National Consumer Bankruptcy Rights Center

Cases in Review
September, 2016

"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—Calculation of projected disposable income: Following what it called the majority view, the court concluded that Code § 541(b)(7) allows a Chapter 13 debtor, in calculating projected disposable income, to deduct contributions to qualified retirement plans whether or not the debtor was making voluntary contributions prior to the bankruptcy filing, so long as the debtor is acting in good faith. *In re Cantu*, --- B.R. ----, 2016 WL 3982881 (Bankr. E.D. Va. July 14, 2016) (case no. 1:15-bk-14556).

Chapter 13—Entitlement to discharge: The Chapter 13 debtors had not completed the payments under their plan, and therefore were not entitled to a discharge under Code § 1328(a), where the debtors had made all the payments to the trustee required under their plan but had not made $41,000 in monthly direct payments to their mortgage creditor that came due during their plan term, and the debtors' plan provided for the curing of an arrearage on the mortgage. Postpetition mortgage payments, whether paid directly or through a trustee, are paid "under the plan" when the plan also provides for the curing of prepetition arrears on the debt. *In re Kessler*, --- Fed. Appx. ----, 2016 WL 3667575 (5th Cir. July 8, 2016) (case no. 15-11252).

Chapter 13—Stripping unsecured lien: A Chapter 13 debtor may not strip an unsecured junior lien where a proof of claim has not been filed for the claim secured by the lien to be stripped. The creditor's claim may not be valued under Code § 506(a) in the absence of a proof of claim, and § 506(d) by its own terms does not apply to void a lien where a claim "is not an allowed secured claim due only to the failure of any entity to file a proof of such claim." *Burkhart v. Community Bank of Tri-County*, 2016 WL 4013917 (D. Md. July 27, 2016) (case no. 8:14-cv-315), appeal filed, Case No. 16-

1971 (4th Cir. filed August 24, 2016).

Dischargeability of debt—For governmental fine, penalty or forfeiture under Code § 523(a)(7): "Case evaluation sanctions" of $188,961.60, consisting of $184,690 in attorney's fees and $4,271.60 in costs, imposed on the debtor in her prior unsuccessful whistleblower case against the county that previously employed her were not a "penalty" within the meaning of Code § 523(a)(7), which renders nondischargeable "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" that "is not compensation for actual pecuniary loss." Moreover, there was no doubt that those costs represented "compensation for actual pecuniary loss"; on both bases, the sanctions were dischargeable under § 523(a)(7). *In re Newell*, --- B.R. ----, 2016 WL 3995940 (E.D. Mich. July 26, 2016) (case no. 2:15-cv-14276).

Dischargeability of debt—Status as domestic support obligation: A debt owed to a court-appointed evaluator of the debtor's minor child was dischargeable. The debt was not a domestic support obligation where nothing suggested that the state court took into account the relative financial positions of the debtor and his former spouse, and it did not appear that the former spouse had any responsibility for the evaluator's unpaid fees. Nor did the debt come within Code § 523(a)(15), as the debt was not owed to the spouse, former spouse or child of the debtor. *In re Hansman*, 2016 WL 4069621 (Bankr. S.D. Fla. July 28, 2016) (case no. 1:15-bk-31499; adv. proc. no. 1:16-ap-1093).

Fair Debt Collection Practices Act—Filing proof of claim for time-barred debt: In a significant setback for debtors, three Courts of Appeals held in panel decisions that a debt collector's filing a proof of claim for a time-barred debt does not violate the Fair Debt Collection Practices Act. See *In re Dubois*, --- F.3d ----, 2016 WL 4474156 (4th Cir. August 25, 2016) (case no. 15-1945) (filing a proof of claim in a bankruptcy case based on a debt that is time-barred does not violate the FDCPA when the statute of limitations does not extinguish the debt); *Owens v. LVNV Funding, LLC*, --- F.3d ----, 2016 WL 4207965 (7th Cir. August 10, 2016) (case nos. 15-2044, 15-2082, 15-2109) (under a competent attorney standard, a creditor's filing a proof of claim for a time-barred debt is not deceptive or misleading, and does not violate the FDCPA, where the proof of claim sets forth accurate and complete information about the status of the debt); and *Nelson v. Midland Credit Management, Inc.*, --- F.3d ----, 2016 WL 3672073 (8th Cir. July 11, 2016), pet. for reh'g en banc filed (August 8, 2016) (case no. 15-2984) (an accurate and complete proof of claim for a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA). Strong dissents were filed in two of the cases. In *Dubois*, the dissent reasoned that a debt buyer's "sharp practice" of filing proofs of claim for time-barred debts and hoping there was no objection "is misleading and unfair to debtors and other

