Spring 2013

October 22, 2012

Seminar Highlights from Evaluations:

- **Audience participation with the judges enlivened the afternoon.**
- **Tax issues session was a great session.**
- **Very informative seminar - especially the presentation about regulations concerning the filing of proofs of claim.**
- **Good mix of practical tips and case law.**
- **National mortgage settlement segment was good.**
- **Best practices discussion was a good reminder for debtor attorneys.**
- **Materials and presentation on mortgage modifications was very instructive**
- **Good frank answers from trustees' panel.**
- **Relevant topics and well-prepared presenters made this a valuable seminar for consumer bankruptcy practitioners.**

Voluntary Post-Petition 401(k) Contributions Reviewed

Disposable income is defined as current monthly income received by the debtor, less amounts reasonably necessary to be expended for the maintenance and support of the debtor. 11 U.S.C. Section 1325(b)(2)(A)(i). For an above-median income debtor, the amounts reasonably necessary to be expended are determined under 11 U.S.C. Section 707(b)(2)(A). Projected disposable income is not defined in the Bankruptcy Code. However, the Supreme Court in *Hamilton v. Lanning*, 130 S. Ct. 2468 (2010), stated that "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Hamilton, supra,* at 2478.

Prior to the enactment of the Bankruptcy Abuse and Prevention Act of 2005 ("BAPCPA"), both 401(k) contributions and 401(k) loan repayments were considered "disposable income." With the enactment of BAPCPA, Section 1322(f) was amended to provide that any amounts required to repay a 401(k) or retirement loan "… shall not constitute disposable income under Section 1325." Clearly, monies used to repay a 401(k) or retirement loan are now excluded from the calculation of disposable income. However, this section did not exclude post-petition voluntary retirement contributions.

Whether voluntary post-petition 401(k) or retirement contributions are excluded from the calculation of projected disposable income is not clear. Until recently, the competing views of various district and bankruptcy courts could be separated into three (3) holdings - the B.A.P. majority in *Seafort,* the *Johnson* decisions and the *Prigge* view. The courts which follow the B.A.P. majority in *Seafort* have held that Section 541(b)(7) limits voluntary post-petition contributions to those amounts being made as of the petition date. *In re Seafort,* 437 B.R. 204 (6th Cir. BAP - Ky. 2010). The courts which follow the *Johnson* decisions have held that all voluntary retirement contributions, both pre-petition and post-petition, are permitted, limited only by the good faith requirement of Section 1325(a)(3). *In re Johnson,* 346 B.R. 256 (Bankr. S.D. Ga. 2006). The courts which follow the *Prigge* view have held that Section 541(b)(7) does not permit post-petition retirement contributions in any amount, regardless of whether the debtor was making pre-petition contributions. *In re Prigge,* 441 B.R. 667 (Bankr. D. Mont. 2010); *In re McCullers* 451 B.R. 498 (Bankr. N.D. Ca. 2011).

No circuit court had addressed this question until the Sixth Circuit Court of Appeals did so in *In re Seafort*, 669 F.3d 662 (6th Cir. 2012). The actual holding of the Court was that income made available once a 401(k) loan has been repaid was "projected disposable income" and could not be used to make voluntary 401(k) contributions. However, the Sixth Circuit made it clear that it believed that the correct interpretation of allowing the deductions of post-petition voluntary 401(k) contributions was the *Prigge* view. *Seafort, supra,* at 671. Voluntary post-petition retirement contributions should be included in the calculation of projected disposable income. In reaching this determination, the Sixth Circuit analyzed the competing court views, the interplay of Sections 541, 1306 and 1322(f), and the intent of Congress as it relates to these sections of the Code.

