



08-BK-G

U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director

Washington, D.C. 20530

August 22, 2008

The Honorable Laura Taylor Swain
U.S. District Judge
U.S. District Court
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Suite 755
New York, NY 10007

Dear Judge Swain:

Enclosed for consideration by the Advisory Committee on Bankruptcy Rules are proposed revisions to Interim Rule 1017 to remove ambiguity with regard to the filing deadline for presumed abuse statements and motions to dismiss under 11 U.S.C. § 704(b), and Interim Rule 4004(c) to clarify that a case may not be discharged until the time for appellate review has expired.

If you have any questions or need additional information, please feel free to contact me at (202) 307-1391.

Sincerely,

A handwritten signature in black ink, appearing to be "Mark A. Redmiles", written over a large, stylized flourish that loops around the signature.

Mark A. Redmiles
Principal Deputy Director

Enclosures

cc: Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter

INTERIM RULE 1017(e)

Discussion

Pursuant to 11 U.S.C. § 704(b)(1)(A), the United States Trustee is required to file with the court, not later than 10 days “after the date of the first meeting of creditors,” a statement (the “10-day statement”) as to whether a case is presumed to be an abuse under section 707(b). Understanding when this 10-day period begins to run is significant because getting it wrong can result in the denial of a motion to dismiss under section 704(b)(2) as untimely.

Section 704(b) was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005) (“BAPCPA”). That section provides:

- (1) With respect to a debtor who is an individual in a case under this chapter
 - (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor’s case would be presumed to be an abuse under section 707(b); and
 - (B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.
- (2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor’s case should be presumed to be an abuse under section 707(b) . . .

11 U.S.C. § 704(b).

Interim Rule 1017(e)(1) provides that “[e]xcept as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss . . .” Fed. R. Bankr. P. 1017(e)(1).

The Interim Rule preserves the existing 60 day deadline for section 707(b) motions, but excepts from its coverage section 704(b)(2). Section 704(b)(2) provides a deadline for certain motions to dismiss under section 707(b), and the deadline is triggered by the filing of a presumed abuse statement by the U.S. trustee in accordance with section 704(b)(1). However, use of the phrase “after the date of the first meeting of creditors” in section 704(b)(1) has created ambiguity regarding how the deadline in section 704(b)(2) is to be applied.

The term “first meeting of creditors” has not been used, pre-BAPCPA, since the Bankruptcy Act of 1898. Turner v. Close (In re Close), 384 B.R. 856, at *16 (D. Kansas 2008) (Bankruptcy Reporter pagination not yet available); In re Draissey, 2008 Bankr. LEXIS 1004, at *5 (Bankr. D. Minn., April 8, 2008). Congress reintroduced the phrase in 2005 and it now appears in Section 704(b) and also in Section 521(a)(6). Why the phrase was reintroduced is unknown, but some courts have suggested that it is the result of careless drafting. In re Close, 384 B.R. at *18 (“[u]nfortunately, Congress did not define the new triggers in a clear and consistent manner”); In re Draissey, 2008 Bankr. LEXIS 1004, at *5 (Bankr. D. Minn., April 8, 2008) (term “first meeting of creditors” illustrated a notion that there could be more than one meeting, a feature of the Bankruptcy Act of 1898 that was abandoned by Congress in the mid-1970s; “BAPCPA’s legislative history is sketchy at best, and it has no indication why Congress used ‘first’”); In re Cadwallader, 2007 Bankr. LEXIS 2260, at *34 (Bankr. S.D. Tex., June 28, 2008) (meeting required by § 341 is important but the references to it in the Bankruptcy Code are not as precise as one might hope). The result is that courts have inconsistently interpreted what the phrase means.

The legislative history discussing this section seems clear:

Section 102(e) of the Act amends section 704 of the Bankruptcy Code to require the United States trustee or bankruptcy administrator in a chapter 7 case where the debtor is an individual to: (1) review all material filed by the debtor; and (2) file a statement with the court (within ten days *following the meeting of creditors held pursuant to section 341* of the Bankruptcy Code) as to whether or not the debtor’s case should be presumed to be an abuse under section 707(b).

