

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
DFI PROCEEDS, INC.) CASE NO. 08-11955
)
)
Debtor)

DECISION

At Fort Wayne, Indiana, on December 21, 2009.

With the bankruptcy reforms of 2005, Congress created something of a chimera – an obligation of the debtor that arises before bankruptcy is filed, and yet is also an administrative expense. See, 11 U.S.C. § 503(b)(9). Prior to that time, the date of the of the petition had operated as a significant point of cleavage, separating pre-bankruptcy events and obligations from post-bankruptcy ones. A claim was a right to payment, 11 U.S.C. § 101(5), the amount of which was determined as of the date of the petition. 11 U.S.C. § 502(b). Administrative expenses, as the name implies, involved the post-petition costs of administering the bankruptcy estate and had their origins in events that occurred after the date of the petition. See, 11 U.S.C. § 503(b)(1-8). With § 503(b)(9), however, Congress has created something entirely new – a right to payment that is not only a pre-petition debt but also an administrative expense, and yet it lacks any connection to a post-petition event.

If categorizing something as a pre-petition claim or a § 503(b)(9) administrative expense was little more than a semantic distinction the question would not matter very much. But, there are more than just semantic differences between them. It determines whether the claimant will stand toward the front or at the end of the distributional queue. There are also significant procedural distinctions

and those procedural distinctions are at the center of the present dispute.

A creditor asserts a claim against the bankruptcy estate by filing a proof of claim, 11 U.S.C. § 501(a), which “is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C. § 502(a). Instead of being deemed allowed just by virtue of having been properly filed, administrative expenses are only allowed “after notice and a hearing,” 11 U.S.C. § 503(b), and the request for such an expense, 11 U.S.C. § 503(a), requires a motion. See, Fed. R. Bankr. P. Rule 9013 (“a request for an order, except when an application is authorized by these rules, shall be by written motion . . .”). Furthermore, unless the court orders otherwise, all creditors and parties in interest are entitled to notice of the request and of the opportunity to object thereto. Fed. R. Bankr. P. Rule 2002(a)(6), (i). See also, N.D. Ind. L.B.R. B-2002-2(a)(7).

Unfortunately, the Federal Rules of Bankruptcy Procedure and the Official Forms have not yet caught up with the peculiarities of a § 503(b)(9) administrative claim. No official form or procedure has been promulgated specifically addressing how and when one is to go about asserting such a claim. As a result, parties must either try to improvise an appropriate procedure, working from the existing rules and forms, or seek greater clarity by asking the court to establish a procedure, generally on a case-by-case basis. See e.g., In re SemCrude, L.P., 416 B.R. 399 (Bankr. D. Del. 2009); In re Modern Metal Products Co., 2009 WL 2990000 *1 (Bankr. N.D. Ill. 2009); Carl N. Kunz, III, “Section 503(b)(9) Claims and Bar Dates: Creditors Must Be Vigilant,” 27 Am. Bankr. Inst. J. 20 (July/August 2008). That is what happened in this chapter 11 case. The unsecured creditors committee previously filed a motion asking the court to establish a deadline and a procedure for filing § 503(b)(9) administrative claims. After holding a hearing on the issue, the court did so by an order and notice issued on September 26, 2008. That order, which was titled “Order

and Notice to Creditors Establishing Procedures for § 503(b)(9) Administrative Claims,” stated:

Any creditor desiring to assert an administrative claim, pursuant to § 503(b)(9) of the United States Bankruptcy Code, must file an appropriate motion or application on or before October 22, 2008, which will be considered following notice to creditors in accordance with rule B-2002-2 of the local rules of this court. See, N.D. Ind. L.B.R. B-2002-2(a)(7). The failure to file the motion/application within the time required will result in the loss or waiver of any administrative status. (emphasis original).

This order was then served upon all creditors and parties in interest by the clerk of the court.