The Sixth Circuit looked at Section 1322(f), which excludes 401(k) loan repayments **from disposable income**, and Section 541(b)(7), which excludes voluntary retirement contributions from **property of the estate.** The court found it significant that the "voluntary retirement contribution exclusion" was outside the confines of Chapter 13. It surmised that this placement by Congress had been deliberate. "The easy inference is that Congress did not intend to treat voluntary 401(k) contributions like 401(k) loan repayments because it did not similarly exclude them from 'disposable income' within Chapter 13 itself." *Seafort, supra,* at 672. The court also found that Congress did not consider voluntary contributions to be reasonable and necessary

expenses because they were not listed in Section 707(b)(2)(A) as allowable deductions. *Seafort, supra*, at 672. In fact, Form B22C, Line 31, specifically excludes voluntary 401(k) contributions from deductions from income.

The Bankruptcy Appellate Panel for the Ninth Circuit considered the question in August, 2012 and rendered its decision in *Parks v. Drummond*, BAP No. MT-11-1366-JuMk-H. At issue was whether a debtor's voluntary post-petition retirement contributions were excluded from disposable income under Section 541(b)(7). The Bankruptcy Appellate Panel found that Section 1306(a)(2) operates to bring the debtor's earnings from post-petition services into the estate but nowhere in Chapter 13 are voluntary retirement contributions excluded from disposable income. *Parks, supra*, at 7. The court reasoned that because Congress failed to mention contributions to 401(k) plans as "reasonable and necessary expenses" under Section 707(b)(2), it did not intend to exclude post-petition voluntary 401(k) contributions from disposable income under Section 541(b)(7)(A). *Parks, supra,* at 10-11. The Court held that chapter 13 debtors may not exclude voluntary post-petition retirement contributions in any amount for purposes of calculating their disposable income. *Parks, supra,* at 11.

Even if a court determines that there are circumstances in which post-petition voluntary 401(k) contributions may be deducted from the calculation of projected disposable income, those contributions would still be subject to the good faith requirement of Section 1325(a)(3). The Eleventh Circuit in *In re Kitchens*, 702 F. 2d 885 (11th Cir. 1983) set forth eleven (11) factors, which are still being applied, that needed to be considered in determining good faith. It would appear that courts would also look at such factors as 1) when the debtors began making 401(k) contributions; 2) whether those contributions had increased significantly prior to the filing; 3) the age of the debtor and the number of years to retirement; and 4) whether reducing and/or excluding the allowed contributions would result in the calculation of an unsecured creditors' pool.

Mid-Case Audit Procedures Explained

Local Bankrupty Rule 3002-2 provides the Chapter 13 Trustee shall during month 18 to 22 and 42 to 46 of the case file and serve on the mortgage lender, the debtor, and their counsel a "Notice of Amount Deemed Necessary to Cure." The notice will state whether the debtor is current on his plan and mortgage.

The mortgage holder will have 60 days to respond to the notice. This will be a contested matter. If the mortgage holder fails to respond the court will issue an order by default finding the mortgage current or alternatively deeming the mortgage delinquent in the amount stated in the notice.

If the mortgage holder responds and disputes the notice, a hearing will be held. The court will determine if the debtor is current and will issue an order. The order (whether by default or hearing) will bind the mortgage holder in any future litigation.

Save the Date
Monday,
October 21, 2013

DFW Area
Chapter 13 Consumer Bankruptcy Conference

Arlington Convention Center
Arlington, TX

Case Decisions
by Tim Truman

Objections to Claims

In re Brunson, No. 11-32727-BJH-13 (Bankr. N.D. Tex 2013)

Debtors scheduled $114,243.92 unsecured debt - all on credit cards, none of which were listed as contingent, unliquidated, or disputed. Debtors objected to twenty unsecured proofs of claim totaling $110,989.65 on the ground that "claimant has not attached documents sufficient to establish a *prima facie* claim." After amended claims or responses were filed, debtors withdrew their objections to five of the claims. The remaining fifteen were all based upon written account agreements. None of the written agreements were attached to the proofs of claim. After notice, no response or appearance was made by any of the fifteen claimants. The debtors requested the court to enter default orders sustaining their objections.

