UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

35th Annual Jay L. Westbrook Bankruptcy Conference

November 17-18, 2016
Austin, Texas

Recent Developments in Consumer Bankruptcy 2016

Deborah B. Langehennig
Chapter 13 Trustee
Austin, Texas

R. Byrn Bass Jr.
Attorney at Law
Lubbock, Texas

Author Contact Information:
Brian T. Cumings
Graves Dougherty Hearon & Moody
Austin, Texas

RECENT DEVELOPMENTS IN CONSUMER BANKRUPTCY 2016

(SPECIAL THANKS TO STEPHEN J. MANZ, LAW CLERK TO THE HON. HARLIN D. HALE, DALLAS AND TO EMILY BUCHANAN, INTERN TO DEBORAH B. LANGEHENNIG, AUSTIN FOR THEIR ASSISTANCE IN COMPILING THIS ARTICLE)

MISCELLANEOUS

***Fear v. United States Tr. (In re Ruiz)*, 541 B.R. 892 (B.A.P. 9th Cir. 2015)**. A chapter 7 trustee applied for compensation and expenses in an amount that exceeded the amount available for distribution on allowed unsecured claims, but was less than the statutory commission. The bankruptcy court held that the lopsided compensation constituted an extraordinary circumstance warranting the court's review of the reasonableness of the Section 326(a) commission rates and awarded only a portion of the requested fees. The Panel vacated and remanded, holding that trustee compensation exceeding distributions to unsecured creditors was not per se an extraordinary circumstance warranting the bankruptcy court's review of the reasonableness of the statutory commission.

***James v. Guidry (In re Guidry)*, 2015 Bankr. LEXIS 4139 (B.A.P. 9th Cir. Dec. 9, 2015)**. During dispute with a chapter 7 trustee over exemptions, debtor who had withdrawn his request to convert to chapter 13 disclosed to the court that his bankruptcy petition preparer had suggested to the debtor the possibility of conversion to Chapter 13. The bankruptcy court show-caused the bankruptcy petition preparer for violation of Section 110(e). While the debtor did not testify at the hearing on the order to show cause, the court relied on his previous statements in finding that the petition preparer had assisted the debtor with the motion to convert. The bankruptcy court found that the petition preparer had violated Section 110(b), (c), and (l), and ordered him to disgorge his fees and fined him pursuant to Section 110(l). The petition preparer appealed based on violation of due process because the show cause order only mentioned Section 110(e) and because the debtor had not testified at the hearing. The Panel reversed, noting that the bankruptcy court erred by using the debtor's non-evidentiary statements to assess the credibility of the petition preparer and that the pro se petition preparer could not have been expected to be prepared for the basis for his alleged conduct if it was not included in the show cause order.

***Lane v. Barney (In re Lane)*, 546 B.R. 445 (B.A.P. 10th Cir. 2016)**. Chapter 7 debtor failed to disclose significant assets, which were brought to the chapter 7 trustee's attention by the debtor's ex-wife. The trustee brought multiple adversary proceedings against the debtor and persons affiliated with the debtor seeking to revoke the discharge and recover assets. The trustee settled with the debtor, agreeing to allow the debtor to retain $2.5 million in retirement accounts and numerous other non-exempt items in exchange for the debtor's agreement that he would no longer interfere in the administration of the estate. Nevertheless, the debtor proceeded to file obstructive pleadings (including seventeen appeals) that prevented the trustee from efficiently marshaling and liquidating estate assets. The bankruptcy court entered two contempt awards against the debtor (but which were only to be collectible from the debtor's share of any proceeds leftover from the estate after all claims were paid), totaling over $300,000. The Panel affirmed, noting that the bankruptcy court had appropriately considered the debtor's ability to pay the sanction by making the sanction payable only from any surplus distribution from the estate.

***Morris v. Davis (In re Morris)*, 2016 Bankr. LEXIS 985 (B.A.P. 9th Cir. March 29, 2016)**. The debtor's filed chapter 11 bankruptcy that was quickly converted to chapter 7 for failure to disclose assets, transfers, and generally comply with obligations of debtor in bankruptcy. The chapter 7 trustee proposed to enter into a settlement with his ex-wife that would resolve the ex-wife's claims against the estate relating to various efforts made by debtor to avoid making payments required by divorce decree, including distributing litigation proceeds to ex-wife. The debtor's business associate objected to the Rule 9019 motion and made an "offer" that the trustee rejected as being not substantially better than deal that had already been reached with the ex-wife. The bankruptcy court approved the 9019 motion, and the business associate appealed. The B.A.P. affirmed, noting that the business associate's offer was not an overbid of the ex-wife's offer when taking into account the ex-wife's reduction of her claims against the estate by $400,000 and the extra costs that would be incurred by the trustee in administrating the business associate's offer.

***In re Palacios*, 2016 Bankr. LEXIS 249 (Bankr. S.D. Tex. Jan. 27, 2016)**. The debtors failed to disclose in their schedules a class action products liability lawsuit in which they were claimants. A little over a year after the petition was filed, the chapter 7 trustee notified the court of the asset. Several months later, the trustee applied to the court to approve the class action settlement that had already occurred, and simultaneously requested permission to retain and pay the attorney who had handled the class action lawsuit. Under the class action settlement, the debtors would receive a net of $49,654.72 out of a total recovery of $87,968.00; the remaining amounts were attributed to covering various attorneys' fees and costs related to the lawsuit. The trustee's request to pay the attorney reflected the attorneys' fee and cost arrangements that had been incorporated as a part of the class action settlement.

The court conditionally approved the proposed settlement, but refrained from ruling on the request to retain and pay the attorney so that the trustee could first comply with Sections 327(e) and 328(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014, the statutes and rule governing the retention of special counsel for the bankruptcy estate. The attorney from the class action lawsuit prepared and filed the fee application, but failed to include certain details, verifications, and disclosures required by the statutes. The bankruptcy court denied the application based on its failure to properly comply with the statute. As a result, the court ruled that the bankruptcy estate would receive the entire $87,968.00 settlement (less the debtors' exempted portion).

***Tower Credit, Inc. v. Schott*, 550 B.R. 299 (M.D. La. 2016) (on appeal to 5th Cir.)**. Parties disputed whether funds paid within ninety days of the bankruptcy filing to creditor in accordance with a wage garnishment order were avoidable as a preference under Section 547(b). The creditor argued that its interest in the funds was perfected when the garnishment order was entered instead of when the wages were actually garnished. The court held that the relevant date was when the debtor earned the wages, noting that it did not matter when perfection occurred under state law because the Bankruptcy Code defines "transfer" for purposes of Section 547 preference claims and

Title search: Recent Developments in Consumer Bankruptcy 2016

Also available as part of the eCourse
2016 Bankruptcy eConference

First appeared as part of the conference materials for the
35th Annual Jay L. Westbrook Bankruptcy Conference session
"Recent Developments"