BANKRUPTCY LAW NEWSLETTER

Published by the Federal Bar Association
Western District of Michigan Chapter

JUNE 1999

THE NEWSLETTER LIVES!!!

By: Steven L. Rayman, Editor

Although I drew the "short straw", I am pleased to report that I am, until run out of office or some other fool steps to the plate, the new Editor of the Newsletter. We have reorganized things and with the help of Dean Rietberg, Dan Casamatta (don't we always get help from the Office of the U.S. Trustee?), Marcia Meoli, Bob Wright and David Anderson, I hope to put together a consistent and good product. Bob Wright will be publishing a "Technology Tip" every month. David Anderson will be giving us a "Chapter

13 Case Tip" from time to time and Dan Casamatta is going to be giving us a "tidbit" from the U.S. Trustee every month about how to stay out of trouble. Dean and Marcia will be editing cases. The Newsletter will come out quarterly (June, September, January and March), except that next month we will publish a special compendium of case summaries of all Michigan Bankruptcy cases published in 1999 (along with Sixth Circuit cases and the Supreme Court). Minutes of the Steering Committee meetings and the Debtor's Bankruptcy Coalition meetings will be published (except we will be skipping them this issue because most of what was discussed is now history).

Although I have avoided doing the Newsletter for as many years as the Bankruptcy Section has been in existence, I am looking forward to serving you as your Editor. Rest assured, however, that I will also do my best to make certain that the Newsletter is readable, not "stuffy", and contains occasional moments of humor. Please keep in mind, if and when you read this or other future issues, if we are poking fun at anything or anybody, it is only that - fun and should not be reflected in a future sanction motion or fee objection.

GOOD FAITH UNDER 11 U.S.C. §707(a)

*By: Peter Teholiz**

With the recent near-passage of bankruptcy reform legislation, including the proposed amendments to 11 U.S.C. 707(b), practitioners are focused again on the possibility that the debtor they are representing (or the debtor they are pursuing) might be pushed out of bankruptcy by virtue of the "substantial abuse" provisions of §707(b). However, review of dismissal problems many times overlook the initial paragraph of 11 U.S.C. §707. This is unfortunate because §707(a) also allows a bankruptcy court to dismiss a chapter 7 case under certain circumstances.

On its face, §707(a) appears to be merely a procedural statute:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including -
>
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
>
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
>
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

In Re Zick, 931 F2d 1124 (6th Cir. 1991), the Court of Appeals held that good faith is an inherent requirement for any bankruptcy case, including chapter 7. Hence, because of the inclusive nature of the statute, a bankruptcy court has the authority to dismiss a chapter 7 bankruptcy under §707(a) if the court finds that the case was filed in bad faith. The Court was quick to

add that "Dismissal based on lack of good faith must be undertaken on an ad hoc basis. It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." Zick at 1129 (cites omitted).

Because these standards must be analyzed under the unique facts of each case, it is difficult to define the conduct that will, or will not, constitute sufficient bad faith to warrant dismissal. However, cases dealing with §707(a) have reached interesting(but often different) conclusions.

Several courts held that "substantial abuse" is grounds for dismissal only under §707(b). Under this theory, a court has no authority to dismiss a case under §707(a) based solely on the ability of the debtor to repay his or her debts, in whole or in part. In re Young, 92 BR 782 (Bankr. ND Ill. 1985); In re Cecil, 71 BR 730 (Bankr. WD Va. 1987). An illustration of this principle can be found in In re Goulding, 79 BR 874 (WD Mo. 1987). There, the Debtor was receiving $12,000.00 per month from a spendthrift trust, and was due to receive a distribution of $200,000.00 from the corpus of the trust within 9 months from the date of his filing. He reaffirmed all of his secured debt, leaving approximately $600,000.00 in unsecured debt to be discharged. The Court found that there was no criminality or fraud, and therefore, there were no grounds for dismissal under §707(a). See In re Kragness, 63 BR 459 (Bankr. D Or. 1986) (similar result).