Held: Debtors' claim objections are overruled because the debtors did not state a legally sufficient ground for claim disallowance. (The objections were overruled without prejudice to the filing of legally sufficient claim objections.) A proof of claim may not be disallowed when the sole basis of objection is the creditor's failure to attach sufficient documentation under Bankruptcy Rule 3001.

Section 502(b) of the Bankruptcy Code sets forth the grounds for disallowance of a proof of claim. Failure to attach documentation to a proof of claim is **not** one of the explicit grounds set forth in § 502(b) even though Bankruptcy Rule 3001(c) requires it. The 2011 amendments to Bankruptcy Rule 3001 added subdivision (c)(2)(D) which explicitly provides for remedies when a claimant fails to provide any of the information required by the rule. Disallowance of the claim is not a remedy provided by the amended rule.

To the extent that *In Re Armstrong*, 320 B.R. 97 (Bankr. N.D. Tex. 2005) may be read to permit such an objection, it will no longer be followed, and the court's subsequent decision in *In re Rochester*, No. 03-32184-BJH-13, 2005 WL 3670877 (Bankr. N.D. Tex. May 24, 2005) is overruled.

In re Pearcy, No. 11-10253-RLJ-13 (Bankr. N.D. Tex. 2012)

Debtors objected to bank's proof of claim because it failed to include sufficient documentation to prove ownership of the note and security.

Held: Objection denied. A creditor's failure to include all documents that definitively prove its claim – and thus arguably failing to meet the standards of Rule 3001 – does not create a substantive basis for claim disallowance. The court cited 11 U.S.C. § 502(b) and *In re Davis*, 2011 WL 1302222.

In re Chaudhry, No. 10-35755-BJH-13 (Bankr. N.D. Tex. 2012)

Creditor filed a timely unsecured proof of claim. Debtor filed an objection asserting the documentation attached was insufficient to establish the *prima facie* validity of the claim. Debtor served the creditor at the address provided on its proof of claim. The creditor failed to respond. Debtor's objection was sustained by order entered on October 4, 2011. On October 16, 2012, creditor filed a motion to reconsider and vacate the order on debtor's objection. At the hearing, creditor offered no evidence.

Held: Motion denied. Creditor's request for relief under Rule 60(b)(1) must "be made within a reasonable time." The creditor, who bears the burden, put on no evidence to explain, *inter alia*, (a) how the court order came to its attention, (b) when the order came to its attention, or (c) why it failed to respond to the objection. {See also *In re Aranda*, No. 09-34798-BJH-13 (Bankr. N.D.Tex. 2012)}

Income Tax Refunds

In re Hymond et al, No. 09-45346-DML-13 (Bankr. N.D.Tex. 2012) (Opinion by Judge Nelms)

Chapter 13 trustees Truman and Whitten moved to compel debtors to turn over tax refunds for 2011 in these and hundreds of other cases.

Held: The turnover motions were denied. The tax refunds in question are property of the estate pursuant to 11 U.S.C. § 1306(a). Although under 11 U.S.C. § 1327 property that exists at the time of confirmation vests in the debtor unless otherwise provided in the plan or order confirming the plan, the estate continues to exist after confirmation and includes earnings and property acquired post-confirmation. This is known as the "estate reconciliation approach," citing *In re Powers*, 435 B.R. 388 (Bankr. N.D. Tex. 2010). However, the trustees may not compel their turnover pursuant to 11 U.S.C. § 542(a) because that section only applies to property that a trustee may use, sell, or lease under 11 U.S.C. § 363, and in a chapter 13 case 11 U.S.C. § 1303 provides ". . . the debtor shall have, exclusive of the trustee, the rights and powers of the trustee under 11 U.S.C. § 363(b),(d),(e),(f), and (l). These include the right to use, sell, or lease property of the estate.