creditors" and gives rise to a cause of action under the FDCPA. The Chief Judge's dissent in *Owens* compared a creditor's filing a proof of claim for a time-barred debt to a creditor's filing a lawsuit to collect a time-barred debt, which the court had previously found to be a violation of the FDCPA. Appeals remain pending before the Courts of Appeals in the First, Third and Sixth Circuits, but to date only the Eleventh Circuit Court of Appeals has found this practice to violate the FDCPA. See *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014) (filing a proof of claim for a debt known to be time-barred violates the FDCPA); *Johnson v. Midland Funding, LLC*, 823 F.3d 1334 (11th Cir. 2016) (the Bankruptcy Code does not preclude a cause of action under the FDCPA for a creditor's filing a proof of claim for a debt the creditor knew to be time-barred).

Means test—Current monthly income: Income derived after the six-month lookback period specified in Code § 101(10A)(A)(i) but before the petition date may be omitted from the debtor's calculation of current monthly income. Thus, here, the debtor properly omitted from his calculation a $10,000 royalty check received by his non-filing wife on December 2, 2015, even though the wife testified that the funds were used for household expenses, where the debtor filed his Chapter 7 petition on December 21, 2015, so that the six-month lookback period ran from June 1 through November 30, 2015. *In re Norenberg*, --- B.R. ----, 2016 WL 4009601 (Bankr. D. Mont. July 21, 2016) (case no. 2:15-bk-61171).

Means test—Expenses—Vehicle ownership expense: The Chapter 7 debtor was entitled to claim a motor vehicle ownership expense deduction under the means test, even though the debtor was not the owner of the automobile, was not the borrower under the automobile loan and was not legally obligated to repay that loan, where the debtor made the monthly payments on an automobile owned by her sister but possessed and used by the debtor, and it was undisputed that the debtor would lose possession of the automobile unless she continued to make payments to the lender. This undisputed fact established for purposes of the means test that the relevant IRS local transportation expense standard of $517 for car ownership expenses was "applicable" to the debtor. *In re Drury*, 2016 WL 4437555 (B.A.P. 9th Cir. August 23, 2016) (case no. 15-1441).

Violation of discharge injunction—Class action: In a proposed class action against the Chapter 13 debtor's mortgage creditor alleging that, following her discharge, the creditor violated the discharge injunction by repeatedly sending the debtor incorrect and inconsistent mortgage statements that contained unexplained late fees, indicated erroneous past-due amounts, and failed to reflect her bankruptcy discharge, and that the creditor had violated the discharge injunction in a similar manner with respect to other Chapter 13 debtors, the court concluded that it had

jurisdiction over the debtor's proposed district-wide class because the class included only debtors who had received discharge orders entered by other judges of the same court, but the court lacked jurisdiction over a proposed national class because a contempt proceeding resulting from a violation of an order or injunction could only be maintained in the court that issued the order or injunction that was violated. *In re Beiter*, --- B.R. ----, 2016 WL 3884789 (Bankr. S.D. Ohio July 15, 2016) (case no. 2:09-bk-51303; adv. proc. no. 2:15-ap-2195).

Violation of discharge injunction—Damages—Emotional distress: Assessing the damages as $1,000 for each of the 19 letters sent to the debtors and $1,000 for each of the 100 phone calls the debtors received, the bankruptcy court awarded $119,000 in damages for emotion distress to the Chapter 7 debtors for their mortgage creditor's violation of the discharge injunction. *In re Marino*, Case No. 3:13-bk-50461 (Bankr. D. Nev. July 5, 2016), appeal filed, Case No. 16-1229 (B.A.P. 9th Cir. filed July 20, 2016).