



**National Consumer Bankruptcy Rights Center
Year in Review
2018**

Overview: The National Consumer Bankruptcy Rights Center (NCBRC) is a 501(c)(3) nonprofit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. Created in 2010, NCBRC was founded by the Board of the National Association of Consumer Bankruptcy Attorneys (NACBA) to provide assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law. This work is of the utmost importance in preserving options for vulnerable individuals and families struggling with overwhelming debt during the challenging economic times.

Organizational Background and Information: NCBRC was created in 2010 as an independent nonprofit 501(c)(3) non-profit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. While legal services organizations represent low-income debtors, and numerous programs throughout the country offer pro bono assistance to debtors in bankruptcy court, there are few programs with the resources or expertise to handle bankruptcy appeals. NCBRC, and its predecessor the Amicus Project the National Association of Consumer Bankruptcy Attorneys, have been working almost exclusively on bankruptcy appeals for more than a decade.

What We Do: Each year, millions of individuals and families across the country struggle to pay their bills. Often financial distress follows on the heels of other unanticipated events such as job loss, divorce, substantial out-of-pocket medical expenses and natural disasters. Bankruptcy may provide these debtors with the opportunity for a fresh start. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the proper functioning of the bankruptcy system as a whole. However, bankruptcy debtors, lacking both financial resources and exposure to the bankruptcy system, often do not have the ability to protect the integrity of the bankruptcy system and preserve the bankruptcy rights of consumer debtors more generally. The National Consumer Bankruptcy Rights Center was created to fill that vacuum.

Program Elements: NCBRC fulfills its mission through its Amicus Program, Pro Bono Appellate Program, and its Educational Programs. Each is described more fully below.

Amicus Briefs

NCBRC provides assistance either by working directly with debtors' attorneys or by filing amicus briefs in courts throughout the country. In cases with the potential to affect consumer debtors throughout the country, NCBRC amicus curiae briefs address broader issues so that the larger legal effects of courts' decisions do not depend solely on the parties directly involved in the case. As part of its amicus program, NCBRC received more than **300 hours** of pro bono support from leading bankruptcy attorneys and former bankruptcy judges around the country.

Recent examples of NCBRC amicus briefs include:

Preserving Debtors' Fresh Start and Protecting the Discharge Injunction:

In *Taggart v. Lorenzen (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018), the Ninth Circuit Court of Appeals held that a creditor's good faith belief that its conduct did not violate the discharge order precludes a finding of contempt for violation of the discharge injunction even if that belief is unreasonable. The decision significantly erodes the protection afforded by the discharge injunction. In the Ninth Circuit, creditors can now avoid contempt sanctions merely by claiming that they had a "good faith" belief, albeit subjective and unreasonable, that the discharge did not apply to their debt. The decision conflicts with the vast majority of decisions that find a creditor violates the discharge injunction if the creditor (1) had notice of the discharge injunction, and (2) intended the actions that violated the injunction. NCBRC assisted debtor in finding pro bono counsel for his petition for rehearing en banc and his petition for a writ of certiorari. NCBRC also filed amicus briefs in support of both of those petitions. The Supreme Court granted certiorari on January 4, 2019.

NCBRC will also be filing a brief in the Seventh Circuit case of *Sterling v. Southlake Nautilus Health*, No. 18-2773 (7th Cir.), in which debtor was incarcerated for three days after creditor and its collection attorneys failed to request withdraw of a civil bench warrant issued in a debt collection case for which the debt had been discharged.

Calling on Courts to Revisit The Standard for Discharging Student Loans:

The undue hardship test for student loan discharge, articulated in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987), and adopted by the majority of the circuits is obsolete. The *Brunner* test developed at a time when debtors sought an immediate discharge of student loans in bankruptcy without waiting five or seven years for an automatic discharge the law then provided. NCBRC continues to ask courts to revisit this standard.

Even if courts continue to apply *Brunner*, NCBRC has argued that the factors applied should not extend beyond what the text of the statute can support. A finding about whether a debtor's hardship is likely to persist should be based on hard facts, not conjecture and unsubstantiated optimism. Hardship should be assessed based on the debtor's ability to repay student loans based on the loan terms, not twenty-five years into the future under an administrative income-based repayment plan. Consideration of the debtor's good faith, past conduct and life

choices simply has no place in an undue hardship determination and if permitted, results in unnecessary litigation and value-laden, inconsistent judgments.

A complete list of amicus briefs filed is attached.

Pro Bono Appellate Program

In addition to filing amicus curiae briefs, NCBRC also works to encourage, identify and support volunteer attorneys interested in providing pro bono appellate services to debtors. Specifically, NCBRC can train attorneys, provide support in navigating the bankruptcy appellate process, and assist pro bono attorneys in writing appellate briefs and preparing for oral argument by reviewing and commenting on briefs and offering moot argument opportunities. Recent cases in which, NCBRC has recruited or assisted pro bono counsel, include:

Taggart v. Lorenzen (In re Taggart), 888 F.3d 438 (9th Cir. 2018) (standard applied for determining violation of discharge injunction).