In dismissing cases under §707(a), courts have relied upon a totality of factors that together, are unseemly. In Zick, supra, the Court relied upon the following facts: (1) The Debtor had manipulated and planned until he only had one creditor whose debt would be discharged. This included transfers of property between himself and his corporation and relatives; (2) The bankruptcy was filed in response to that one creditor's obtaining a favorable mediation award; and (3) The Debtor had not made any significant lifestyle changes or efforts to repay, notwithstanding his annual gross income of $361,000.00, and a non-debtor spouse who had additional income. Similarly, in In re Maide, 103 BR 696 (Bankr. WD Pa. 1989), dismissal was ordered on the following facts: (1) The Debtor transferred his residence to his estranged wife for little consideration 18 months prior to his bankruptcy; (2) The Debtor failed to list a pension as either an asset or a source of income; (3) The Debtor indicated that would reaffirm all of his $75,000.00 unsecured debt, except for one debt for approximately $28,000.00; and (4) The Debtor's annual income was in excess of $60,000.00 per year, demonstrating an "easy ability" to repay all of his debts. See In re Hammonds, 139 BR 535 (Bankr. D Colo. 1992) (dismissal warranted where Debtor was trying to continue in same business with all creditors save one; Debtor transferred property and did not make fair disclosure of assets).

In addition to the factual basis necessary for bringing a dismissal action, creditors should be aware that there is potentially a procedural hurdle, as well. Although there is no bankruptcy rule that requires a motion under §707(a) to be brought within a specific time, several courts have constructed a time requirement using the following logic: (1) Under Fed.R.Bankr.Proc 4004(c), a Debtor is (with specific exceptions) entitled to a discharge "forthwith" after the expiration of the time fixed for filing a complaint for objecting to

discharge and the time in which to bring a dismissal motion under §707(b); (2) Unless extended, these time periods expire 60 days after the first meeting of creditors under 11 U.S.C. 341; and (3) Hence, in a typical case, under Rule 4004(c), a debtor will be entitled to his or her discharge 60 days after the first meeting of creditors. Moreover, once a discharge is entered, a motion to dismiss is moot. Thus, even though there is no specific time period in which to bring a motion to dismiss under §707(a), some courts have reasoned that Fed.R.Bankr.Proc. 4004(c) requires that such a motion be brought within 60 days after the first meeting of creditors.

Courts that follow this logic also hold that the Motion must not only be filed, but must also be heard within the time period. In In re Adams, 203 BR 240 (Bankr. ED Va. 1996), a discharge was entered while the Motion to Dismiss under §707(a) was pending. The Court dismissed the motion as moot. Further, the Court rejected the creditor's arguments that it could revoke the debtor's discharge, holding that revocation of a discharge is authorized by 11 U.S.C. §727 only under certain circumstances, and that a pending motion to dismiss was not one of them. But see In re Gaskins, 85 BR 846 (Bankr. CD Cal. 1988) and In re Ladd, 82 BR 476 (Bankr. ND Ind. 1988) (discharge can be revoked upon granting of a motion to dismiss). In In re Nelkin, 150 BR 65 (Bankr. D Kan. 1993), the creditor had filed a motion to convert the case. After the 60-day period had passed, the debtors filed a motion for "an immediate discharge". In addition to objecting, the creditor amended its motion to convert to include a motion to dismiss under §707(a). The Court entered the discharge and dismissed the creditor's motion and amendment as moot.

Perhaps the strongest enunciation of this logic can be found in In re Tannenbaum, 210 BR 182 (Bankr. D Colo. 1997). In this case, the U.S. Trustee had filed a Motion to Dismiss under §707(a) before the 60-day period had expired but the hearing was held after the period expired. Although the period had expired, no discharge had yet been entered, based on the practice of the clerk's office to hold the discharge while a motion to dismiss was pending. Notwithstanding such, the Court still held that the Motion to Dismiss under §707(a) was untimely. The Motion was dismissed, and the clerk was instructed to enter the debtors' discharge. The Court reached this result even though it concluded that "Under applicable case law, these Debtors would qualify as debtors who are substantially abusing the bankruptcy system." Tannenbaum at 183.

Although 11 U.S.C. §707(a) is not as well-known as its more famous counterpart, 11 U.S.C. §707(b), it provides a means to check debtors who are attempting to unfairly manipulate the bankruptcy system. It should not be forgotten as a tool in those unfortunate cases.

---

* Peter Teholiz is a partner of Hubbard, Fox, Thomas, White & Bengtson, PC graduated *magna cum laude* from Indiana University in 1982, and affiliated with the American Agricultural Law Association, Michigan Agricultural Marketing and Bargaining Act Arbitrators List, Lansing Regional Chamber of Commerce, DeWitt Kiwanis Club, and Springbrook Homeowners Association Board of Directors, and is the proud owner of a plastic pocket pencil protector.

