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NEWS FROM THE BANKRUPTCY COURT

The New Bankruptcy Law's Credit Counseling Requirement

In *In re Lorie Jane LaPorta,* Bky. Case No. 05-90784 (Bankr. D. Minn., Oct. 27, 2005), the United States Bankruptcy Court for the District of Minnesota held that a creditor who had not first obtained credit counseling, as required by new 11 U.S.C. § 109(h)(1), nor complied with the exemption provisions in § 109(h)(3), could not be a debtor under the Bankruptcy Code.

The Debtor filed a petition under Chapter 7 on October 21, 2005. 11 U.S.C. § 109 (h)(1) became effective for all bankruptcy cases filed on or after October 17, 2005. It requires an individual debtor to have received certain services from "an approved credit counseling agency" during the 180 day period preceding the date on which such a debtor files a bankruptcy petition. The "briefing" required by § 109(h)(1) does not have to in person; it may be conducted by telephone or via the Internet. The pro se Debtor in this case stated that: "As far as credit counseling goes . . . what is listed is way beyond the territory I can afford to travel for time and distance, and gas prices." The Debtor went on to evince her willingness to use "a free online course that I can take," "if it were available." The Debtor did not, however, file a certificate from an approved nonprofit budget and credit counseling agency within 180 days preceding the date on which the Debtor filed bankruptcy as required by 11 U.S.C. § 521(b)(1).

Judge Kishel noted that § 109(h)(3) provides an exemption from the credit counseling requirements "on certain very narrow and specific grounds." The facts showing such grounds must be set forth in a written certification signed under penalty of perjury by the debtor. The Debtor here failed to sign a statement under penalty of perjury and the facts she set forth did not demonstrate qualifying exigent circumstances. The fact that her car was subject to repossession because she had failed to make certain required payments was not an exigent circumstance. The court noted that filing a Chapter 7 petition would only result in delaying enforcement of the consensual lien. The court also stated that, even if an exemption is granted, it only lasts for 30 days, subject to a 15 day extension "for cause" shown. 11 U.S.C. § 109(h)(3)(B).

The Bankruptcy Court therefore concluded that the Debtor may not be a debtor under the Bankruptcy Code, and dismissed the case without prejudice. Judge Kishel went on to express his opinion that the result reached here was "harsh," but that no other result was possible under the clear language of the statute.

Insurers Raise Plan Confirmation Issues In A Chapter 11 Asbestos' Case

In the case *In re A.P.I. Inc*, Bky Case No. 05-30073, Docket No. 373-1 (Bankr. D. Minn., Oct. 15, 2005), the Debtor proposed a Chapter 11 plan that would establish a trust for the benefit of the holders of asbestos-related personal injury claims. Prior to the Chapter 11 filing, the Debtor's insurers advised the Debtor that indemnification coverage under the policies had reached its limits and that the insurers would not defend and indemnify the Debtor as to any further asbestos-related claims. The Debtor disputed the insurers' right to terminate defense and indemnification and this led to litigation in state court. Before the Bankruptcy Court, the Debtor brought a summary judgment motion to resolve the insurers' objections to confirmation of the Debtor's plan. The motion involved the resolution of two primary issues.

First, the insurers challenged the Debtor's right to transfer the Debtor's rights and interests under the insurance policies to the trust. They argued that the trustee's assumption and exercise of the Debtor's benefits under insurance policies could infringe on the insurers' contractual rights to control the defense and settlement of claims. They further argued that confirmation of a plan in which the trustee could demand indemnification would jeopardize their substantive position in the state court coverage litigation. The Debtor argued that the plan preserved all of the insurers' rights and abilities to challenge coverage.

The Bankruptcy Court found the plan preserved both the parity of rights, duties and options that prevailed between the Debtor and non-settling insurers before the Debtor's bankruptcy filing and the insurers' full latitude to respond to any demand for indemnification that existed before the Debtor's bankruptcy filing. Concluding that confirmation would not alter any of the insurers' pre-petition rights or duties vis-à-vis the Debtor or the trust as the successor, the court found that there was no basis for denying confirmation on any ground relating to this group of the insurers' concerns. Accordingly, the court overruled all such objections.

The second issue presented in the summary judgment motion involved the insurers' standing to make further objections to various provisions of the plan and its confirmation. The central question considered was: where a party to a Chapter 11 case is not a creditor to the debtor, may it object to all aspects of the debtor's plan and the debtor's showing for confirmation, or is it limited to those aspects that bear on its specific relationship to the debtor?

