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Thursday, February 14, 2002

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In re

PAUL and VEDA GARSKE,

[Debtor](#)(s).

No. 98-13427

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VEDA GARSKE, et al.,

[Plaintiff](#)(s),

v.

A.P. No. 00-1139

ARCADIA FINANCIAL, LTD.,

[Defendant](#)(s).

Memorandum on Class Certification

This is a class action lawsuit regarding the rights of [Chapter 7](#) debtors who retained a [secured creditor](#)'s collateral without formally reaffirming the debt and thereafter became delinquent. In a nutshell, plaintiffs argue that a secured creditor violates the debtor's injunction by contacting the debtor and threatening repossession of the collateral if the debtor does not make a payment. Numerous similar cases have been brought across the country.

Plaintiffs have moved for certification of their class. While the courts has serious doubts as to the merits of the legal position staked out by plaintiffs, defendant has asked the court to rule only on the class certification motion and defer consideration of summary judgment.

There are several other trial court decisions reported either in print or electronically which have considered the issue. While at least one similar class has been certified, most have denied certification on two grounds: that conflicts of law between the circuits produces "non-common" issues and that the primary remedy in these cases is monetary and not injunctive. The court disagrees with both grounds.

The much-discussed split of the circuits on the right of a secured creditor to repossess its collateral after a debtor's [discharge](#) even if the debtor has remained current in payments, used as an excuse for finding a lack of commonality, seems to this court to be a complete red herring. The proposed class consists of those who have been contacted by the secured creditor threatening repossession after becoming delinquent in their obligations on un-reaffirmed [secured debt](#). The issue, whether or not such conduct violates the debtor's discharge injunction, is exactly the same whether or not the [creditor](#) has a right to repossess as to debtors who are not delinquent.

It is abundantly clear that the primary relief in this case is injunctive and declaratory. Aside from attorneys' fees, individual damages will be either nominal or non-existent. Regardless of the dubious merits of plaintiffs' legal position in this case, a class action is an appropriate vehicle for determining debtors' rights and ruling on the common and established practices of a large institutional creditor.

It appears to the court that all of the required elements of FRCP 23(a) are present. In addition, the court finds that defendant has acted on grounds generally applicable to a class, making injunctive and declaratory relief appropriate if such conduct is determined to be wrongful. This action is accordingly maintainable as a class action pursuant to FRCP 23(b)(2).

For the foregoing reasons, the court will certify as a class all debtors who obtained a discharge, retained defendant's collateral without reaffirmation, became delinquent, and were threatened with repossession by defendant if they did not bring their payments current. The class will not include debtors in cases where the court issued an order specifying defendant's rights or there is an agreement between the debtor and defendant outlining said rights.

Counsel for plaintiffs shall submit an appropriate form of order.

Dated: February 14, 2002

Alan Jaroslovsky
U. S. [Bankruptcy Judge](#)

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