



FEDERAL BAR ASSOCIATION

BANKRUPTCY SECTION NEWSLETTER
JULY, 2002

CHAPTER 13 SUCCESS DAVID C. ANDERSEN

I first met Ray Johnson over 20 years ago when I was interested in getting into bankruptcy practice. As a young lawyer I was greatly impressed by his knowledge, not only about chapter 13 and bankruptcy, but how of how to get things done and how the real world works. His knowledge of business and finance enabled him to share with me a great deal of experience that eventually has led me to build a successful practice as a bankruptcy specialist.

Bankruptcy law appealed to me right away. I had taken Creditor's Rights in law school the same year that Congress had passed the Bankruptcy Code.

The main thing Ray Johnson and I seemed to share in common was a belief that many debtors who have regular income could afford to pay on their debts and should do so if they have the ability. In my years of practice I have learned that most debtors that come to see me for help actually want to pay their debts if they can afford it and are reluctant to even approach a bankruptcy lawyer until they have exhausted all other avenues of relief. That is why many of my clients come to me after they have taken out second or third mortgages, transferred balances from one account to another, borrowed from retirement savings or refinanced or consolidated their loans and accounts.

The other thing that really impressed me about Ray Johnson was the way he created an environment for chapter 13 practice. Through the training of his staff (including Brett Rodgers at one time), through case analysis, and through encouragement and sometimes compromise, he is probably the main person responsible for the quality of chapter 13 practice in this district and the success that people have in paying on their chapter 13 plans.

We are now fortunate enough to have Brett Rodgers in the Grand Rapids district administering chapter 13 plans along with Ray Johnson. I do believe that, like me, Brett learned from Ray over the years and between the two of them, have fostered a very positive environment for chapter 13 success. Mary Hamlin, who administers chapter 13 plans in Kalamazoo, is also very knowledgeable and capable in this area of practice.

In order for Chapter 13 cases to work, there has to be a good environment in which attorneys and their clients can function. In addition to the quality of knowledge on the part of the chapter 13 trustees and their staffs, the functioning of the Court on motion day and its local rules and practices are key to a successful chapter 13 environment. To the extent that attorney fees are adequate and that motions and confirmations are handled promptly, efficiently and fairly, a good environment for chapter 13 cases will exist in most districts. In this district we not only have knowledgeable trustees, but we are also fortunate enough to have a bench and bar that understand how chapter 13 cases work and what it takes to succeed in getting these plans completed.

There are several significant factors in a chapter 13 practice that can foster success in the overall practice. One of the biggest factors in a successful chapter 13 practice is preparation for motion day.

Case Preparation for Motion Day and Confirmations:

The change in procedure requiring written responses by the debtor to motions to dismiss has improved the administration of cases on motion day. For example, on a Monday several months ago, in one of our

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IMPORTANT DATES:

SUMMER SEMINAR JULY 25-27. SEE PAGE 4.

CONSUMER BANKRUPTCY COALITION MEETINGS:

SECOND FRIDAY OF JULY AND EVERY SECOND MONTH THEREAFTER @ 9:00 A.M. @ FIFTH THIRD BANK, EAST PARIS ROAD, GRAND RAPIDS. CALL JOHN PIGGINS OR JILL @ (616) 447-1800 FOR DETAILS, TO GET ON THE MAILING LIST AND TO VERIFY MEETING.

NATIONAL CONFERENCE OF BANKRUPTCY JUDGES; THE ANNUAL MEETING THIS YEAR IS IN CHICAGO FROM OCTOBER 2-5. SEE WWW.NCBIJ.ORG.

Something missing? Let us know about other dates!

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courtrooms, approximately 200 cases were administered in about an hour, covering more than 30 pages of the calendar, all scheduled for 9 o'clock. The Judge was prompt, efficient and fair. She allowed everyone to respond or argue each case. No one was cut short or denied a fair chance to present the merits of the controversy. Efficient administration is consistent with fair administration in our district.