Although Shambaugh & Son, Inc., received a copy of the order of September 26, it apparently did not pay to close attention to its provisions. On October 17, 2008, it filed a proof of claim, using the Official Form.¹ The matter is presently before the court on the objection to Shambaugh’s proof of claim filed by the trustee of the liquidating trust established by debtor’s confirmed plan. The trustee takes no exception to the total amount that Shambaugh claims is due. Instead, the objection is directed only to the administrative expense priority claimed for \$9,370.41 of the total debt. The trustee argues that Shambaugh did not, and has not, followed the procedure established by the court’s order of September 26. As a result, although the amount in issue should be allowed as a claim against the estate, it should not be accorded administrative status but, instead, allowed only as a general unsecured claim. In response, while Shambaugh acknowledges that it did not follow the

¹This form contains the notation that it “should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.” Section 5 of the claim form asks for information about “amount of claim entitled to priority under 11 U.S.C. § 507(a).” It instructs that “if any portion of your claim falls in one of the following categories check the box and state the amount.” The listed categories all contain a brief description and a statutory reference to the different types of claims which § 507(a) of the United States Bankruptcy Code accords some type of priority status, the last of these is “other” which then directs the creditor to “specify applicable paragraph of 11 U.S.C. § 507(a)(___).” Shambaugh checked this box and wrote beneath it “PRIORTY CLAIM under Section 503(b)(9).” In doing so it asked that \$9,370.41 of its claim be accorded this status.

procedure established by the court's order, it argues that because the creditor filed the claim pro se² it should not have been required to do so. It points out that Shambaugh's proof of claim was filed prior to the § 503(b)(9) bar date established by the court's order, specifically claimed an elevated status, and referred to § 503(b)(9). In light of all this, Shambaugh contends that it has substantially complied with the court's requirements and, in view of the latitude frequently accorded pro se litigants, see, In re Fink, 366 B.R. 870, 876-77 (Bankr. N.D. Ind. 2007), any deficiencies should be excused.

Although the court may be sympathetic to Shambaugh's situation and its procedural uncertainty regarding the assertion of a § 503(b)(9) claim, it cannot embrace the remedy Shambaugh suggests: ignoring the court's order of September 26. That order was very clear, not only as to what § 503(b)(9) claimants were required to do (file an appropriate motion or application), but also as to when they were required to do it (on or before October 22, 2008) and the consequences of the failure to do so (the loss or waiver of any administrative status). Admittedly, Shambaugh may not have understood all of the subtle nuances in the reference to § 503(b)(9) or the court's local rules, or the lack of any reference to § 503(b)(9) on the proof of claim form it completed, but the remedy for that lack of understanding was not to strike out on one's path own and hope that everything will turn out to be okay in the end. Instead, the appropriate response was to consult with an attorney.³ This is

²Shambaugh did not retain counsel with regard to this case until after the trustee objected to its claim.

³The first notice creditors generally receive about a bankruptcy filing tells them as much. The first paragraph the notice of the filing of this case stated: "you may want to consult an attorney to protect your rights." The second page of the notice, under explanations, reiterates this admonition, explaining that "the staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case." Notice of Chapter 11 Bankruptcy Case, issued June 23, 2008.

particularly so when the creditor in question is a relatively sophisticated corporation, like Shambaugh, and not an individual who has little occasion to be involved with courts, judicial proceedings, or attorneys.

Furthermore, the court does not agree with creditor's counsel that Shambaugh has substantially complied with the order of September 26. Admittedly, it has filed a proof of claim which references § 503(b)(9). It has not, however, filed the required motion or done anything to give all creditors and parties in interest notice of both the request and the opportunity to object to it. Section 503(a) thus seems to answer the question before the court. It provides: "An entity may timely file a request for payment of an administrative expense, or may tardily file such a request if permitted by the court for cause." 11 U.S.C. § 503(a). At this point in time Shambaugh has not filed either a timely or an untimely request for an administrative expense. Assuming that its response to the trustee's objection can be construed as a request to tardily file such a claim, it has not come forward with sufficient cause to justify allowing it to do so. The trustee's objection will be sustained and Shambaugh's claim allowed in the total sum of \$37,885.64, all as a general unsecured claim.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court