The court stated that it agreed with *Washington v. Countryman*, 390 B.R. 843 (E.D. Tex. 2007) that the issuance of an income tax refund to a debtor who is making payments under a plan is clear grounds to seek a modification under 11 U.S.C. § 1329. The court did not rule on the issues of whether tax refunds are projected disposable income or whether it makes any difference to plan modification if the refund results from over withholding or tax credits saying those issues were not before the court but might require resolution in the context of plan modification.

Best Interest of Creditors Test

In re Moran, No. 08-60201-RLJ-13 (Bankr. N.D. Tex. 2012)

Above-median debtors filed a modification to "prepay" their 60-month plan in the 35th month from a portion of an inheritance of $25,700.00. Part of the inheritance amounting to $2,097.47 was exempt under the "wild card" exemptions. The plan base was only increased by $ 444.00. The chapter 13 trustee objected.

The issue addressed by the court was whether the modification satisfied the liquidation (best interest of creditor) test of 11 U.S.C. § 1325(a)(4) as of the effective date of the plan. (Section 1329(b)(1) dealing with post-confirmation modifications makes § 1325(a)(4) applicable.) The court followed the majority view that the "effective date of a plan modification is the date of the modification rather than the effective date of the initial confirmed plan," citing Keith M. Lundin, *Chapter 13 Bankruptcy*, § 254.1.

The court cited *In re Powers*, 435 B.R. 385, No. 02-10322 (Bankr. N.D. Tex. 2010) for the proposition that "estate property that exists at the time of confirmation vests in the debtor per § 1327(b), but property acquired by the debtor after confirmation becomes estate property" and it should be considered in evaluating the amount that unsecured creditors would be paid in a hypothetical chapter 7 case to determine if the liquidation test is satisfied. Here, the inheritance did not exist at the time of confirmation and is considered property of the estate. Therefore, when conducting the liquidation test, an additional $23,602.53 should be factored in to what the creditors would receive in a hypothetical liquidation.

Held: Evidence is reopened to allow the debtors and the trustee to submit evidence that addresses the liquidation test. If the liquidation test is not satisfied, it will not be necessary to consider the question of whether the applicable commitment period is a temporal requirement or a multiplier.

Business Homestead

In re Perry, No. 12-41595-DML-7 (Bankr. N.D. Tex. 2012)

The chapter 7 trustee objected to debtor's claim of business homestead. The debtor resided in Bosque County, Texas, on lot 136 and conducted his welding business on adjoining lot 152. Debtor moved his residence to Tarrant County, Texas, but continued to conduct his business on lot 152 in Bosque County. Debtor never resided on lot 152. In his chapter 7 statement of intention, debtor surrendered his interest in lot 136.

Held: Business homestead exemption denied. A business homestead does not survive the abandonment of an accompanying residential homestead.

2012 IRS Tax Refund Procedures Outlined

In light of the recent Memorandum Opinion issued by Judge Nelms in the *Dustin Kyle and Brittany Rae Dwinnell* bankruptcy (Case No. 08-41356), Chapter 13 Trustees Tom Powers and Tim Truman will not be requesting a turnover of the **2012 tax refund**. However, **2012 tax returns** should be turned over to the trustees when they are filed.

When **tax returns** are received from the debtors, the trustees may file a plan modification to capture all or part of any **Excess IRS Refund** reflected therein. The **Excess IRS Refund** is defined as the amount of the refund over the first **$2,000.00**.

If, prior to receiving a trustee modification, debtors wish to retain all or part of any **Excess IRS Refund**, they will need to complete and forward to the trustee a request and an affidavit with receipts or other documentation justifying the request. The trustee will evaluate these requests and make decisions on a case by case basis.