Such efficiency is not without cost. Behind the scenes, the Judge, Trustee and debtor's counsel must be fully prepared. Without adequate preparation, there would be a corresponding drop in the quality of presentation and representation. Based on my observations, for the most part, the debtors are getting good representation on motion days. Adequate representation requires extensive preparation for each motion day.

When the notice of dismissal is received, debtor's counsel must send a letter or notice to the client that they must respond. Although this is stated in the motion itself, counsel cannot leave it up to the debtors to figure out what to do or when to do it. The notice sent by counsel requests that they contact the attorney's office to evaluate the options for staying in the plan and for preparing a response to the motion.

A follow up interview is necessary on the phone or in person. The plan must be analyzed in detail for payment status, plan length, budget considerations and changes in circumstances, possibilities for plan amendments or surrender of collateral, reduced dividends to creditors, or conversion or dismissal. All this requires quality time spent researching the trustee's records on line, meeting and/or discussing details with the clients, making decisions and giving advice, and then implementing any needed changes through plan amendments. A written response must also be timely filed to preserve the issues for motion day.

Response deadlines must be internally docketed and checked and rechecked. Amendments generally should be done before the hearing date, so amendments need to be prepared, mailed to clients, mailed back to the office, then noticed out at the attorney's expense to interested parties.

As the motion day nears, clients should be reminded that they must appear in court and that they should dress appropriately, arrive early for a brief meeting with the attorney, that they should bring documentation of insurance, proof of payments, proof of employment, etc. if needed.

The day before motion day, the attorney needs to check with the trustee's office as to which motions are going forward, which are adjourned and which ones are withdrawn. This involves detailed phone conversations with the chapter 13 trustee or staff attorney.

Clients call to find out if they need to attend motion day. Since the client is notified of the motion, and there is a chance they can fix the problem ahead of time, they are instructed to check with the attorney the day before. Therefore, the business day before motion day is extremely busy for both attorney and trustee due to fielding calls from clients and interested parties inquiring as to whether a court appearance is necessary the next day.

Last minute documents are often faxed to the trustee's office to show proof of payments or plan amendments in order to save the plan from being dismissed on the motion day. Most motions are now resolved ahead of time so that they are either withdrawn, adjourned or disposed of without a contested hearing. As a result of all the preparation for motion day by the trustee and debtor counsel, there are now very few contested motions brought before the Court. The work done behind the scenes is very significant in this regard.

The above scenario of motion day preparation can be repeated several times for cases where motions are adjourned or if subsequent problems are encountered on the case before discharge. Many cases are subject to adjournments or repeat motions due to the debtor's circumstances.

Other Chapter 13 Issues and the Statistics - Are We Succeeding?

As a follow up to this article, the writer intends to review other aspects of chapter 13 practice and analyze the overall chapter 13 statistics in this district and in his own practice and compare them to the national averages. We'll look at success rates for the debtors. Are they completing their plans or failing?

David C. Andersen

STATISTICS					
THE COURT WEBSITE PROVIDES STATISTICS ON THE NUMBER OF CASES FILED SINCE 1994 IN OUR DISTRICT.					
2001:	CHAPTER 7: 10,596	CHAPTER 13: 3,307	CHAPTER 11: 69	TOTAL: 13,974	
THROUGH JUNE 6, 2002:	CHAPTER 7: 4149	CHAPTER 13: 1190	CHAPTER 11: 24	TOTAL: 5363	

THANK YOU TO DEAN RIETBERG AND MIKE JONES FOR THESE SUMMARIES.
UNITED STATES SUPREME COURT

United States V. Craft, United States Supreme Court, decided April 17, 2002 find at www4.law.cornell.edu.

