Supplement to

Problems and Materials on Bankruptcy Law and Practice

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Chapter Three

Page 100, n.44:

See also In re Cresta Technology Corp., 583 B.R. 224 (9th Cir. BAP 2018) (the date a check is honored is when the transfer occurs for the purposes of § 549).

Page 103, chart of payments:

As noted in note 44 on page 100, courts have generally adopted a date-of-delivery rule for determining when a transfer occurs for the purposes of § 547(c)(4). This chart obliquely shows why. If instead courts used the date the check was honored, a business that gave new value after receiving a check in payment of an existing debt, but before the check was honored, would not be able to take advantage of the defense. Yet that type of practice is precisely what the § 547(c)(4) defense was intended to protect.

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 In re Burke, 592 B.R. 834 (Bankr. E.D. Tenn. 2018); 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).

Cf. In re Johnson, 593 B.R. 895 (Bankr. N.D. Ga. 2018) (a state court judgment declaring void ab initio a debtor's pre-petition transfer of an interest in real property to his wife did not result in a reconveyance of the property back to the debtor; consequently, the judgment liens of several judgment creditors attached when their liens were recorded, which was outside the preference period, not on the date of the state court judgment invalidating the transfer to the wife, which was inside the preference period).

Page 127, n.80:

The Supreme Court affirmed the decision in *FTI Consulting, Inc. v. Merit Management Group, LP*, ruling that a transfer was not "made by or to (or for the benefit of)" a financial institution merely because a financial institution operates as a conduit for the transfer. 138 S. Ct. 883 (2018).

Chapter Four

Page 151, n.21:

See also Wilson v. Rigby, 909 F.3d 306 (a debtor who initially claimed as exempt the full amount of her equity in her home on the petition date – $3,560 – could not amend her exemption to exempt post-petition appreciation, even though the total claimed remained under the cap; exemptions are fixed as of the petition date).

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 Six

Page 250, n.39:

See also In re Immel, 2018 WL 3701679 (Bankr. E.D. Wis. 2018) (reaching the same conclusion as *Duvall*).

Page 255, n.45:

In *In re Taylor*, 899 F.3d 1126 (10th Cir. 2018), the court abrogated the decision in *In re Cozad* and concluded that the impairment calculation must, when deducting other liens, use an amount that corresponds to the debtor's percentage of ownership (*i.e.*, the total lien amount times the fraction equal to the debtor's percentage of ownership of the property), and thus effectively adopted the calculation on the right.

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 290, n.18:

For a recent decision adopting the minority approach after a thoughtful analysis, see *In re Dev*, 593 B.R. 435 (Bankr. E.D.N.C. 2018).

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 314, after first full paragraph following Problem 8-2:

Recall that under § 365(p), an individual debtor in a Chapter 7 case may assume a lease of personal property if the trustee does not assume the lease. The process of doing so does not include any of the protections under § 524(c). In particular, neither the court nor the debtor's attorney need conclude that assumption does not impose an undue hardship on the debtor. Moreover, nothing in the Code expressly states that the debtor's assumed obligations under the lease survive the discharge.

Not surprisingly, therefore, courts disagree whether a lease that is assumed under § 365(p) remains enforceable if the obligations are not reaffirmed under § 524(c). *See Bobka v. Toyota Motor Credit Corp.*, 586 B.R. 470 (S.D. Cal.) (concluding that an assumed lease is enforceable against the debtor), *appeal filed*, (9th Cir. May 30, 2018); *In re Abdemur*, 587 B.R. 167 (Bankr. S.D. Fla. 2018) (same).

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 317, n.22:

Several courts have recently adopted the minority position that a postpetition refusal to return collateral repossessed prepetition preserves the status quo and is not an act to exercise control over property of the estate. *See In re Cowen*, 849 F.3d 943 (10th Cir. 2017); *In re Denby-Peterson*, 941 F.3d 115 (3d Cir. 2019). In contrast, the Seventh Circuit recently reaffirmed its position that retaining possession of collateral seized prepetition does violate the stay. *In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *petition for cert. filed* (Sept. 18, 2019).

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, second full paragraph:

The U.S. Supreme Court disagreed with the majority of courts and concluded that a statement about a single asset can be about the debtor's "financial condition." Thus, a false representation about a single asset cannot render a debt nondischargeable unless that statement was made in writing and the other elements of § 523(a)(2)(B) are satisfied. *Lamar, Archer & Cofrin, LLP. v. Appling*, 138 S. Ct. 1752 (2018).

Pages 395-96:

Because most courts apply the "undue hardship" analysis on a per-loan basis, and refuse to discharge a portion of a single loan, a debtor who has consolidated student loan debt into a single obligation will have to show undue hardship as to the entire debt. *See, e.g., In re Martin*, 584 B.R. 886 (Bankr. N.D. Iowa 2018).

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).

Page 398, last full paragraph:

Although a default judgment generally lacks preclusive effect because the underlying merits are not litigated, if a default judgment is entered as a sanction for bad conduct, most courts treat the judgment as having preclusive effect when determining the nondischargeability of the debt, so as to deprive the sanctioned party the opportunity to litigate an issue, which would undermine the sanction. *See e.g.*, *In re Snyder*, 939 F.3d 92 (2d Cir. 2019).

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 Amaya, 585 B.R. 403 (Bankr. S.D. Tex. 2018) (plan could provide for equal monthly payments on a secured claim even though those payments did not start immediately); *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 437, n.30:

See also In re Williams, 583 B.R. 453 (Bankr. N.D. Ill. 2018).

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 448, n.59:

The *Witt* decision was overruled. *See Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019).

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).

Page 476, after first full paragraph:

In an opinion that threatens to disrupt settled understandings of bankruptcy law, the Eleventh Circuit rules at the end of 2018 that a debtor whose confirmed and completed Chapter 13 plan stated that the debtor would make payments to a mortgagee directly but did not specify repayment terms or make any changes to the mortgage's terms did not "provide for" the mortgage debt within the meaning of § 1328(a). Accordingly, the debtor's liability was not discharged and the mortgagee could pursue the debtor for a deficiency after foreclosing the mortgage. Perhaps even more important, the court ruled that, even if the plan had "provided for" payment of the debt, discharging the debt would, because the mortgaged property was the debtor's principal residence, constitute a modification of the mortgagee's rights, and thus violate § 1322(b)(2). *In re Dukes*, 909 F.3d 1306 (11th Cir. 2018). Under the court's analysis, it would appear to be impossible for a Chapter 13 debtor to discharge personal liability on a home mortgage debt.

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.