

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
JOHN A. COUWENHOVEN,) BANKRUPTCY NO. 04-65475 JPK
) Chapter 13
Debtor.)

ORDER ON MOTION TO ALLOW LATE CLAIM

On August 28, 2006, a hearing was held on the debtor's Motion to Allow Late Claim filed on June 21, 2006. The debtor appears by counsel Steve Wade; the Chapter 13 Trustee appears by counsel Julia M. Hoham.

The debtor's motion states that The Methodist Hospital/Southlake was inadvertently omitted from Schedule F as originally filed in the case, and thus that the creditor did not have an opportunity to timely file a claim in the debtor's Chapter 13 case. The debtor now seeks to file a claim on behalf of that creditor.

The matter presented to the Court is a more complicated one than might first appear. In addition to presenting the general issue of the treatment of a late-filed claim in a Chapter 13 case, the matter also presents the complicating factors of lack of notice to the creditor in time to allow the creditor to file a timely claim, and the issue of when a debtor or trustee may file a claim on behalf of a creditor.

First, the issue concerning the late-filing of a claim by a creditor itself (at least when the creditor had notice of the case in time to timely file a claim), and the manner in which the creditor may be able to establish grounds for allowance of the claim despite its late-filing, have been conclusively addressed in *Matter of Greenig*, 152 F.3d 631 (7th Cir. 1998). As review of that case will establish, had the Methodist Hospital/Southlake had timely notice of the case and itself had filed the motion now before the Court, the Court would be compelled to deny it. Thus, the parameters of the allowance of a late-filed claim when the issue is presented to the

Court by means of a motion has been conclusively addressed in this Circuit in the context in which the creditor received notice of the case in time to file a timely claim.

However, in the instant matter, the debtor asserts that the Methodist Hospital/Southlake did not receive notice of the filing of the case in time to file a timely claim. This lack of notice raises significant due process issues with respect to a determination that a creditor may be completely foreclosed from participation in distribution in a Chapter 13 by the simple mechanism of not providing that creditor with notice of the filing of that case in a manner which allowed it to timely file a proof of claim. As stated in the Court's order of July 28, 2006, footnote 5 in *Matter of Greenig*, supra, posits that perhaps lack of notice of the filing of a case may not be a sufficient basis to extend the original claim filing deadline for a creditor which did not receive notice. That pronouncement is *dicta*, and if actually acted upon would clearly violate a long line of United States Supreme Court due process notice cases, including the most recent, *Jones v. Flowers*, 126 S.Ct. 1708 (2006). Thus, this Court has no trouble holding that if the creditor which did not receive notice in a manner allowing for the timely filing of a claim, and otherwise had no knowledge of the filing of the case, itself sought relief from the Court, promptly upon receipt of notice, to allow the timely filing of the claim – the Court would allow the claim to be filed as timely.¹

¹ There is an even more interesting issue lurking here. Let's assume a pre-petition creditor receives no notice of the debtor's filing and has no knowledge of the case, and that the debtor then receives a discharge under 11 U.S.C. § 1328(a). What then is the status of that creditor's claim against the debtor – is it discharged? Intuitively, one would say that the identical due process issues which relate to allowing a creditor which did not receive notice to be able to obtain an allowed claim despite its having been late-filed, should answer this question as well, and thus that the creditor would not be discharged. This is particularly so in light of § 1328(a)'s provision that a discharge only affects "all debts provided for by the plan or disallowed under § 502 [of the Bankruptcy Code]": if the creditor never received notice of the case, it is obvious that its debt was never "provided for by the plan." But . . . prior to amendment by BAPCPA, 11 U.S.C. § 1328(a) did not provide an exception for discharge of debts of the nature of those described in 11 U.S.C. § 523(a)(3), i.e., debts of a creditor which were neither listed nor scheduled in time to permit the creditor to timely file a proof of claim,

Another scenario, addressed by Attorney Wade at the hearing, should also be discussed. What if, instead of filing a motion which seeks relief from the Court, a creditor in the circumstance of The Methodist Hospital/Southlake merely files a claim. The Court agrees with the decision of the Honorable Robert Grant in *Matter of Jensen*, 232 B.R. 118 (Bankr. N.D. Ind. 1999): A claim is allowed, even if untimely, until it is objected to and disallowed in an appropriate contested matter. That won't help the debtor here, because it is the debtor, and not The Methodist Hospital/Southlake, which has sought the allowance of the untimely claim.

