." The same Tax Code section defined "qualified higher education

expenses" as "the cost of attendance ... at an eligible educational institution, reduced by the sum of" applicable scholarships or financial aid. A loan's purpose was centrally discerned from the lender's agreement with the borrower, and here, the debtor's loan applications and promissory notes (1) expressly tied the loans to the debtor's student status at the University of Michigan for a given enrollment period, (2) limited the loan amount to the "full cost of education less any financial aid you are receiving," (3) limited use of the loan to "specific educational expenses," and (4) included an area for the university to certify this information. *In re Conti*, 982 F.3d 445 (6th Cir., Dec. 14, 2020) (case no. 20-1172).

Means test—Expenses—Secured debt expense: Code § 707(b)(2)(A)(iii) allows debtors to deduct contractual payments on secured debts without regard to whether the amount of the payments exceeds the IRS Standard for the expense category. *In re Kapua*, 2020 WL 7345740 (Bankr. S.D. Ala., Dec. 14, 2020) (case no. 20-10538).

Proof of claim—Compliance with Bankruptcy Rule 3001(c): Because tax claims are based on statutory obligations rather than obligations created by a writing, Bankruptcy Rule 3001(c), which provides that a claim "based upon a writing" shall have "the writing" filed "with the proof of claim," does not apply to proofs of claims filed by taxing authorities. *In re Zimmer*, --- B.R. ----, 2020 WL 7090170 (Bankr. W.D. Pa., Dec. 4, 2020) (case no. 17-20543).

Property of the estate—Avoidance of lien impairing exemption: The debtor could avoid, under Code § 522(f), a judgment lien that attached to his interest in property he owned as a tenant by the entireties that was exempt under Code § 522(b)(3)(B). Under state law, the lien attached to all present and future property interests of the debtor, so that it attached to at least the debtor's contingent future interest in possibly gaining full ownership of the property, even though the judgment creditor could not execute against the property so long as it remained entireties property. While changing future circumstances might cause the tenancy by the entirety to be transformed into some other form of property interest to which the exemption under § 522(b)(3)(B) did not apply, such as in the case of a divorce, a sale, or the death of the debtor's spouse, under the snapshot rule the validity of the debtor's exemption was determined as of the petition date. The court noted that the debtor's motion to avoid the lien was conditionally granted, subject to the proviso that he saw his Chapter 13 plan through to its conclusion and obtained a discharge. *In re Skelton*, 2020 WL 7393492 (Bankr. N.D. Miss., Dec. 16, 2020) (case no. 20-10636).

Property of the estate—Exemptions—Availability to debtor under savings clause of Code § 522(b)(3): Under the hanging paragraph at the end of Code § 522(b)(3), the Chapter 7 debtors were entitled to claim the federal exemptions

specified in Code § 522(d) since under § 522(b)(3) the debtors, who lived in Arizona, could claim state-law exemptions only under Idaho law, but most of Idaho's exemptions were limited to state residents, and there was no indication that the debtors owned property that qualified for the remaining Idaho exemptions. Because courts understand the safeguard in the hanging paragraph as contemplating access to relief, the question was whether a debtor could actually claim an exemption under the laws of the applicable state, not whether some exemption under those laws could apply if the debtor were in a different factual scenario. *Ulrich v. Kauer*, 2020 WL 7778012 (D. Ariz., Dec. 31, 2020) (case no. 2:20-cv-1328).

Property of the estate—Exemptions—Under federal law: The term "residence" in Code § 522(d)(1) covers both primary and non-primary residences, so that the Chapter 7 debtor could claim an exemption under § 522(d)(1) in her interest in property that her son used as a non-primary residence and that the debtor co-owned with her former husband. The ordinary meaning of the word "residence" does not exclude non-primary residences. Unlike the concept of domicile, residence requires only "bodily presence as an inhabitant in a given place," and not a permanent intention to remain; a person thus may have more than one residence at a time. Congress's use of the standalone term "residence"—as opposed to "primary residence" or "principal residence"—therefore suggested that the exemption was not limited to primary residences, and the court believed that the choice of terminology was deliberate, as several provisions in the Bankruptcy Code used the term "principal residence." *In re Maresca*, 982 F.3d 859 (2nd Cir., Dec. 14, 2020) (case no. 19-3331).