CHAPTER 13 CASE TIPS

*By: David C. Anderson**

Due to the volume of Chapter 13 cases handled by the Court and the Chapter 13 Trustee's office, it is incumbent on Debtor's counsel to be well prepared and to actively manage the Chapter 13 caseload. Support from the Trustee's office for issues that come up for Debtors is quite limited, due to the limited resources they have available.

PLAN AMENDMENTS: In order to approve or object to plan amendments, the Trustee's office needs to have some detailed explanation of why the amendments is being filed. How did the debtor's circumstances change? Why is the amendment necessary? The trustee will analyze the amendment for conformity to the Code, but will need to know what prompted the amendment and why the Debtor is proposing it. Usually amendments are needed due to a change in the Debtor's disposable income. An amended budget is appropriate whenever payments are reduced as is a narrative explanation of why and how the changes occurred. These will make it easier for the Trustee's office to approve the proposal. Since plan amendments must comply with the Bankruptcy Code, the Trustee will look at disposable income requirements as well as the liquidation analysis. Unsecured creditors must receive at least the equivalent of a Chapter 7 hypothetical liquidation, so the base amount or percentage paid to unsecured creditors is a factor whenever there are nonexempt assets.

TAX REFUND REQUESTS: A major "headache" for the Trustee's office (and Debtor's counsel) is the routine request for Debtors to keep all or a portion of their tax refunds during the first three years of the plan. This is due to the stipulation that Debtor must pay their disposable income for a least 36 months. Since tax refunds are usually not part of the budget they may be disposable and turned over to the Trustee. Yet many Chapter 13 Debtors have a difficult time making their payments and providing for all of their living expenses. In cases where the tax refund is needed by the Debtor to make ends meet, the Trustee may allow the Debtor to keep all or a portion of the refund. Often times if counsel foresees the problem, the plan itself may provide that the first year's refund will be dedicated to a particular need of the Debtor. For example, language could be inserted as follows: "The tax refund for the first year of the plan will be used to purchase a vehicle for the Debtor's transportation needs." The Debtor should be advised to document the expense since any remaining funds should be turned over to the Trustee. Since the plan (if confirmed) provides for the disposition of the funds, the Trustee would not demand that the refund be turned over as long as the Debtor documented the expenditure.

More common is the situation where

the Debtor did not foresee an expense and is requesting that he or she be allowed to keep the refund. A detailed request is necessary and the Trustee's office has a form that can be filled out by the Debtor. However these requests should be submitted through the Debtor's counsel. Counsel must screen the request to make sure it is genuine and merits consideration, and also has the necessary detail to justify approving the request.

---

*David C. Anderson graduated *cum laude* from Wayne State University Law School in 1979, is a member of the National Association of Consumer Bankruptcy Attorneys, an associate member of the National Association of Chapter Thirteen Trustees, and, luckily for his clients, teaches C.P.R. for the American Red Cross, and holds a Paramedic License.

NEWS FROM THE U.S. TRUSTEE'S OFFICE

By: Daniel Casamatta

Two items are worthy of discussion - the Court's General Order #9 that changes the way professional employment applications are processed and our Chapter 13 trustee opening in Kalamazoo.

General Order # 9 - Appointment of Professional Persons

General Order #9 (printed in its entirety elsewhere in this edition of the Newsletter) is effective May 1, 1999. It procedurally changes the way we process professional employment applications. The new process will be similar to the way fee applications are currently processed in the District.

If you file an employment application pursuant to 11 U.S.C. Sections 327, 1103 or 1114, you must attach a disinterestedness affidavit pursuant to FRBP 2014 and a proposed order as before. However, now you must submit the original and *two copies* to the Clerk's office. One copy will be transmitted to the United States Trustee's office by the Clerk of Court after docketing.

The United States Trustee will have 25 days from the date of docketing to file an objection to the application, if any. If no objection is filed within 30 days of docketing, the applicant can file an affidavit of no objection with the Court for entry of the proposed order.

My office proposed this new procedure because the former procedure lacked finality and was unduly labor intensive by both my staff and the Court's staff. Professionals complained of undue delays, and many times my office was not properly served with employment applications. With the new procedure you

will not have the obligation to serve the United States Trustee with employment applications, saving you time and effort. While you will have to file the affidavit of no objection after 30 days, this is generally a one page document that should not require undue effort by your offices.

We also suggested a procedure to help "walk through" employment applications in emergency situations. The Court included this suggestion in paragraph (b) of the new General Order. If you absolutely need the application to be approved the day of filing, you can hand-deliver a copy of the application to the United States Trustee. If we have no objection to the application, we will certify on the proposed order that we have no objection and you can file the application and proposed order with the Court. Assuming the Court has no problem with the application, the order should be entered by the Court. Since we have only limited staffing and time, we would appreciate it if you presented us "emergency" applications only when you truly have a emergency.

