cdcbaa | Central District Consumer Bankruptcy Attorney Association

PROGRAM SUMMARY 1-23-21

By: Gary R. Wallace-Program Summary Committee Chair

***cdcbaa* Holds First Meeting and MCLE Program of 2021: "15th Annual Review of 9th Circuit Decisions on Bankruptcy in 2020"**

On January 23, 2021, the CDCBAA held its first members meeting and MCLE program of the year. To help mitigate the spread of COVID-19, the meeting and program were conducted as a live webinar via Zoom video. The program topic was: **"15th Annual Review of 9th Circuit Decisions on Bankruptcy in 2020."** The distinguished panel featured the Hon. William Lafferty of the United States Bankruptcy Court for the Northern District of California and Member of the 9th Circuit Bankruptcy Appellate Panel, the Hon. Neil Bason of the United States Bankruptcy Court for the Central District of California (Los Angeles division), and our own former president, M. Jonathan Hayes of Resnik Hayes Moradi LLP.

The panel discussion began with the recent United States Supreme Court decisions and then moved to Chapter 13 decisions, Chapter 7 decisions and finally Chapter 11 decisions. Ninth Circuit, B.A.P., District Court and California state court decisions were also discussed. Among the more notable case discussions by the panel were the following:

Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020). There, the Supreme Court held that denial of a motion for relief from the automatic stay is a final order making the notice of appeal required within 14 days thereof.

Bobka v. Toyota Motor Credit Corporation, 968 F.3d 946 (9th Cir. August 2020). Held, a lease assumption under 11 U.S.C. section 365(p) need not comply with the reaffirmation procedures of 11 U.S.C. section 524(c) to be enforceable when the debtor and creditor mutually waive them.

In re Nolan, 618 B.R. 860 (Bankr. C.D. Cal. 2020). Can the debtor take the homestead exemption on real property owned by an irrevocable trust of which he is a beneficiary where he is in residing in the property? Answer: Yes. The debtor owned a beneficial interest in the property that could have been attached by a lien creditor.

Lorenzen v. Taggart (In re Taggart), 980 F.3d 1340 (9th Cir. November 2020). The 9th Circuit ruled that no violation of the discharge injunction occurred where the creditor had any "objectively reasonable basis" to believe that the debtor had "returned to the fray." The 9th Circuit was guided by the recent "fair ground of doubt" standard established by the US Supreme Court. It is worth noting that the CDCBAA panelists felt that the concept of returning to the fray is still vague and that this area of the law regarding the standards for determining violations of the discharge injunction is still quite murky.

Moser v. Sterling-Pacific Lending, Inc. (In re Moser), 613 B.R. 721 (9th Cir. BAP April 2020). The 9th Circuit determined that it was appropriate for a bankruptcy court to hear and decide a creditor's request for a determination as to whether proposed conduct will violate a discharge injunction and that such a determination does not constitute the giving of an advisory opinion. The panel voiced concern about the risks inherent in such an obligation, and urged counsel

seeking such a determination to present in detail all underlying facts and related proceedings so that the ruling takes into account all conceivable future issues to the fullest extent possible.

Universal Home Improvement v. Robertson, 51 Cal. App.5th 116 (July 2020): California Civil Code section 3432 specifically permits a debtor to pay one creditor in preference to another. Therefore, there can be no fraud where such payment is in satisfaction of a bona fide debt. Notably, however, the recited facts favoring the prevailing party seemed dubious because the transferee of the payment in question was the sister of the debtor, and the debt was likely barred by the statute of limitations.

In re Green Pharmaceuticals, Inc., 617 B.R. 131(Bkrtcy. C.D. Cal. May 2020): A substantial, not *de minimis*, contribution of new value is required for chapter 11 plan approval. Here, the proposed new value equaled just 1.38% of the general unsecured creditors' claims.

Hamilton v. Elite of Los Angeles, Inc. (In re Hamilton), 803 Fed. Appx. 123, 2020 WL 1244256 (9th Cir. March 2020)(unpublished). Issue: Did the bankruptcy court err in confirming the chapter 11 plan where the debtor was paying only a small portion of a large non-dischargeable debt and preventing the creditor from attempting to collect the rest for five years? Answer: Yes.

The one case that seemed to generate the most discussion both during and after the program is the Supreme Court's decision in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696, 206 L.Ed.2d 1 (2020). There, the Court held that a federal court's authority to issue "*nunc pro tunc*" (i.e., "now for then") orders is limited to those that "reflect the reality" of something that has already occurred but is not yet entered as an order through inadvertence of the court. However, a court "cannot make the record what it is not." While this decision concerned bankruptcy jurisdiction, several other subsequent bankruptcy court decisions have now held that *Acevedo* requires bankruptcy courts to stop the common practice of approving employment applications *nunc pro tunc* for a time prior to when the order issues. *See, e.g., In re* Miller, 62 B.R. 637 (Bankr. E.D. Cal. 2020), the U.S. Trustee is now taking the position that the services of a professional cannot be approved for a period prior to the date that the Court signs the order. This implies that services rendered prior to the approval of employment will approved only if the standard of "reasonable and necessary to preserve the estate" is met. While the long-term ramifications and nuances of this position remain to be seen, the most prudent advice circulating through the consumer bar is to file employment applications immediately.

A lengthy and helpful handout, which included summaries of the cases, was also provided to all participants. The program was once again well-attended and very well-received.

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