Supreme Court decision in which Judge Scalia's death changed the outcome.[30]

Absent Justice Scalia, the United States Supreme Court opinion merely states that: "The judgment is affirmed by an equally divided Court."

Lenders and other interested parties are left with two rules on spousal guaranties; the Eighth Circuit *Hawkins* rule, and the Sixth Circuit *RL BB Acquisition* rule; uncertainty prevails in the other circuits. Some lenders will be able to reduce their compliance risk by using a contractual choice of law and venue clause in the loan documents, to reference the law of an Eighth Circuit state. However, the uncertainty is not likely to long prevail, as a number of factors suggest there may be continuing litigation on the issue. First, there is the widespread prevalence of spousal jointly owned assets. Second, once a loan is obviously in default, obligor defenses tend to be spawned by reason of the remaining potentialfor personal liability, like in cases where a commercially unreasonable sale of collateral or a tainted guaranty is alleged. The ability of spousal guarantors, who were never asked by the lender to provide a guaranty, to fabricate a defense based on an ECOA violation due to a lender request for that guaranty after loan default, will likely continue to create more litigation on this issue. That will occur even if no lender had asked a spouse for a guaranty. So, very probably there is more to come.

30. Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 Minn. L. Rev. 107, at 117.

Creditors Beware – Complying with IRS Rule May Cancel Underlying Indebtedness

by Larry E. Parres and John J. Hall*

Some creditors try to assert additional pressure on their debtors by issuing, or threatening to issue, a form required by the Internal Revenue Service (IRS) (Form 1099-C) informing the IRS that the full amount of the outstanding debt is cancelled even though the creditor intends to continue collection activities. IRS regulations require creditors to issue the Form 1099-C if they cancel a debt of $600 or more in any calendar year.[1] Banks, trust companies, credit unions, savings and loan associations, and any other organization whose significant trade or business is the lending of money are subject to this regulation. The IRS regulations list several "Identifiable events" that trigger the obligation to file a Form 1099-C, including: discharge of the debt in bankruptcy; expiration of the statute of limitations for collections; discharge by agreement of the parties; a creditor's decision to discontinue collection activity and discharge the debt; and expiration of the non-payment testing period.[2] Nothing in the Internal Revenue Code or IRS regulations prohibits collection of the debt following the filing of a Form 1099-C.

The IRS treats cancelled debt as income to the debtor, which might subject the debtor to additional federal income tax. As noted, some creditors try to assert pressure on their debtors by issuing, or threatening to issue, a Form 1099-C. However, a recent case decision[3] by Chief Judge Thad J. Collins of the U.S. Bankruptcy Court for the Northern District of Iowa reveals that a creditor may face peril in issuing a Form 1099-C debt cancellation notice. Given this recent decision, debtors in the Northern District of Iowa might welcome the receipt of a Form 1099-C.

In *Lukaszka*, First Federal Credit Union (the credit union) gave up trying to collect a debt from the Lukaszkas that was secured by a mortgage on the Lukaszkas' house, and issued a Form 1099-C. The Lukaszkas reported the income and paid taxes on the cancelled debt. They subsequently filed a Chapter 13 bankruptcy petition. The credit union opposed the Lukaszkas' Chapter 13 plan because it did not propose any payments to the credit union on the mortgage debt. The Lukaszkas claimed that the credit union had discharged the debt by virtue of filing the Form 1099-C. Ruling in favor of the debtors, Judge Collins noted that the filing of a Form 1099-C by itself normally will not discharge the creditor's underlying claim. Here, however, the Form 1099-C, when coupled with evidence that the debtors reported the debt as income on their tax returns and paid the taxes due on that income, caused the debt to be canceled. The debtors were able to confirm their Chapter 13 plan based on the bankruptcy court's finding that the credit union's $60,000 of unpaid indebtedness was cancelled and that under Iowa law a mortgage ceases to be enforceable when the debt underlying the mortgage lien no longer exists. Thus, the bankruptcy court both cancelled the debt and removed the credit union's mortgage lien from the Lukaszkas' house.

Although *Lukaszka* adopted the minority reasoning in these cases, it does strike at the majority rationale, which holds that the filing of an IRS Form 1099-C alone is not sufficient evidence that the debt has been cancelled.[4] Under *Lukaszka*, the filing of a Form 1099-C, combined with reporting of the debt cancellation as income and the payment of associated taxes by the debtors, is sufficient to cause a cancellation of the debtor's loan obligation and accompanying mortgage lien, at least under Iowa law.

Creditors may need to be aware of this potential pitfall. Under the correct circumstances – over which the creditor may have no control – the issuing of the Form 1099-C may effect a legal cancellation of the debt and release the lien securing the debt. Conversely, debtors may welcome a Form 1099-C, report it on their next tax return, and pay the taxes due. Although no statues or regulations prohibit collection of a debt after the filing of a Form 1099-C, creditors should be aware of the associated perils illustrated by the *Lukaszka* holding.

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1. 26 CFR § 1.6050 P-1.

2. *Id.*

3. *In re* Lukaszka, 2017 WL 273516 (August 4, 2017).

4. *See*, *e.g.*, F.D.I.C. v. Cashion, 720 F.3d 169 (4th Cir.2013). In *Lukaszka*, Judge Collins recognized that his holding was a minority view, citing *In re* Washington, 2017 WL 1130144, at *5 (Bankr. D. S.C. Mar. 24, 2017), as a recent example of the majority rule. *See Lukaszka*, 2017 WL 273516, at *6.