The Bankruptcy Court found the insurers' standing to object must be determined on a particularized basis as to each theory raised in opposition to confirmation. Complainants must demonstrate both constitutional and prudential standing. To meet the requirements of constitutional standing, a party must have such a personal stake in the outcome of the controversy as to secure concrete adverseness. Once a party has met the constitutional requirements, its standing may be challenged on three prudential grounds: (a) it is asserting a third party's rights; (b) it alleges a generalized grievance rather than an inquiry particular to it; and (c) it asserts an inquiry outside the zone of interest that the statute was designed to protect.

The Bankruptcy Court determined that the insurers had no standing for the following reasons: they were without a stake or claim; they would not share from the distributions; the plan did not alter any of the insurers' legal or contractual rights; they had no stake in the funding or administration of the trust assets and thus would have no interest in whether the Debtor acted properly in releasing related entities from liability; and only holders of asbestos claims that would receive distributions from the trust had standing to question whether the arrangements to secure the trust were fiscally sound.

As such, the Bankruptcy Court concluded the objecting insurers lacked both constitutional and prudential standing. Thus, it declined to hear those issues in objection to the confirmation of the Debtor's plan. The Bankruptcy Court awarded summary judgment to Debtor on all major plan objections made by the insurers.

Asbestos' Case Part II: Plan Confirmation Objections

In the second *A.P.I.* order addressed in this issue of the Bankruptcy Bulletin, the court had before it various issues raised concerning the confirmation of the Debtor's plan of reorganization. *In re A.P.I. Inc.*, Bky Case No. 05-30073, Docket No. 374-1 (Bankr. D. Minn., Oct. 15, 2005). Specifically, the objecting parties raised objections under 11 U.S.C. sections: 1122(a), 1123(a)(1), 1129(a)(4), 1129(a)(5)(A)(ii), 1129(a)(5)(B), 1129(a)(12), 1129(a)(13), 524(g)(2)(B)(i)(II), 524(g)(2)(B)(i)(III), and 524(g)(2)(B)(ii)(I). Overruling the objections, the court held as follows:

11 U.S.C. § 1122(a): Under §1122(a), the debtor may exercise broad discretion in its classification of claims. The debtor only needs to show that there is a reasonable basis for the classification and that the claims within a particular class are substantially similar. Here, the Debtor placed all of the asbestos-related claims, including both current existing and future unknown claims, into one class. The court noted that the key question is whether all the claims in one class are substantially similar based on the character of each category of claim. All were personal injury claims; all the claims were unsecured and of equal priority; all the claims were subject to satisfaction by rights against insurers. Because the asbestos' claims shared the same defining characteristics, classifying them into a single class was appropriate and valid as a matter of law.

11 U.S.C. § 1129(a)(4): Section 11 U.S.C. § 1129(a)(4) requires that any payments for services or for costs and expenses in connection with the case or plan must be approved by the court and found to be reasonable. Here, an objection was made on the grounds that the plan did not provide for court review and approval of the fees of the post-confirmation trustee. The court noted that the purpose of § 1129(a)(4) is to require court supervision of payments of fees from the estate or for fees related to the confirmation of the Chapter 11 plan, not for fees incurred by the trustee post-confirmation. Thus, the court held that payment for fees and services provided by the trustee post-confirmation are not subject to review and approval by the bankruptcy court.

11 U.S.C. § 1129(a)(5): 11 U.S.C. § 1129(a)(5)(A)(I) requires that the plan disclose the identity of any individual who proposes to serve as a director, officer, or voting trustee of the reorganized debtor. 11 U.S.C. § 1129(a)(5)(B) further requires that a plan disclose the identity of any "insider" to be employed and any compensation to such individual. The objecting party argued that the plan failed to sufficiently identify any such individuals. The court held that the Debtor satisfied the disclosure requirements of § 1129(a)(5) where the plan simply stated that no change was contemplated in the managing officers or directors. The objection was further overruled because the trust to be created by the plan would not be a reorganized debtor. Thus, the objection was outside the scope of § 1129(a)(5)(A)(ii).

11 U.S.C. § 524(g)(2)(B)(i)(II): This section requires that the asbestos "personal injury" trust must be "funded in whole or in part by the securities of one or more debtor involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends. Here, objections were made on the grounds that: (1) the Debtor's trust was funded by cash and a promissory note (secured by 51% of the Debtor's stock) as opposed to a direct equity interest in the Debtor, and (2) no dividends would be paid to the trust under the terms of the promissory

note. The objecting parties claimed that a promissory note did not qualify as a "securities" of the Debtor. The court had little trouble in rejecting the objecting parties' argument by pointing out that the Bankruptcy Code expressly defines a "security" to include a "note," a "bond," a "debenture," or a "certificate of deposit." As to the argument that future payments into the trust must be made in the form of a "dividend," the court analyzed the specific language used by Congress to hold that future payments *may* be made by paying dividends, but it is not a requirement. The court therefore found that the Debtor had satisfied the requirements under 11 U.S.C. § 524(g)(2)(B)(i)(II) for the asbestos "personal injury" trust.