Remember, we will continue to process employment applications with the same legal diligence as before. If we find something objectionable in an employment application, we will simply have to file an objection immediately instead of taking the time to work out the concern. This will undoubtedly mean more frequent employment objections. To avoid simple objections, please ensure that you follow the technical provisions of 11 U.S.C. Sections 327, 1103 and 1114 and FRBP 2014 when you file an employment application.

If you have any concerns with this new procedure, please give me a call at (616) 456-2002 ext.16 so we can discuss it.

Chapter 13 Trustee Opening in Kalamazoo, Michigan

After more than 23 years of diligent service, Chapter 13 Trustee Joseph Chrystler in Kalamazoo, Michigan has decided to resign effective April 1, 2000. The United States Trustee intends to fill the position and has issued a public notice of its opening. You should find a copy of the Public Notice for this position published elsewhere in this Newsletter.

We have set June 30, 1999 as the deadline for receiving resumes. Since maximum compensation for this position is $129,820 annually and since the position does not require a law degree, we expect quite a few applications.

If you have any questions about the position, please feel free to call me.

TECHNOLOGY TIPS

By: Robert E.L. Wright

The Technology Subcommittee of the Federal Bar Association's Bankruptcy Steering Committee was formed in June 1996 and has been working with the Bankruptcy Court on various technological issues, including the development of the Bankruptcy Court "Home Page" for the Western District which can now be found on the World Wide Web at:

http://www.miw.uscourts.gov/miwb/Default.htm

By typing the above address into your web browser, you can access the Bankruptcy Court's Web Page.

This month's tip: Go to the Bankruptcy Court's Web Page to download a copy of upcoming Motion Day schedules directly to your own computer where you can store, retrieve, search, or print them, all free of charge!

If you liked this tip, watch for more tips in upcoming issues.

BANKRUPTCY SEMINAR

Don't forget that this years Bankruptcy Seminar will be held at the Park Place Hotel in Traverse City on August 5th, 6th and 7th. If you haven't gotten the flyer or need another one, please contact Judy Walton at (616) 732-5000.

ANNOUNCEMENTS

STEERING COMMITTEE POSITIONS OPENING

Two of the Steering Committee's esteemed members will have their terms lapse this summer. The Steering Committee is always interest in new members. If you are interested, please send a note to Peter Teholiz at pteholiz@hubbardlaw.com. More on this next month.

LIKE TO JOIN THE 90's?

We are interested in knowing how many of our readers would like to receive their Newsletter by e-mail. It would save on mailing costs and clearly earmark those who accept it by e-mail as being computer literate wiz kids on the edge of technology. Please send your yeas or nays at slr@raymanhamlin.com. Once you do that, I will have available mailing list that will certainly be salable on the open market - only kidding.

LOCAL BANKRUPTCY STATISTICS

CHAPTER	May, 1999	YTD - 1999
Chapter 7	625	3372
Chapter 11	7	19
Chapter 12	1	4
Chapter 13	222	1138
TOTALS	855	4534

United States Bankruptcy Court
For the Western District of Michigan

GENERAL ORDER # 9
Appointment of Professional Persons

Effective May 1, 1999

Whereas, this court wishes to amend the existing local procedure for appointment of professional persons pursuant to Federal Rule of Bankruptcy Procedure 2014; and

Whereas, it appears that the local rules of practice and procedure will not be generally revised in the immediate future;

Now Therefore, It is Ordered that the following procedure is adopted pending implementation as a local rule of practice in this court:

(a) General Procedure for Applications Under Fed R. Bank. P. 2014 - The provisions of this paragraph shall govern all applications for employment of professional persons made under U. S. C. Sections 3 27, 1103 and I 1 14.

(1) Filing the Application - All applications for employment of professionals filed pursuant to Fed. R. Bank. P. 2014 shall be filed with the Clerk. Each application must be accompanied by two copies and a proposed order.

(2) Service of the Application - Unless the case is a chapter 9 municipality case, every applicant shall file two extra copies of the application, verified statement, other supporting documents and proposed order with the Clerk who will transmit one of the copies directly to the United States Trustee.

(3) Objections - The United States Trustee shall have 25 days from the date of docketing of the application in which to file with the Clerk a written statement of any objection which it might have to the application. A copy of the objection shall be sent ,o the applicant by the United States Trustee.