A taxpayer's interest in real estate, owned with his wife as entireties property, was property subject to a tax lien for his separate tax obligations. This is not a bankruptcy case, but has obvious potential impact on our practice in Michigan, which recognizes the entireties exemption. This case will also be discussed at the summer seminar by Jeff Moyer, who handled the case at the lower level and was present for arguments before the United States Supreme Court.

BANKRUPTCY COURT, WESTERN DISTRICT OF MICHIGAN.

In re Corradini 276 B.R. 571 (Bankr. W.D. Mich. 2002)

What is justifiable reliance on false misrepresentations for purposes of determining the nondischargeability of a debt under 523(a)(2)(A) for money obtained through fraud? How unspecified payments by a debtor are to be applied to several debts.

In re Davis 278 B.R. 429 (Bankr. W.D. Mich. 2002)

The Judge *sua sponte* dismissed an involuntary bankruptcy case filed in bad faith by a convicted felon to harass the judge and prosecutor of his criminal case.

SIXTH CIRCUIT BAP.

In re Leet 274 B.R. 695 (6th Cir. BAP (Ohio) 2002)

Creditors were not allowed to file their complaint to determine dischargeability under 11 U.S.C. 523. The bankruptcy court must strictly enforce F.R.B.P. 4007(c) requiring that an extension of the 60-day limitation be sought within that time period. Equitable tolling is inconsistent with the specific text.

In re Schoenlein 2002 WL 1339155 (6th Cir. BAP (Ohio))

The bankruptcy court incorrectly granted a default judgment when defendant answered a complaint a week after an extension to answer the complaint expired. Service was improper when the plaintiff mailed the complaint via regular, first class mail to a contract employee of the defendant. The contract employee was not an officer, managing agent, or general agent. The Bankruptcy Appellate Panel held that the standard is a willful standard not a mere negligence standard.

In re Sweezy 276 BR 186 (6th Cir. BAP 2002)

Under the Rooker-Feldman doctrine, a bankruptcy court may not review and redetermine the merits of a debt or set aside the default judgment reflecting it, but it may within its exclusive jurisdiction determine whether the debt is dischargeable or not.

When deciding whether a state court judgment should be given collateral estoppel effect, the bankruptcy court must look to state law to determine if the prerequisites of issue preclusion have been met.

SIXTH CIRCUIT COURT OF APPEALS.

In re Desilets 2002 WL 1159745 (6th Cir. (Mich. 2002))

In overturning both the district and bankruptcy courts, the 6th Cir. ruled that a lawyer licensed to practice law in Texas could practice bankruptcy law before bankruptcy court in Western District of Michigan, without being admitted to Michigan state court, where lawyer was eligible for admission to bar of Western District of Michigan and was properly admitted pursuant to local rule.

In re Sallee 286 F.3d 878 (6th Cir. 2002)

Plaintiff's naive trust in bank officers, standing alone, does not create a fiduciary relationship.

In re Yates, ____ F.3d ____, 2002 W.L. 597034 (6th Cir. April 2002).

Topics: Preferences (11 U.S.C. § 547); Property of the estate (11 U.S.C. § 541) Loan Repayment to Erisa Pension Plan Avoidable as Preference.

EASTERN DISTRICT OF MICHIGAN

In re Felski 277 BR 732 (Bankr. E.D. Mich. 2002)

An obligation incurred to pay a personal injury debt is itself a personal injury debt and cannot be discharged. Debt owed to Michigan Assigned Claims Facility by debtor under Michigan's no fault laws was held to be for personal injury with the meaning of 11 U.S.C. 523(a)(9) and thus nondischargeable.

In re Kiefer 276 BR 196 (E.D. Mich. 2002)

The court declined to follow the "substantial and material consideration" test set out in *In re White Motor Corp.* 42 BR 693 (N.D. Ohio 1984) when considering to withdraw the proceeding under 28 U.S.C. 157(d) and F.R.B.P. 5011(a). Instead, the court agreed with the literal interpretation in *Martin v. Friedman* 133 BR 609 (N.D. Ohio 1991).

