Supplement to

Problems and Materials on Bankruptcy Law and Practice

Third Edition

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Chapter Three

Page 113, n.66:

See also In re CVAH, Inc, 570 B.R. 816 (Bankr. D. Idaho 2017) (a trustee's power under § 544(b) to exercise the rights of unsecured creditors to avoid prepetition transfers includes: (i) the power of the IRS to avoid transfers under state law as far back as ten years, without regard to any state statute of limitations; and (ii) the power to use the Federal Debt Collection Practices Act to avoid transfers made up to six years earlier).

Page 116, before first paragraph after block quote:

Section 8(a) of the Uniform Fraudulent Transfer Act provides a defense to an intentionally fraudulent transfer for a person who took in good faith and for reasonably equivalent value. That phrasing failed to indicate whether the value provided by the transferee had to go to the transferor. *Cf.* UFTA § 8(d) (protecting the transferee of an avoidable transfer for the value given to the debtor). Section 8(a) of the UVTA removes that ambiguity by expressly providing that the defense is limited to situations in which the reasonably equivalent value goes to the debtor.

Due to concerns that this can be unfair to transferees who had no notice of the fraud and were not unjustly enriched, Washington adopted a non-uniform amendment to UVTA § 8(a) to remove the requirement that the value go to the debtor.

Page 116, n.70:

See also CAL. PROB. CODE § 283 ("A disclaimer is not a voidable transfer by the beneficiary under the Uniform Voidable Transactions Act."). *But cf. SBA v. Bensal*, 853 F.3d 992 (9th Cir. 2017) (the Federal Debt Collection Procedures Act, which applies when the Small Business Administration seeks to collect a debt and which includes a provision for avoiding fraudulent transfers, preempts CAL. PROB. CODE § 283 and thus the SBA could avoid the debtor's disclaimer of a bequest);

contra In re White, 2014 WL 555212 (Bankr. D. Neb. 2014) (the debtor's disclaimer of an inheritance was an avoidable fraudulent transfer).

Page 127, n.80:

The Supreme Court granted certiorari in *FTI Consulting, Inc. v. Merit Management Group, LP*, 137 S. Ct. 2092 (U.S. 2017).

Chapter Five

Page 186, n.3:

For a contrary ruling, holding that § 524 provides the exclusive means for enforcing the discharge injunction and thus attempting to collect a discharged debt does not violate the Fair Debt Collection Practices Act, see *Walls v. Wells Fargo Bank*, 276 F.3d 509 (9th Cir. 2002).

With respect to filing a proof of claim based on a time-barred obligation, the U.S. Supreme Court ruled that such action does not violate the FDCPA. *See Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (U.S. 2017). Noting that the Act prohibits debt collection activity that is "false," "deceptive," "misleading," "unconscionable," or "unfair," the Court readily concluded that none of the first thee adjectives applies because the filed claim indicated on its face that it was barred by the applicable statute of limitations. *Id*. at 1411-12. Then, assuming but not deciding that filing a civil action on a time-barred claim would be "unconscionable" or "unfair," the Court nevertheless distinguished filing a proof of claim in a Chapter 13 case. The Court noted that the debtor initiates such a proceeding, a knowledgeable trustee is available, and the claims-resolution process is more streamlined and less unnerving that facing a collection lawsuit. *Id.* at 1413-14

Page 186, n.6:

Cf. In re Farmer, 567 B.R. 895 (Bankr. W.D. Wash. 2017) (creditor could not compel arbitration of debtor's adversary proceeding seeking a declaration that the debt was not a nondischargeable student loan).

Page 202 (after Problem 5-5):

If the debtor's prepetition guaranty covers future extensions of credit to the principal obligor (a continuing guaranty), it is not entirely clear whether the creditor has a prepetition claim for a postpetition extension of credit. In one recent district court decision, the court ruled that the creditor did not. *In re Brand*, 578 B.R. 729

(D. Md. 2017). As a result, the debtor's discharge did not absolve her of liability under the guaranty for an extension of credit made after the discharge order was entered. Because the debtor could have but did not revoke the continuing nature of the guaranty, she remained liable.

Chapter Seven

Page 273:

Apparently, a creditor's postpetition report to a credit agency of the debtor's overdue or delinquent payments does not constitute a violation of the stay, absent evidence that the report was made in an effort to coerce payment. *See In re Keller*, 568 B.R. 118 (9th Cir. BAP 2017).

Page 294, n.21:

See also In re Lanshaw, 853 F.3d 657 (3d Cir. 2017) (damages for emotional distress are available for a willful violation of the automatic stay; the debtor need not produce corroborative medical evidence if the violation is egregious).

Chapter Eight

Page 315, n.19:

But see In re Nejic, 2017 WL 2189527 (Bankr. C. D. Cal. 2017) (noting a split in authority and concluding that the debtor's right to redeem does end when the stay is lifted as to the collateral).

Page 319, last paragraph):

For the point that the debtor might be able to retain collateral if the agreement lacks a default-on-bankruptcy clause, see *In re Templin*, 2018 WL 1864928 (Bankr. D.N.M. 2018) (also refusing to delay entering the discharge order because of the debtor's failure to comply with § 521(a)(6)).