For those cases in which there is an **Excess IRS Refund** and a request and affidavit are not received by the trustee, the trustee may propose a modification regarding the **Excess IRS Refund**. If a timely objection is filed, debtors will have an opportunity to present evidence regarding the need to keep all or part of the **Excess IRS Refund** by way of an affidavit signed by the debtor(s) and filed as an exhibit to an objection to the modification indicating the need for the refund, with the supporting documentation attached.

An objection to modification is the appropriate action to take if the debtor seeks all or a portion of the **Excess IRS Refund**. General Order 2013-01, paragraph k, provides for allowable attorney fees for filing an objection to the trustee's modification.

Except in a default situation, the trustees are willing for the agreed order approving the modification (which the trustees will prepare and submit) to provide that the trustee will pay through the plan any allowed debtor attorney fees and expenses, provided the plan base is additionally increased by such amount out of the amount that would otherwise go to the debtor. The attorney must plead for these fees in any objection to the trustee modification filed and represent that such fees are agreed upon by the debtor.

If the proposed modification is unopposed (no objection/response is filed), a default order will be entered approving the modification which will provide that the **Excess IRS Refund** will be due in a lump sum amount to be paid by the debtor to the trustee by cashier's check or money order within 90 days of the entry of the order. The plan base will be increased by the **Excess IRS Refund** amount.

Bankruptcy Clerk Posts Notice

Effective May 1, 2013, the bankruptcy courts will begin charging a new fee of $25 for each claim transferred. This fee was approved by the Judicial Conference of the United States at its September 2012 session.

The fee will be assessed by bankruptcy courts upon the filing of the claim transfer, whether filed by a transferee or transferor. It will apply to partial claims transfers as well. In the event multiple claims transfers are filed at one time by one entity (claims upload or batch filing), the $25 fee will be charged for each individual claim transferred.

The fee must be paid by credit card upon the filing of the claims transfer in CM/ECF using Pay.gov, ACH Debit card, or by whatever means is designated by the court if the claim transfer is not filed electronically. An entity that electronically handles claims transfers must ensure that the individual filing a transfer is authorized to pay this fee by credit card.

Entities that transfer claims should be aware that courts may be reviewing user accounts, account access, and the number of accounts authorized for a particular entity in anticipation of this fee.

Clerk's Notice 13-04

Bankruptcy Rule 9011 Pitfalls Explored

by Angela Allen
Staff Attorney for Tim Truman

The consequences of an attorney's failure to use the bankruptcy system responsibly can be steep. Bankruptcy Rule 9011 (the bankruptcy counterpart to FRCP 11) requires that every attorney give serious thought and consideration before signing and filing any petition, pleading or paper.

Courts have held that there are several general purposes behind the implementation of BR 9011. The most common reasons are to deter or discourage frivolous and abusive litigation in the bankruptcy court, and to avoid clogging the courts with paper that wastes judicial time. Courts seem to emphasize that their enforcement of Rule 9011 stems from a desire to impress upon all attorneys that, in addition to their ethical duties to their client, attorneys also have duties to the courts and to the judicial system.

An attorney may be found to be in violation of Rule 9011 by presenting to the bankruptcy court a petition, pleading, written motion or other paper that is not filed for a proper purpose, whose claims are not warranted by existing law, whose allegations have no factual or evidentiary support, or whose denials of factual contentions are not warranted on the evidence.[1]

It is important to note that no finding of bad faith on the part of the attorney is required. The test is whether grounds existed at the time that the paper was signed to the best of the signer's information and belied, after reasonable inquiry into the circumstances. This is an objective standard applied by the court which has the discretion to impose sanctions. The courts' Rule 9011 sanction power is in addition to the courts' powers under 11 U.S.C. §105(a) to "take any action or make any determination necessary or appropriate to prevent an abuse of process." An attorney's good faith belief is no defense in a Rule 9011 action since an objective standard is used to determine whether the attorney made a reasonable inquiry into the circumstances and into the facts and the law prior to filing the paper. The rule requires counsel to read and consider before filing. As one court noted, "an empty head but a pure heart is no defense."[2]

