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—Calculation of projected disposable income: In a Chapter 13 case in which the debtor's tax refund is generated from tax credits to low-income workers, debtors may prorate the expected refund over 12 months, thereby increasing their current monthly income by 1/12 of the expected annual payment. They may then offset the increase with reasonable expenses that accumulate over the course of the year. If the full expected refund is offset, debtors need not pay any additional amount to the Chapter 13 trustee beyond their regular monthly plan payment. The trustee is not automatically entitled to the tax refunds of debtors who will not pay unsecured creditors 100% of their claims. *In re Morales*, 563 B.R. 867 (Bankr. N.D. Ill. Feb. 27, 2017) (case no. 1:16-bk-21624), appeal filed, *Marshall v. Morales*, Case No. 1:17-cv-1999 (N.D. Ill. March 14, 2017).

Chapter 13—Confirmation of plan—Treatment of secured claims—Rate of interest—Tax claim: In applying Code § 511, which states that the rate of interest applicable to tax claims "shall be the rate determined under applicable nonbankruptcy law," the appropriate way to read "applicable nonbankruptcy law" is as referring to any law that is not aimed solely at bankruptcy proceedings. The language of the Bankruptcy Code indicates Congress was granting authority to states to set generally-applicable interest rates, but not interest rates specific to bankruptcy proceedings. The doctrine of constitutional avoidance supported this interpretation because the alternative interpretation raised constitutional difficulties. Accordingly, a Tennessee statute providing that "[f]or purposes of any claim in a bankruptcy proceeding pertaining to delinquent property taxes," a penalty imposed under the statute "constitutes the assessment of interest" was a "bankruptcy law," rather than a "nonbankruptcy law," within the meaning of § 511 and did not apply in determining

the interest rate applicable under § 511. *In re Corrin*, 849 F.3d 653 (6th Cir., Feb. 23, 2017) (case nos. 16-5717, 16-5719).

Chapter 13—Confirmation of plan—Treatment of secured claims—Vesting of title to collateral in creditor: A Chapter 13 plan may not couple surrender of real property collateral for a secured claim with vesting of title to the collateral in the creditor. A surrender, by definition, leaves the creditor free to exercise its rights in the collateral. Vesting, however, threatens to impair those same rights. By shifting the debtor's interest to the creditor, vesting prevents the creditor from exercising its most important state-law right—foreclosure—as a method of eliminating junior liens. Vesting also forces a mortgagee to assume risks and obligations—such as environmental remediation, maintenance, or taxes—that it would not bear in the absence of vesting. Vesting compromises the very rights that surrender permits the creditor to exercise, and surrender of collateral to a creditor and vesting of the same collateral in the creditor are thus mutually exclusive. *In re Brown*, 563 B.R. 451 (D. Mass., Feb. 3, 2017) (case no. 1:16-cv-11443).

Chapter 13—Eligibility—Debt limits: Where the collateral for an undersecured claim is a 910-day motor vehicle, the hanging paragraph in Code § 1325(a) may prevent bifurcation of the claim for the purpose of the Chapter 13 debt limits, so that the entire claim may be treated as secured debt. *In re Wilkins*, 564 B.R. 419 (Bankr. E.D. Cal., Feb. 15, 2017) (case no. 1:16-bk-11025).

Chapter 13—Stripping unsecured lien: The Chapter 13 debtor could strip a wholly-unsecured junior lien from her residential property where the debtor was the sole owner of the property as of the petition date, following her former husband's transfer of his interest in the property to the debtor, although the former husband had also signed the note and mortgage and remained personally liable on the debt. *In re Bailey*, 2017 WL 587980 (Bankr. M.D. Fla., Feb. 13, 2017) (adv. proc. no. 3:16-ap-125).

Chapter 13—Violation of plan confirmation order: Where a mortgage creditor failed, for 27 months, to release its liens on two parcels of real property after the creditor's secured claims had been paid in full under the debtor's confirmed Chapter 13 plan, the court awarded the debtor, as sanctions for the creditor's civil contempt, punitive damages of $25,000 and compensatory damages consisting of $2,295 for time and effort expended, $6,750 for mental and emotional stress, $4,220 in reasonable and necessary accountant fees, and $10,662 in reasonable and necessary attorney's fees. *In re Rhodes*, 563 B.R. 380 (Bankr. M.D. Fla., Feb. 3, 2017) (case no. 6:11-bk-18257).

Discharge injunction—Scope of discharge: A Chapter 13 debtor is not personally liable for postpetition homeowner assessments where the debtor surrenders the

property under the debtor's Chapter 13 plan and the debtor no longer occupies the property, even if the assessments arise under covenants that run with the land. *In re Hovious*, 2017 WL 627370 (Bankr. S.D. Ind., Feb. 15, 2017) (adv. proc. no. 1:16-ap-50195).

Dischargeability of debt—Student loan debt under Code § 523(a)(8)—Establishing undue hardship: Two courts found that the debtors had established undue hardship, permitting the discharge of the debtor's student loan debt under Code § 523(a)(8). See *In re Fern*, 563 B.R. 1 (8th Cir. B.A.P., Feb. 7, 2017) (case no. 16-6021) (the 35-year-old debtor, a single mother of three dependent children, established, under the totality of the circumstances test, that excepting her $27,000 in student loans from discharge would impose an undue hardship on her and her children, where the debtor, who had never made more than $25,000 per year, would probably never be able to make substantial payments on her loans); *In re Williams*, 2017 WL 665050 (Bankr. W.D. Wash., Feb. 17, 2017) (adv. proc. no. 2:16-ap-1114) (the court's failure to discharge the 44-year-old debtor's $250,000 in private student loans would impose an undue hardship on her, under the *Brunner* test, where the debtor could not work full-time due to her chronic and progressive health problems, and it was almost certain that the debtor's financial situation would not improve over the next 20 years).

Violation of discharge injunction—Damages: Where the creditors violated the automatic stay by obtaining a default state-court judgment against the debtors while their Chapter 7 case was pending, and the creditors thereafter violated the discharge injunction by failing to vacate the judgment for six years, the court awarded the debtors $36,000 in damages, including $15,000 in punitive damages, $18,000 in attorney's fees, $1,850 in emotional distress damages, and $1,250 in additional actual damages. *In re Achterberg*, 2017 WL 473829 (Bankr. E.D. Cal., Feb. 3, 2017) (adv. proc. no. 9:15-ap-9054).

Violation of stay—Failure to return property of estate: Disagreeing with the majority rule, which holds that a creditor's act of passively holding onto an asset that is property of the estate constitutes exercising control over the asset, and that such action violates the automatic stay under Code § 362(a)(3), the Tenth Circuit Court of Appeals reasoned that § 362(a)(3) stays entities from doing something to obtain possession of or to exercise control over the bankruptcy estate's property. The provision does not cover the act of passively holding onto an asset, nor does it impose an affirmative obligation to turn over property to the estate. The automatic stay, as its name suggests, the court said, serves as a restraint only on acts to gain possession or control over property of the estate. Stay means stay, not go. *In re Cowen*, 849 F.3d 943 (10th Cir., Feb. 27, 2017) (case no. 15-1413).