Chapter Nine

Page 345, n.24:

See also In re ADI Liquidation, Inc., 560 B.R. 105 (Bankr. D. Del. 2016). The same is true even if pursuant to agreement the severance benefits are to paid over time. *In re Golden Gate Community Health*, 577 B.R. 567 (Bankr. N.D. Cal. 2017).

Chapter Ten

Page 378, n.29:

But cf. In re Pagan, 564 B.R. 324 (Bankr. N.D. Ill. 2017) (allegation that employee deliberately breached the non-solicitation clause in her employment agreement by soliciting other employees to leave her employer and to join her in accepting employment from competitor did not state a cause of action to render the debt nondischargeable under § 523(a)(6)).

Page 380, n.43:

See also In re Appling, 848 F.3d 953 (11th Cir. 2017), *cert. granted*, 2018 WL 386562 (U.S. 2018) (adopting the broader approach by interpreting a debtor's misrepresentation about the amount of an anticipated federal income tax refund to be about the debtor's "financial condition").

Page 397, after Problem 10-8:

Although § 727(b) states that a discharge under Chapter 7 discharges the debtor of all prepetition debts except those listed in § 523, a federal statute outside the Bankruptcy Code purports to make nondischargeable a service member's obligation to repay the unearned portion of a re-enlistment bonus if the service member is discharged from active duty before completing the period of re-enlistment. *See* 37 U.S.C. § 303a(e). Courts have concluded that the specific statute governs the general and, hence, that the repayment obligation is not discharged in bankruptcy. *See, e.g.*, *In re Ryan*, 566 B.R. 151 (Bankr. E.D.N.C. 2017).

Chapter Eleven

Page 435 (end of third paragraph):

Although the debtor need not deliver the collateral to the secured claimant, and may continue to use or occupy the collateral until the secured claimant seeks to exercise its rights to the collateral, a debtor cannot, under the guise of surrender, retain the collateral for a substantial period of time against the wishes of the secured claimant, even if the debtor makes periodic payments on the secured claim. *See, e.g., In re Thompson*, 581 B.R. 1 (Bankr. D. Mass. 2018).

Page 435. n.27:

The *Sagendorph* decision was reversed on appeal. *In re Sagendorph*, 562 B.R. 545 (D. Mass. 2017) (the debtor cannot force a secured party to accept title to the collateral over the secured party's objection); *see also In re Brown*, 563 B.R. 451 (D. Mass. 2017) (following *Sagendorph*).

Page 437, n.29:

See also In re White, 564 B.R. 883 (Bankr. W.D. La. 2017) (following *DeSardi* but nevertheless concluding that a proposed plan was not confirmable because it was funded in part with annual tax returns with the result that monthly payments to the secured claimant would not be equal after the administrative expenses were paid).

Page 441, n.43:

See also In re McPhilamy, 566 B.R. 382 (Bankr. S.D. Tex. 2017).

Page 444, n.50:

Because a Chapter 13 debtor's right to strip off of a wholly underwater home mortgage lien stems from § 1322(b), not § 506(b), the right applies even if the creditor does not file a proof of claim. *See, e.g., Burkhart v. Grigsby*, 886 F.3d 434 (4th Cir. 2018).

Page 446, n.55:

See also In re Velazquez, 570 B.R. 251 (Bankr. S.D. Tex. 2017) (the Chapter 13 trustee could not unilaterally alter the amounts to be paid to a home mortgage lender under a confirmed plan after the lender filed a late proof of claim indicating that the arrearage exceeds the amount indicated in the plan and which the plan provided to cure); *In re Flournoy*, 570 B.R. 293 (Bankr. E.D. Wis. 2017) (even though a creditor with a security interest in the debtor's vehicle did not file a claim, and thus the plan need not provide for distributions to the creditor and could provide for the debt to the creditor to be discharged, the plan could not eliminate the security interest).

Page 447, n.56:

The name provided for the cited decision of the U.S. Court of Appeals for the Fourth Circuit is incorrect. The case is *In re Birmingham*, not *In re Bingham*.

Page 450, n.67:

The flip side of not treating direct payments to a mortgagee as payments under the plan is that a debtor who fails to make such payments, but who makes all payments that the plan does require, might be entitled to a discharge. *See, e.g., In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill. 2018)

Page 461, n.87:

See also In re Cole, 563 B.R. 526 (Bankr. W.D.N.C. 2017) (Chapter 13 debtor lacks standing to use the trustee's strong-arm, preference, or fraudulent transfer avoidance powers).

Page 467, after Note:

For a good discussion of how confirmation of Chapter 13 plan affects how credit reporting agencies may describe the debts subject to the plan, see *Mensah v. Experian Information Solutions, Inc.*, 2017 WL 1246892 (N.D. Cal. 2017).

Chapter Twelve

Page 575, in last full paragraph:

The requirement for cramdown that at least one impaired creditor class accept the plan applies in jointly administered Chapter 11 cases on a per-plan basis, not a per-debtor basis. *See In re Transwest Resort Properties*, 881 F.3d 724 (9th Cir. 2018).

Page 587, after the case:

In *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), the Supreme Court held that any distributions ordered by a court in a Chapter 11 case in connection with a voluntary dismissal of the bankruptcy case must comply with the absolute priority rule.