Nebel v. Warfield, No. 17-16350 (9th Cir.) (valuation of non-transferrable property)

Educational Programs

Project Director, Tara Twomey, regularly participates in educational programs throughout the year both in person and in on-line trainings. Recent trainings include:

- *They Did What? 2018 Case Law In Review*—Webinar for NACBA
- *How to Introduce Valuation Evidence in Bankruptcy* —NACBA's Summit at Sea
- *Short Sales and Carve Outs*—Northern Virginia Bankruptcy Bar Association
- *FCRA and Bankruptcy* —NCLC's Consumer Rights Litigation Conference
- *Student Loans: Why We Should Care*—Idaho Bankruptcy Bar Association

White Papers: NCBRC is also exploring the possibility of producing a series of white papers on narrow, but important bankruptcy issues. Currently, the topics include the exemption of EITC and HSA accounts, and the intersection between the FCRA and Bankruptcy Code.



2018 Amicus Briefs

Supreme Court

***Taggart v. Lorenzen*, No. 18-489**

Type: Amicus in support of a writ of certiorari

Date: November 15, 2018

Description: Whether creditor's unreasonable belief that conduct did not violate discharge injunction precludes a finding of contempt.

Result: Petition granted January 4, 2018.

Circuit Courts of Appeals

***Whaley v. Guillen*, No. 17-13899 (11th Cir.)**

Type: Amicus

Date: January 23, 2018

Description: Whether an unanticipated change in circumstances is required to justify modifying a confirmed chapter 13 plan.

Result: Pending

***Veltre v. Fifth Third Bank*, No. 17-2889 (3d Cir.)**

Type: Amicus

Date: February 5, 2018

Description: Whether a foreclosure sale may constitute an avoidable preference.

Result: Debtor lost (unpublished opinion)

***Richardson v. Priderock Capital Partners, Inc.*, No. 18-1099 (4th Cir.)**

Type: Amicus (pro se debtor)

Date: March 26, 2018

Description: Whether postpetition rent due under prepetition residential lease was discharged in pro se Chapter 7 debtor's case, so that landlord's postpetition eviction of debtor did not violate discharge injunction

Result: Debtor lost (unpublished opinion)

***Bias v. Tangipahoa Parish School System*, No. 17-30982 (5th Cir.)**

Type: Amicus (pro se debtor)

Date: April 25, 2018

Description: Whether judicial estoppel precludes debtor from pursuing post-petition claim (chapter 13), where the debtor did not amend previously filed schedules.

Result: Debtor lost (unpublished opinion); petition for rehearing pending

City of Chicago v. Shelly C. Moore, No. 17-3664 (7th Cir.)

Type: Amicus

Date: May 22, 2018

Description: Whether chapter 13 plan must provide that all property of the estate shall vest in the debtor upon confirmation.

Result: Pending

Lorenzen v. Taggart, No. 16-35402 (9th Cir.) (en banc)

Type: Amicus

Date: June 18, 2018

Description: Whether creditor's unreasonable belief that conduct did not violate discharge injunction precludes a finding of contempt.

Result: Rehearing denied.

Bobka v. Toyota Motor Credit, No. 18-55688 (9th Cir.)

Type: Amicus

Date: July 31, 2018

Description: Whether assumption under 365 serves as a reaffirmation of debt so that personal lease liability continues after discharge.

Result: Pending

Arianna Holding Co. v. Hackler, No. 18-1650 (3d Cir.)

Type: Amicus

Date: July 27, 2018

Description: Whether a tax lien certificate sale that does not involve competitive bidding may constitute an avoidable preference.

Result: Pending.

Crocker v. Navient Solutions, No. 18-20254 (5th Cir.)

Type: Amicus

Date: August 17, 2018

Description: Whether a bar exam study loan and career training loan are excepted from discharge under 523(a)(8)(A)(ii), as an educational benefit, scholarship or stipend.

Result: Pending

Hurlbut v. Black, No. 17-2449 (4th Cir.)(en banc)

Type: Amicus

Date: August 27, 2018

Description: Whether anti-deficiency statute prevented the creditor against the debtor following foreclosure of the mortgage.

Result: Petition for rehearing granted.

Smith v. State of Maine, Department of Revenue, No. 18-1573 (1st Cir.)

Type: Amicus

Date: August 30, 2018

Description: Whether termination of the automatic stay under section 362(c)(3) applies to property of the estate.

Result: Debtor lost

Thomas v. Dep't of Education, No. 18-11091 (5th Cir.)

Type: Amicus

Date: November 5, 2018

Description: Whether the debtor was entitled to hardship discharge of her student loans.

Result: Pending

Wade v. Kreisler Law, P.C., No. 18-2564 (7th Cir.)

Type: Amicus

Date: August 30, 2018

Description: Whether termination of the automatic stay under section 362(c)(3) applies to property of the estate.

Result: Pending

State Supreme Courts

Haarhuis v. Cheek, No. 332917-2 (N.C.)

Type: Amicus

Date: Dec. 17, 2018

Description: Whether N.C. personal property exemption applies to personal injury claims.

Result: Pending

Comm. of Pennsylvania v. Petrick, No 47 MAP 2018 (Pa.)

Type: Amicus

Date: December 10, 2018

Description: Whether a criminal restitution obligation can be imposed for a discharged debt where creditor failed to challenge the dischargeability of the debt.

Result: Pending

Merceri v. Deutsche Bank, et al., No. 95654-5 (Wash.)

Type: Amicus

Date: May 22, 2018

Description: Whether under Washington State law, the automatic stay tolls the statute of limitations for foreclosure where the creditor did not seek relief from stay.

Result: Petition denied.