Kelley Kronenberg
ATTORNEYS AT LAW

IS DEBT FOR VEHICLE LOAN PAID OUTSIDE OF CHAPTER 13 PLAN DISCHARGED AT THE END OF THE CASE?

BY: DENNIS J. LEVINE
PARTNER
Kelley Kronenberg, P.A.

View Dennis LeVine's Bio

SUMMARY: The 11th Circuit recently held that when a Chapter 13 plan provides for direct payment of a mortgage, the debt is not "provided for" under the plan and therefore a deficiency claim is not discharged. *In re Dukes*, 909 F.3d 1306 (11th Cir. 2018). Creditors can argue that the *Dukes* case applies to auto loans paid directly to the lender in Chapter 13 cases, and this would result in any later deficiency not be discharged (and subject to collection).

Under the Bankruptcy Code, a discharge in Chapter 13 covers "all debts provided for by the plan." [1] In many Chapter 13 cases, the debtor will elect to pay a secured claim (such as the car loan) "outside" of the plan, directly to the lender. In other words, the Chapter 13 plan does not set forth a payment schedule or modify the terms of the secured claim. Most Model Plans require a debtor to list these "direct payment" secured claims. The debtor's primary reason for choosing this treatment is the secured claim is current at the time of the bankruptcy filing, and paying the secured claim through the Plan would require additional payment

of Trustee fees on disbursements to the secured creditor.

When a Chapter 13 plan directs payment of a secured vehicle claim **outside the plan**, there is a good argument that the secured claim not being "provided for" by the plan and renders any vehicle deficiency not discharged at the conclusion of the Chapter 13 case. In *In re Dukes*, the Eleventh Circuit looked at a Chapter 13 Plan which provided to make mortgage payments "directly to the Creditor". [2] The Court confirmed the Plan in 2010. The Debtor timely made all 36 payments to the Trustee under the Plan. None of the Trustee payments were made toward the mortgage. The bankruptcy court then entered an order pursuant to 11 U.S.C. § 1328(a) discharging "all debts provided for by the plan". After entry of the discharge, the debtor defaulted on the mortgage and the lender foreclosed. The sale of the real property did not satisfy the balance due. The lender moved to reopen the bankruptcy case and filed an adversary action to determine the mortgage deficiency was not discharged. The Bankruptcy Court agreed with the lender. [3] The District Court affirmed. [4]

The Eleventh Circuit, stating this was a matter of first impression, agreed that since the debt was not provided for by the Plan, the debt was not discharged. The mere reference to the mortgage debt in the plan (i.e. providing the mortgage debt would be paid outside plan) was not "providing for" the mortgage debt. As such, the debt was not discharged upon completion of debtor's plan payments.

The Court's analysis in *Dukes* has been criticized by some consumer bankruptcy commentators. For example, Judge Keith Lundin described the Eleventh Circuit's analysis of direct payment of debt as "mangled" due to "misunderstanding the history and structure of Chapter 13." [5] Still, creditors should attempt to use the Dukes case to their advantage. The ruling in *Dukes* should be applicable when a vehicle claim is being paid directly to the secured creditor in the Chapter 13 plan. Unlike real estate, vehicles generally depreciate in value. Thus, deficiency claims on defaulted vehicle loans paid directly outside the plan seem more likely.

There is a practical problem. Once a deficiency balance is established after a vehicle is repossessed and sold, a creditor would have to wait until after discharge of the debtor to collect. After the Chapter 13 case ended, there is a question as to whether a secured creditor would move forward to collect the deficiency without an order or other determination from the Bankruptcy Court confirming the debt was not discharged. Indeed,

that is what the creditor did in *Dukes* - moved to reopen the Chapter 13 case to ask the Bankruptcy Court enter an order confirming the debt was not discharged since it was paid outside of the plan.

Even assuming a creditor moved to reopen a closed Chapter 13 case to obtain a judicial determination that a vehicle deficiency claim was not discharged, there is a possibility that the Bankruptcy Court would refuse to even consider the issue in a closed case based on lack of jurisdiction. [6]

FOOTNOTES

1. 11 U.S.C. § 1328(a).

2. 909 F.3d 1306 (11th Cir. 2018).

3. 2015 WL 3856335 (Bankr. M.D. Fla. 2015)(J. Delano)(Court granted mortgagee's motion for summary judgment).

4. 2016 WL 5390948 (M.D. F la. 2016).

5. *Lundin on Chapter 13* / Ch13online Bulletin, available at www.LundinOnChapter13.com (last visited March 28, 2019).

6. In *In re Thorpe*, 2019 WL 262197 at *4 (Bankr. E.D. Pa. Jan. 17, 2019), long after the confirmation of a chapter 12 plan, the debtor moved in the Bankruptcy Court to litigate a post-confirmation mortgage servicing dispute between the debtor and the home mortgage holder. The Bankruptcy Court recognized that the dispute was a real one and its outcome important to both parties. Nevertheless, since the debtor's plan did not provide for JPMorgan's claim in her confirmed chapter 12 plan, the Court refused to consider the matter and ruled that the dispute "will have no discernible impact on her almost fully administered bankruptcy case".

Dennis LeVine focuses his state wide practice on bankruptcy litigation and creditors' rights. Dennis is one of only seven attorneys in Florida to be Board Certified in both consumer bankruptcy law and business bankruptcy law by the American Board of Certification (ABC).

1511 N. Westshore Blvd. | Suite 400
Tampa | FL 33607

813.223.1697 | Office (x1947)
813.601.0683 | After hours
dlevine@kklaw.com

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