Chapter 13 Mini-Seminar
January 29, 2021

Uh-oh, SCOTUS says keeping collateral that was legally repossessed pre-petition is just fine . . . or does it?

- *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021)

The City of Chicago impounded cars due to owners' failure to pay fines for motor vehicle infractions. Each of the owners filed chapter 13 and requested return of the vehicles. The City refused. The issue before the Court was whether the City violated the stay under § 362(a)(3) by retaining possession of the debtors' property after they had filed bankruptcy.

The Bankruptcy Court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed, stating that the City had acted "to exercise control over" the debtors' cars in violation of § 362(a)(3).

The Supreme Court vacated the lower courts' rulings. The Court, in analyzing sections 362 and 542 (the turnover provision) of the Code, concluded that the mere retention of estate property after the filing of a bankruptcy does not violate § 362(a)(3). Section 362 is not the turnover provision of the Code; § 542 is. Section 362(a)(3) stays "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate."

The Court concluded that such provision requires something more than mere retention. The language of the provision—"stay," "any act," "exercise control"—implies an affirmative act that disturbs the status quo of estate property as of the time the petition is filed.

Nunc Pro Tunc Relief – Is this still a thing?

- *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020).

Federal courts may issue nunc pro tunc orders only to "'reflect . . . the reality' of what has already occurred." The Court explained that "[s]uch a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court."

“[N]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating ‘facts’ that never occurred in fact.”

- Order from *Heartland Drilling, Inc.*, Case No. 19-10301-rlj7, ECF No. 34 (Bankr. N.D. Tex. Sept. 18, 2020).

I denied approval of trustee’s motion to approve the sale of equipment nunc pro tunc. The sale took place on May 5, 2020; the motion was filed on June 11, 2020. Nunc pro tunc relief concerns *the court’s approval* of a party’s act, not the act itself, that has previously taken place but was not properly recorded on the court’s record.

In light of *Acevedo*, and § 363(b)(1)’s requirement that the sale of estate assets must take place *after* notice and a hearing, I denied the trustee’s motion. In doing so, I noted that, as the sale had taken place at an auction held more than four months prior, it could not practically be avoided.

So, what is the effect of my denying approval of the trustee’s motion?

The Fifth Circuit comes to the rescue of chapter 13 debtors

- *Brown v. Viegelahn (In re Brown)*, 960 F.3d 711 (5th Cir. 2020).

Brown filed chapter 13 and proposed a chapter 13 plan that provided for payments of $1,080 per month over 5 years. His plan stated that he would pay “approximately 100%” of his unsecured claims. The chapter 13 trustee, Viegelahn, objected to the plan. Brown’s monthly disposable income—his income less necessary expenses—on his Schedule J was $2,191. He thus had $1,111 of excess disposable income. The trustee said that Brown’s plan was not proposed in good faith, failed to comply with all applicable provisions of the Code, and that it was not feasible given Brown’s failure to submit all disposable income to the plan.

The bankruptcy court conditioned confirmation on Brown agreeing to either use *all* his disposable income for the first seven months of the plan to pay unsecured creditors (and thus would retain his modification rights under § 1329) or incorporate “*Molina* language” into the plan—stating that he shall not modify the plan unless such modification pays 100% to unsecured creditors (or, if

necessary, modify the plan *to pay* 100% to unsecured creditors). The *Molina* provision also states that Brown would not receive a discharge if the plan failed to pay a 100% dividend to creditors.

Brown elected to include the *Molina* provision but presumably under protest. Upon confirmation, Brown appealed the confirmation order. The district court certified a direct appeal to the Fifth Circuit. The Circuit vacated the bankruptcy court's confirmation order.

The Circuit reviewed §§ 1325(a) and (b), 1329(a), and 105(a) of the Code. It found that because Brown's plan proposed to pay all creditors in full—"approximately 100%"—but keep some disposable income, it was not necessary that he turn over all his disposable income. He need only submit the amount "as is necessary" for execution of the plan. § 1322(a)(1). "Whatever a trustee's duty to preserve the estate, it is not that a trustee must control a Chapter 13 debtor's excess disposable income." *Id*. at 717.

The court rejected the trustee's view that maintaining excess disposable income reflects bad faith and manipulation of the Code. It observed that debtors are not in bad faith merely for doing what the Code permits them to do. The court concluded that the plan complied with § 1325(a). It then turned to § 1325(b)(1), the exception to subsection (a).

For § 1325(b)(1), the court held that its requirements, triggered by the trustee's objection, were likewise satisfied. Upon an objection by the trustee or an unsecured creditor, the court may not approve the plan unless the creditor is paid in full under the plan *or* the plan dedicates all disposable income for payments to unsecured creditors. The court found that the plan did provide for payment in full.

Last, the court addressed whether the *Molina* provision was proper given the plan's otherwise compliance with the requirements for confirmation. Looking to § 105 as the basis for imposing such provision, the court held that the *Molina* language violated § 1329 and improperly limited the debtor's ability to request a future plan modification. The court stated: "[A] bankruptcy court should not limit

Section 1329's availability based on speculation about an as-of-yet non-existent request to modify a Chapter 13 plan." *Id*. at 721. Invoking equity to justify the *Molina* provision was improper given the debtor's explicit right to modify his plan under § 1329. The court vacated the confirmation order and remanded the case to the bankruptcy court.

- *Diaz v. Viegelahn (In re Diaz)*, 972 F.3d 713 (5th Cir. 2020).

The Western District's standing order for chapter 13 cases adopted a District Form Chapter 13 Plan which includes Section 4.1, which requires that any tax refund amounts over $2,000 must be turned over to the trustee.

The debtor, Diaz, filed her plan but, in doing so, struck Section 4.1. The trustee objected to this.

Diaz was a below-median debtor. Her plan was a 60-month plan.

The Bankruptcy Court, Judge Gargotta, denied confirmation of the plan, saying that the debtor was not allowed to strike the provision. Diaz then filed another plan in which Section 4.1 was *not* stricken. The bankruptcy court confirmed the revised plan under an order that required that Diaz pay the amount of the refund that exceeded $2,000, $1,261.00, over the balance of the plan term. The debtor appealed. The District Court affirmed.

The Fifth Circuit reversed and remanded. The Circuit states that the issue was "whether [the] rule—which automatically designates debtors' 'excess' tax refund amounts as 'projected disposable income' to which the Trustee is entitled—is valid." The Circuit looked to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), where the Court "made clear that the Code requires courts to treat above- and below-median income debtors' 'disposable income[s]' differently." For below-median debtors, *any* amounts reasonably necessary to be expended for the maintenance and support of a debtor *are not* to be considered a part of his or her disposable income. (Note that for above-median debtors, only certain specified expenses are included.) As § 1325(b)(2) "plainly allows"

below-median debtors to retain any income needed for their maintenance and support, the preemptive requirement of Section 4.1 “abridges” the debtors’ substantive right to use the excess refund. The requirement violated Diaz’s right as a below-median income debtor.

Allowance (or Not) of Late-Filed Claims

For a case that provides an analysis of the far-too-often problem of late-filed proofs of claim and the follow-up request to have such late-filed proof of claim allowed, see *In re Orosco*, No. 19-60038, 2020 WL 6054695 (Bankr. N.D. Tex. Oct. 13, 2020).