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***DAVIS* CLEARS UP *SEAFORT* FOOTNOTE**

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The Chapter 13 debtors in the case of Seafort v. Burden (In re Seafort), 669 F.3d 662 (6th Cir. 2012) were paying back 401K loans but they were not making a voluntary contribution to their 401K plans at the time of filing their Chapter 13 plans. The debtors were going to pay those 401K loans off prior to completion of their Chapter 13 plans. The debtors' plans proposed that upon completion of the 401K loans that the debtors would begin making voluntary contributions to their respective 401K plans instead of using the freed-up 401K loan money to pay unsecured creditors. Their Chapter 13 trustee disagreed with that position and objected to that treatment in their respective plans.

The debtors' argument won initially with the Bankruptcy Court; however, the Bankruptcy Appellate Panel ruled in favor of the Trustee, and by February 2012 the case had made it to the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals sided with the Trustee stating that the post-petition income that becomes available to a debtor after a 401K loan is repaid cannot be used to fund a voluntary 401K and it needs to be committed to the Chapter 13 reorganization plan. The opinion itself was straightforward; however, the Sixth Circuit Court of Appeals decided to add a footnote that would create additional problems for debtors.

Footnote 7 in the *Seafort* case stated "[t]he Trustee "concedes" that if a debtor is making voluntary retirement contributions when the bankruptcy petition is filed, such continuing contributions may be excluded from disposable income. We do not agree with this assertion, …. However, our view is not relevant here, because this issue is not presently before us." The Sixth Circuit Court of Appeals seemed to be providing unsolicited guidance that existing 401K deductions were improper and that continuing contributions should be stopped in favor of paying more into the Chapter 13 plan.

The dicta in Footnote 7 of *Seafort* lead to confusion in the Sixth Circuit for over eight long years. In June 2020, the issue of voluntary retirement contributions came full circle in front of the Sixth Circuit Court of Appeals in the case of Davis v. Helbling (In re Davis), No. 19-3117 (6th Cir. June 1, 2020).

Retired bankruptcy Judge Eugene Wedoff argued on behalf of the debtor that voluntary retirement contributions should be excluded from disposable income. The Sixth Circuit Court of Appeals agreed with the debtor's position that discontinuing voluntary 401K deductions is not required.
While *Seafort* remains good law as to 401K loans in the Sixth Circuit, Footnote 7's dicta no longer remains in the shadows blanketing this issue in uncertainty.

The *Davis* decision is welcome news in making Chapter 13 a more attractive option to those debtors contemplating bankruptcy because the ability to put away funds for retirement keeps the debtors on a level playing field for those similarly situated contemplating Chapter 7. Additionally, the decision harmonizes with Congressional goals of protecting retirement accounts under the available bankruptcy exemptions and allowed deductions on the Chapter 13 means test.

EDITOR'S PICKS

Exemptions

In re Richardson, Case No. 20-30790 (Bankr. E.D. Mich. 2020): this is a Judge Applebaum opinion that addresses the use of the Michigan exemptions. In this case, the Debtor sought to use MCL §600.5451(1)(b) to exempt her cash on hand and the funds in her bank accounts. The statute provides "a debtor in bankruptcy under the bankruptcy code . . . may exempt from property of the estate . . . (b) provisions and fuel for comfortable subsistence of each householder and his or her family for 6 months." The Court examined the meaning of the statutory terms "provisions" and "comfortable subsistence" and found that cash on hand or on deposit falls within the meaning of the statute. "Cash is a provision as that term is used in the statute, not simply a means to acquire "provisions" sometime in the future. Cash has an immediate use." The opinion noted that while the amount that can be exempted could be more than a *de minimus* amount, the exemption use is subject to an evaluation on a case-by-case basis. Great for debtors, but not unlimited great.

Social Security Income as a Factor in the §707(b)(3) Abuse Analysis

Meehean v. Andrew R. Vara, United States Trustee, District Court, E.D. of Michigan, 2020: In this case Judge Friedman upheld Judge Tucker's decision that Social Security income may be considered in determining whether a debtor has the ability to pay or whether they are needy and deserving of a Chapter 7 discharge. Section 707(b)(3)(B) permits dismissal if the court finds "the granting of relief would be an abuse of the provisions of this chapter" considering "the totality of the circumstances…of the debtor's financial situation." Judge Friedman pointed out that "totality" is just about the most inclusive term that can be used and that §707(b)(3)(B) places only one limit on what may be considered – "the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions…to any qualified religious or charitable entity or organization." Section 707(b)(1).

Judge Friedman also affirmed Judge Tucker's ruling that the inclusion of Social Security benefits does not violate 42 U.S.C. §407(a), stating "including Social Security income in this assessment does nothing more than assist in determining whether the debtor has the ability to pay. Answering this question in the affirmative does not result in Social Security benefits being transferred, assigned, executed on, or

‘subjected to’ the operation of any bankruptcy law, but only (when considered with other relevant factors) in the denial of Chapter 7 relief.”

Judge Friedman also addressed another issue where courts are split. He decided that Social Security income can be “properly considered in determining whether a Chapter plan has been proposed in good faith.” Of course, good faith being required under §1325(a)(3).

It is important to note that these were not sympathetic debtors. Judge Tucker found that the debtors could have paid the unsecured creditors in full within 41 months, had stable income (social security and pensions), had no dependents, incurred over $43,000 in unsecured debt over 5 years, and discharged almost $164,000 in unsecured debt in a 2008 Chapter 7 bankruptcy. The decision also reads as though the debtors made no effort to allocate any of the Social Security income to necessary expenses, but merely backed it out as an expense. Maybe a little more care and thought in preparing the Schedule J could have gone a long way.