

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 7—Determination of abuse—Recovery of attorney’s fees by trustee:

Granting the Chapter 7 trustee's motion under Code § 707(b)(4)(A) for reimbursement, by the Chapter 7 debtor's attorney, of costs and fees incurred by the trustee in prosecuting a motion to dismiss the case for abuse under § 707(b)(1) and § 707(b)(3), the court concluded that the attorney failed to make a reasonable independent investigation into the debtor's income and expenses as reflected on the debtor's Schedules I and J in violation of § 707(b)(4)(C). Specifically, the court found, the attorney failed to perform a reasonable inquiry into the circumstances surrounding the debtor's retirement fund contributions and retirement loan repayments, the debtor's payment of her son's college tuition and other expenses, and contributions received by the debtor from a man who became her husband. *In re Beinbauer*, 2017 WL 1373254 (Bankr. E.D. N.Y. April 13, 2017) (case no. 8:14-bk-74450).

Chapter 7—Dismissal for cause: A creditor's motion to dismiss the Chapter 7 debtor's case for cause under Code § 707(a), based on the lavish lifestyle that the debtor allegedly continued to live postpetition, was barred by laches where the creditor did not file the motion until 13 months after discovering the legal basis for the motion, and the debtor was prejudiced by the creditor's delay. *In re Dini*, 566 B.R. 220 (Bankr. N.D. Ill. April 6, 2017) (case no. 1:13-bk-25078).

Chapter 13—Authority of trustee: Although, under the district's model Chapter 13 plan, home mortgage claims were paid by the Chapter 13 trustee on the basis of the amounts stated in the creditor's proof of claim rather than on the basis of the amounts stated in the debtor's confirmed plan, the trustee lacked authority to retroactively change a debtor's monthly plan payment to reflect a home mortgage

proof of claim filed post-confirmation without obtaining court approval for modification of the debtor's plan. The court found that the trustee developed and implemented an unauthorized and unsolicited policy that retroactively changed confirmed Chapter 13 plans in 25 cases in violation of the Bankruptcy Code. The court ordered the trustee to file a notice of withdrawal of all notices of adjustment to plan payments filed in these cases, and to adjust her records and restore the plan payments in the cases to the amounts specified in the respective confirmed plans. *In re Velazquez*, 2017 WL 1380534 (Bankr. S.D. Tex. April 17, 2017) (case no. 7:16-bk-70326).

Chapter 13—Confirmation of plan—Good faith—Effect of Social Security

income: Agreeing with those courts that had concluded that a Chapter 13 debtor's retaining Social Security income was not sufficient to show a lack of good faith, the court said that, applying that rule here, the debtor's retention of \$920 monthly of her Social Security income, while paying unsecured creditors approximately 20% of their claims, did not constitute a lack of good faith, although "the optics of the situation are not pleasant." For the same reason, the court found no lack of good faith in the debtor's failure to provide a more thorough explanation of her plans for her Social Security income. *In re Ogden*, 2017 WL 1501411 (Bankr. N.D. Ga. April 26, 2017), amended, 2017 WL 2124413 (May 15, 2017) (case no. 3:16-bk-12280).

Chapter 13—Eligibility—Debt limits: A junior mortgage debt was considered neither secured nor unsecured debt for the purpose of the Chapter 13 debt limits where (1) the debtor's personal liability had been discharged in a prior Chapter 7 case and (2) there was no value in the collateral to support a secured claim. *In re Hernandez*, 2017 WL 1395741 (B.A.P. 9th Cir. April 11, 2017) (case no. 16-1228), appeal filed, Case No. 17-60044 (9th Cir. filed May 12, 2017).

Chapter 13—Voluntary dismissal of case: Addressing an issue as to which the courts disagree, the bankruptcy court held that, under Code § 1307(b), a Chapter 13 debtor has the absolute right to dismiss a case that had not previously been converted despite a pending motion under § 1307(c) to convert the case to Chapter 7. *In re de Lamadrid Perez*, 2017 WL 1458857 (Bankr. D. Puerto Rico, April 24, 2017) (case no. 3:12-bk-2042).

Violation of discharge injunction—Damages: Where, following the Chapter 7 debtor's discharge, her cell phone provider attempted to collect a discharged obligation of \$629.36 on 10 different occasions, the court awarded the debtor \$8,916 in damages, consisting of a "compensatory and coercive fine" in the amount of \$500 for each violation of the discharge injunction, totaling \$5,000, travel expenses and lost wages in the amount of \$1,330, and attorney's fees and costs in the amount of \$2,586.

In re Lewis, 2017 WL 1233816 (Bankr. D. Mont., April 3, 2017) (case no. 2:16-bk-60898).

Violation of discharge injunction—Damages: Where, following the Chapter 13 debtor's discharge, a successor mortgage servicer erroneously attempted to collect a non-existent arrearage on the mortgage, and the debtor spent eight months attempting to rectify the matter, the court awarded the debtor \$10,000 in actual damages and \$10,000 in attorney's fees, and the court also sanctioned the servicer \$10,000 payable to the court for the servicer's failure to abide by the court's order finding that the debtor had paid all prepetition arrears in full and for ignoring the debtor's sanctions motion. *In re Greene*, 2017 WL 1628870 (Bankr. E.D. N.C., April 28, 2017) (case no. 8:10-bk-6466).

Violation of stay: Repeated motions filed by a secured creditor during the debtors' Chapter 13 case to postpone a scheduled sheriff's sale merely sought to preserve the status quo, and thus did not violate the automatic stay. *In re Billings*, --- Fed. Appx. ---, 2017 WL 1488657 (3rd Cir. April 26, 2017) (case no. 16-3096).

Violation of stay—Damages: Affirming the lower courts, the Third Circuit Court of Appeals held that the bankruptcy court did not err in awarding the debtors \$50,100 in damages, consisting of actual damages of \$2,600, emotional distress damages of \$7,500 and punitive damages of \$40,000, for the "egregious" violations of the automatic stay by the lessor of commercial space for the debtors' daycare business. A few days after the debtors' bankruptcy filing, the lessor entered the daycare premises without permission to allegedly take photographs of the property he claimed was subject to his "Notice of Distraint." Several days later the lessor chained and padlocked the doors to the premises, thus temporarily denying access to the debtors and disrupting the operation of the daycare, and he subsequently wrote a letter to the debtors' intended new landlord threatening to file suit against him if he went forward with the new lease involving the debtors. *In re Lansam*, 853 F.3d 657 (3rd Cir. April 10, 2017) (case no. 16-1867).