Rule 9011 includes a "safe harbor" provision that requires the party filing the Motion for Sanctions to do so in a separate pleading and to serve the Motion for Sanctions on the other party at least 21 days prior to any hearing date. A violation of Rule 9011 may be cured by withdrawal or amendment of the offending paper, unless the conduct alleged is the filing of a petition, which may not be cured. This is especially important in the consumer bankruptcy context since the filing of "serial" or repetitive chapter 7 or chapter 13 bankruptcy petitions has been held by many courts to be a violation of Rule 9011. An attorney who files a petition for a debtor without doing a nationwide search on PACER for prior filings does so at considerable risk.

Sanctions that may be imposed for a violation of Rule 9011 vary. Monetary sanctions, including the award of attorney fees to the party bringing the 9011 action are common. It is also not unusual to see courts using public censure of the offending attorney as a deterrent. In some instances, courts have required the offending attorney to disgorge fees and have even referred cases to the state bar or the U.S. Attorney for criminal prosecution. Consumer bankruptcy practitioners operate in a high stress environment. A combination of large case loads, limited fees and the high speed nature of the process can lead to deadly results unless careful procedures are strictly followed with regard to the requirements of Rule 9011. So, be careful!

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[1] F.R.B.P 9011 (b)(1-4.)

[2] *In re Slaughter*, 191 B.R. 135 (Bankr. W.D. Wis. 1995).

Fort Worth: Tim Truman, Trustee

Phone Numbers:		Fax Numbers:
Main Phone Number:	817-770-8500	817-498-1362
New Cases/341 Meetings –	817-770-8521	817-770-8518
Claims/Confirmations/TRCC –	817-770-8531	817-770-8506
Modifications/Dismissals/Closings –	817-770-8572	817-770-8508
IRS Refunds/Wage Directives –	817-770-8553	817-770-8508
Legal –	817-770-8558	817-770-8511
Systems Management/Website –	817-770-8567	817-770-8509

Email Addresses:
New Cases/341 Meetings – truman341docs@ch13ftw.com
Confirmations – trumanconfirmationdept@ch13ftw.com
Legal Issues – trumanlegal@ch13ftw.com
Tax Returns - trumantaxreturns@ch13ftw.com

Chapter 13 Trustees 2013 Useful Contact Information

Fort Worth: Tom Powers, Trustee
Main Phone Number: 817-916-4710
New Cases/341 Meetings – Ext. 4702
Claims/Confirmations/TRCC – Ext. 4704
Modifications/Dismissals/Closings – Ext. 4705
IRS Refunds/Wage Directives – Ext. 4701
Fax Number: 817 916-4770
E-mail Addresses:
341's – fwpowers341docs@fwch13.com
Trust - fwpowerstrust@fwch13.com
Modifications - fwpowersplanmods@fwch13.com
Confirmations/TRCC - fwpowersconfirmationdept@fwch13.com
Legal - fwpowerslegal@fwch13.com
Dismissals/Closings - fwpowersdismissals-closings@fwch13.com
Tax returns - fwpowerstaxreturns@fwch13.com (Fax: 817-916-4737)

Dallas: Tom Powers, Trustee
Main Phone Number: 214-855-9200
New Cases/341 Meetings – Ext. 350
Claims/Confirmations/TRCC – Ext. 361
Modifications/Closings/Dismissals – Ext. 362
IRS Refunds/Wage Directives – Ext. 360
Motions to Incur Debt – Ext. 273
Systems Management – Ext. 232
Fax Numbers:
New Cases – 214-965-0754
Confirmations – 214-965-0756
Public Information – 214-965-0754
Post Confirmation – 214-965-0757
Legal – 214-965-0758
Tax Returns/Paystubs – 214-969-0506
Trust – 214-965-0755
Email Tax Returns:
powerstaxreturns@dallasch13.com