In re Kriegish 275 BR 838 (E.D. Mich. 2002)

Debt of a subcontractor is nondischargeable under section 523(a)(4) because debtor breached his fiduciary duty to contractor-creditor created by the Michigan Building Contract Fund Act (MBFA).

In re McNamara 275 B.R. 832 (Bankr. E.D. Mich. 2002)

Payment owed by appellant-debtor titled "amended order of settlement" was clearly an attempt to resolve legitimate disputes about the level of alimony appellee was entitled to and thus was nondischargeable under 11 U.S.C. 523(a)(5).

In re Parks B.R. (Bankr. E.D. Mich. 2002)

In determining when a claim arose, the Judge adopted the "fair contemplation" test. This is the broadest approach. It looks at whether there was a pre-petition relationship between the debtor and the creditor such that a possible claim is within the fair contemplation of the creditor at the time the petition was filed. A third party's complaint for misrepresentation violated discharge injunction because the claims arose pre-petition and were therefore discharged.

CHAPTER 13 ISSUES

The local US trustee office organized free seminars to train attorneys and their assistants for chapter 13 work. Dean Rietberg took the lead in organizing the seminars, and staff from the US Trustee office and all chapter 13 trustee offices participated. Judging from the attendance at the Grand Rapids seminar, it appears that the organizers were successful in getting many new attorneys there.

Mike Maggio of the US trustee office spent a good deal of time reviewing 707(b) considerations. This could be significant because it appears that the US trustee office is filing more motions under 707(b). It is important for all debtor attorneys to carefully review the budgets in all bankruptcies. Read it from the perspective of the trustee or judge that might review it. For that matter, this approach should be taken with all of the bankruptcy papers filed for debtors. They are forms, but that does not mean that they can be completed without care. It is much preferable to find the problems with a budget or other issue about a client's financial situation prior to filing, rather than after filing, when another party is investigating it.

For more information about the chapter 13 seminars, contact Jan Roys at the US trustee office at 456-2002, extension 11 or at Jan.Roys@usdoj.gov.

Bankruptcy Section Newsletter
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SUMMER SEMINAR

The annual bankruptcy seminar will be held on Mackinaw Island from July 25 through 27, 2002. A couple of the highlights will be sessions on electronic case filing and a speech from Lawrence Friedman, the Executive Director of the US Trustee program. We will also have sessions on chapter 7, 11 and 13 issues tax issues and consultants and auctioneers. As usual, there will be many opportunities for social gatherings to give us opportunities to relax together.

It is anticipated that this seminar will be sold out. If you try to sign up and this is the case, consider ordering materials for the seminar for \$75.00. This will be especially important for those who wish to obtain information about electronic case filing. The materials will include the update on the review of bankruptcy cases for our jurisdiction. To sign up for the seminar or order materials, contact Mary Hamlin's office at (616) 345-0305.

We look forward to seeing you there!

PEOPLE AND CHANGES

THE EDITOR RECEIVED NO INFORMATION ABOUT THIS TOPIC. IF YOU HAVE SOME NEWS WHICH WOULD BE OF INTEREST TO THE BANKRUPTCY BAR, PLEASE E MAIL IT TO MEOLI@TRITON.NET.

TECHNOLOGY TIPS: WE ARE STILL INTERESTED IN ANY IDEAS THAT YOU MIGHT HAVE, ESPECIALLY IF YOU THINK THAT BANKRUPTCY PRACTITIONERS DO NOT KNOW ABOUT IT.

CLERK'S OFFICE ISSUES

The court website is now presenting the opportunity to see how electronic case filing will work. If you go to the court site, <http://www.miwb.uscourts.gov/>, it will link you to 6 modules showing how to use a system for electronic filing. It appears to be quite comprehensive and you should check it out. Also do not forget to sign up for RACER/PACER as soon as possible, to enable you to used electronic case filing.