We arrive next at the potential for the debtor's filing the claim for the creditor, under Fed.R.Bankr.P. 3004. This rule, however, places a strict deadline upon the ability of the debtor or the trustee to file a claim under this section: The claim must be filed within 30 days after the expiration of the time for filing claims provided for by Fed.R.Bankr.P. 3002(c). One might argue that if a creditor can file an untimely claim which will be allowed if no one objects, the same rule should apply to the debtor or the trustee to enable the filing of a claim after the 30 day period provided by Rule 3002. There are nuances and issues in this context which argue against this formulation. First, the amendment of § 1328(a) by BAPCPA now excludes claims falling under 11 U.S.C. § 523(a)(3) from discharge. Allowing the debtor or the trustee to untimely file a claim on behalf of a creditor which has no notice of the case entirely eviscerates this provision, and in addition creates a potential for fraud and/or unfairness by allowing a creditor's claim to be dealt with in a case without providing the creditor with the ability to otherwise participate in the case.

unless the creditor had notice or actual knowledge of the filing of the case. Thus, by a strict reading of the pre-BAPCPA provisions of § 1328(a), even a creditor which received no notice whatsoever of a Chapter 13 case prior to the entry of discharge would have its claim discharged. Again, the Court has no problem construing the pre-BAPCPA law to preclude the discharge of the claim of a creditor which received no notice at all of the filing of, and had no knowledge of, the case prior to the entry of the discharge; to do otherwise violates due process, a determination which this Court is confident the United States Supreme Court would make were this issue presented to it.

Moreover, in the instant case, the debtor has sought affirmative relief from the Court, and thus the debtor is required to establish a *prima facie* case for the requested relief even in the absence of any objection to his motion, a circumstance which he cannot satisfy under the provisions of Rule 3004 as the case presently presents itself to the Court.

The circumstance presented by the debtor's motion can arise in a number of ways. Many debtors do inadvertently fail to schedule a creditor until after the claims' filing deadline. Occasionally, a pre-petition matter is asserted against the debtor by a person or entity whom the debtor had no reason to believe might have been a creditor until after the claims' filing deadline had expired, and in this context it is patently unfair to preclude the debtor from effectively dealing with that claim. For the purposes of due process to creditors, and fairness to debtors, it is therefore imperative to derive a procedure which accords with due process without doing violence to the law which the Court must apply to this circumstance.

It is not uncommon at all that a Chapter 13 case will be filed, and that then after the conducting of the § 341 meeting – and indeed sometimes after the confirmation hearing has been noticed to creditors initially scheduled – the debtor will amended schedule F to add previously omitted creditors. In this context, the Court provides notice to the added creditors and provides them with a claim filing deadline commensurate to that which they would have had, had they received notice of the case from its inception. The Court also provides those creditors with an opportunity to object to the debtor's Chapter 13 plan. The Court is of the firm opinion that failure to take the foregoing measures with respect to initially omitted creditors would constitute a violation of due process with respect to the interests of those creditors in a bankruptcy case. A similar procedure may be employed in the instant matter. The procedure the Court adopts is the following. If a creditor has been omitted in a Chapter 13 case, that creditor may be added by means of a motion filed by the debtor which requests the addition of

the creditor by means of the filing of such amended schedules and a matrix as may be necessary to include the creditor in the case. The Court will then issue a separate notice to the added creditor/creditors, which provides those creditors with a claims' filing deadline essentially equivalent to that which would have existed had they been included at the inception of the case, and which in addition provides those creditors an opportunity to object to a plan – even if previously confirmed – to the extent of its effect on their interests. Because of the serious due process implications of determining otherwise, the newly-established claims' filing deadline will then trigger the application of Fed.R.Bankr.P. 3004, thereby allowing the debtor to bring the creditor under the plan if the creditor fails to file a timely claim.²

In this matter, the debtor's motion is phrased in terms of allowing the debtor to file an untimely claim for the creditor. That motion must be denied. However, the denial is without prejudice to the debtor's filing of a separate motion with the Court which requests the addition of The Methodist Hospital/Southlake as a creditor in this case, and which further requests the Court's authorization for the debtor to amend appropriate schedules and the matrix to add the creditor.³ If the Court then grants the motion, the Court will issue a separate notice to the omitted creditor/creditors which provides for a claims' filing deadline and for the opportunity to object to the plan as the plan affects the creditor's/creditors' interests.

Based upon the foregoing, the Court finds that the debtor's motion should be denied,

² Although not at issue at the present time, in a pre-BAPCPA case, the debtor's failure to add a creditor prior to the entry of discharge under § 1328(a) will preclude discharge of that creditor's claim; quite simply, under such circumstances, the "debt" of the creditor has not been "provided for by the plan." Under similar circumstances in a post-BACPCA case, the addition of 11 U.S.C. § 523(a)(3) to 11 U.S.C. § 1328(a)(2) generates the same result.

³ Without suggesting at all that there is any circumstance of manipulation in this case, in order to avoid the possible initial intentional failure to schedule a creditor, the motion must specifically state the reasons for the debtor's failure to initially list the creditor in such manner will allow the Court to review the *bona fides* of the initial omission.

without prejudice to the debtor's undertaking action in accordance with the terms of this opinion.

IT IS ORDERED that the debtor's motion is DENIED.

Dated at Hammond, Indiana on October 5, 2006.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, U.S. Trustee