11 U.S.C. § 524(g)(2)(B)(i)(III): 11 U.S.C. § 524(g)(2)(B)(i)(III) requires that the trust "own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of –(aa) each such debtor; (bb) the parent corporation of each such debtor; or (cc) a subsidiary of each debtor that is also a debtor." The Debtor proposed to fund the trust with a cash payment, with the remaining balance to be paid by a promissory note secured by 51% of the voting shares of the Debtor. The objecting parties claimed that the payment arrangement did not guarantee any reasonable prospect that the trust will ever own, or by the exercise of rights on specified contingencies would be entitled to own, a majority of the voting shares of the Debtor. The court rejected the objection citing the contingency language in the Code provision. The court stated that if the Debtor defaults on the promissory note, the trust could take control of a majority voting interest in the Debtor by foreclosing on the promissory note. The Debtor had met the requirements under 11 U.S.C. § 524(g)(2)(B)(i)(III).

11 U.S.C. § 524(g)(2)(B)(ii)(I): This provision requires that, in order for the debtor to take advantage of the channeling injunction provided by § 524(g), the debtor must be "likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the [channeling] injunction." An officer of the Debtor, in a declaration, stated a prima facie case that the Debtor would face substantial future demand for payment arising out of similar conduct that would be addressed by the injunction. As evidence of the magnitude of the unknown future claimants, the Debtor stated that the present holders of claims would only be paid 13% of their liquidated claims so that future claimants could be paid on a similar prorated basis. The objecting parties did not come forward with any evidence sufficient to rebut the prima facie case made by the Debtor. As such, the court held that the Debtor has established that it met the requirement of 11 U.S.C. § 524(g)(2)(B)(ii)(I).

NEWS FROM THE BANKRUPTCY COURT

October was an eventful month at the Bankruptcy Court. During those 31 days, the Court accepted 7789 bankruptcy petitions, converted to CM/ECF and processed the first cases applying the new requirements of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

I. The 2005 Bankruptcy Blip

The Bankruptcy Court in Minnesota, like courts around the country, experienced a record influx of filings in the weeks leading up to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Some statistics from the so-called "Bankruptcy Blip," with comparisons to previous years' filing levels, are noted in the tables below:

U.S. Bankruptcy Court, District of Minnesota: total case filings:

	2005	2004	2003
September	3267	1478	1673
October	7789	1514	1958
Full year	25312*	17831	20891

* through 10/31/05

U.S. Bankruptcy Court, District of Minnesota: case filings by chapter:

	Chapter 7	chapter 13	chapter 11
September 2005	2863	399	4
October 2005	7092	694	3
Two month total	9955	1093	7

District of Minnesota daily filings: October 11 - 16, 2005:

Tuesday, October 11:	576 cases
Wednesday, October 12:	779 cases
Thursday, October 13:	1238 cases
Friday, October 14:	**1578 cases**
Saturday, October 15:	893 cases
Sunday, October 16:	518 cases
6 day Total:	5,582 cases

It is noteworthy that total filings on October 14th were comparable to a typical month's filings during "normal" times. Likewise, the 7,776 filings received during the first two weeks of October were comparable to almost six months' filings in an average year.

While final statistics are not yet available, it is estimated that over 600,000 cases were filed nationwide during the first two weeks of October.

II. CM/ECF Implementation

The court activated CM/ECF on October 31. All electronic filing now occurs through that system. Attorneys who encounter problems filing to CM/ECF should contact Margaret Dostal-Fell at 612-664-5273 for assistance.

For the time being, attorneys can access images for filings that predate the court's conversion to CM/ECF through the "ERS Case Search" option on the court's website. Images for documents filed in 2004 and 2005 should be moved to the CM system in early December. Image conversion will continue thereafter until all images have been moved to the CM system and the ERS Case Search option will remain available until that time.

The Judge/Trustee assignment module has been temporarily disabled to accommodate the "bankruptcy blip" and to make some changes to the 341 meeting calendar requested by the US Trustee. This feature, which assigns the judge and trustee and generates the 341 meeting notice immediately upon case filing, should be available by April 2006.

III. BAPCPA

As of November 22, 2005, 83 new cases have been filed under BAPCPA. Of these, six have been dismissed because the debtor failed to undergo pre-petition credit counseling or because the debtor's Certification of Exigent Circumstances was determined by the Court to be unsatisfactory.