(4) Hearings on Applications - No hearing shall be set on any application falling within the scope of subparagraph (a)(3) of this rule unless;

(A) an objection is received from the United States Trustee, or

(B) the Court orders that a hearing be held.

(5) Notice of Hearings - In the event a hearing is required, the Clerk shall schedule a hearing and serve notice of the hearing upon the United States Trustee, the applicant and others as may be directed by the Court.

(6) Submission of Order - In the event a hearing is held, a proposed order shall be submitted as directed by the Court. In the event no objection is Med or hearing held, the applicant shall submit to the Court, no less than 30 days after the date of docketing of the application, an affidavit that no objection has been filed.

(b) Emergency Approval of Applications Under Fed. R. Bank-. P. 2014 - If the applicant requires emergency approval of the application for employment of professional persons, it shall hand-deliver a copy of the application to the United States Trustee. Should the United States Trustee agree that it has no objection to the application, it may, solely within its discretion, certify on the applicant's proposed order that it has no objection to the application, The applicant may then file the application and the proposed order will be entered, unless otherwise ordered by the Court.

on. James D. Gregg,
hief Bankruptcy Judge

Hon. Jo Ann C. Stevenson,
Bankruptcy Judge

Signed this Day of April, 1999 in Grand Rapids, Michigan

Amendment of Court Policy on Service of Notices and Orders
[Exhibit 8 to the Local Bankruptcy Rules]

Change Effective May 1, 1999

On February 12, 1999, the Bankruptcy Court entered a General Order amending the court's noticing policy. In chapter 12 and 13 cases, a 341 meeting notice and a copy of the debtor's plan [or a summary thereof] will be served on all creditors and parties in interest by the standing trustee to those persons listed on the mailing matrix filed with the bankruptcy case. It shall be the responsibility of the debtor or the debtor's attorney to serve 341 meeting notices and copies of the debtor's plan to creditors and other parties in interest if: (1) the debtor failed to file a mailing matrix with the petition or has added creditors to such matrix after the date of filing, or (2) the debtor failed to file a plan with the petition and the trustee has previously noticed the case to creditors. Proofs of service should be filed to document the service of such documents. It is hoped that this change will provide incentive for the prompt filing of complete mailing matrices and plans so that first meetings may be noticed out and held within the time limits set by Fed.R.Bankr.P. 2003. We also urge the filing of schedules at the very beginning of the case. Since first meetings will now be scheduled in some cases before schedules have been filed, it is essential that schedules are received by the trustees as quickly as possible so that first meetings are not unnecessarily delayed.

Court Website

If you've visited our website recently, you've probably noticed that the site has an improved look and offers more information than before. If not, check us out at http://www.miw.uscourts.gov.

The current highlight is the addition of the Judge's Motion Day Calendars. Due to the several different types of word processing software, we are providing the calendars in the PDF (Portable Document File) format. To optimize use of these documents, we suggest that you download and install the (*free*) Adobe Acrobat Reader software. The "Latest Updates" section keeps you informed of new additions and changes to the site as we progress with its development.

The site has been designed to view optimally with Microsoft's Internet Explorer web browser, version 4x, at a screen resolution of 800x600. You may need to check the resolution settings on your PC for best viewing. Effort has been made to ensure the pages will view properly under earlier versions of Internet Explorer and Netscape Navigator, but without the recommended web browser you may have to make minor formatting and display adjustments. Top web browsing software from Microsoft and Netscape are *free*, so make sure you use the latest browser technology by visiting their web sites. We appreciate comments and suggestions so feel free to let us know what you think.

Send comments to:
webmaster@miwb.uscourts.gov

Check It Out !

WWW.MIW.USCOURTS.GOV

Got Internet?

U.S. Bankruptcy Court, WDMI

- ✖ More Information
- ✖ Easier to Navigate
- ✖ Forms Online
- ✖ 1999 Court Calendar
- ✖ Motion Day Calendars
- ✖ Local Rules Online
- ✖ More in the works!

U.S. Bankruptcy Court, WDMI

110 Michigan Street, #299
P.O. Box 3310
Grand Rapids, MI 49503

Phone: (616) 456-2693
Fax: (616) 456-2919

Web Site Address:
www.miw.uscourts.gov

Western Michigan Chapter of the
Federal Bar Association
200 Monroe NW, Suite 300
Grand Rapids, MI 49503

PETER A. TEHOLIZ
5801 W MICHIGAN AVE
LANSING, MI 48917-2476