H.R. Rep. No. 31, 109th Cong., 1st Sess. 102 (2005) (emphasis added).

Two courts in the Southern District of Texas have interpreted the phrase “after the date of the first meeting of creditors” to mean after it has been held or is concluded. In re Singletary, 354 B.R. 455, 466 (Bankr. S.D. Tex. 2006) (UST has up to ten days after the meeting of creditors to file a 10-day statement); In re Cadwallader, 2007 Bankr. LEXIS at *36 (first meeting of creditors and meeting of creditors are equivalent). One court has ruled that the phrase means after the date the first creditors meeting in the case is actually convened. See e.g., In re Close, 384 B.R. 856, at *23 (plain meaning of “date of first meeting” means the first meeting date and not some later date).

As reflected in the range of bankruptcy court decisions to date, it is not clear whether the presumed abuse statement must be filed 10 days from the first date set, from the date the meeting of creditors is first convened, or from the conclusion of the meeting.

Proposed Amendment

The following amendment is proposed to provide a consistent deadline for presumed abuse statements filed under section 704(b)(1) and consequently motions filed pursuant to section 704(b)(2).

Rule 1017. Dismissal or Conversion of Case; Suspension.

- (e)(1) Except as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss. [delete rest of paragraph from (1) and insert at new (3)]
- (2) the date of the first meeting of creditors referenced in § 704(b)(1)(A) is the date the meeting of creditors under § 341(a) is first convened.
- (3) As provided in § 704(b)(2), the United States Trustee shall file a motion to dismiss within the time set forth in that section, but no later than 60 days after the first date set for the meeting of creditors under § 341(a), if the meeting of creditors is not convened or concluded on the first date set.
- (4) The party filing the motion shall set forth in the motion all matters to be considered at the hearing. A motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse.
- (5) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing.

INTERIM RULE 4004(c)

Discussion

Interim Rule 4004(c) requires the court to grant a discharge “forthwith,” unless several conditions listed in subparagraph (1) prevent it. Five of these conditions do not allow for possible appellate review and, therefore, should be amended. The Rule provides, in relevant part, as follows:

- (c) Grant of Discharge.
 - (1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:
 - . . .
 - (D) a motion to dismiss the case under § 707 is pending,
 - (E) a motion to extend the time for filing a complaint objecting to discharge is pending,
 - (F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending.
 - . . .
 - (I) a motion to delay or postpone discharge under § 727(a)(12) is pending:
 - . . .
 - (K) a motion to delay discharge, alleging that the debtor has not filed with the court all tax documents required to be filed under § 521(f), is pending.

Fed. R. Bankr. P. 4004(c)(1).

Under the Interim Rule, as long as the types of motions specified are pending, including a motion to dismiss under 11 U.S.C. § 707, the bankruptcy court should not enter a discharge order. Black’s Law Dictionary states that “an action or suit is ‘pending’ from its inception until the rendition of final judgment.” Black’s Law Dictionary 1134 (6th ed. 1990). Cf. Griffith v. Kentucky, 479 U.S. 314, 326 (1987) (cases on appeal are “pending cases” to which a new rule of decision applied). The Supreme Court has defined “final judgment” to mean “one where ‘the availability of appeal’ has been exhausted or has lapsed, and the time to petition for certiorari has passed.” Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711 n.14 (1974), citing Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). See, e.g., Williams v. Cain, 217 F.3d 303, 310-11 (5th

Cir. 2000) (defining “pending” under 28 U.S.C. § 2244(d)(2) to mean until appellate review was no longer available). Thus, the word “pending” under Interim Rule 4004(c) includes section 707 motions and other motions upon which a final, non-appealable order has not been entered.

Nonetheless, some could read the Interim Rule as meaning that those types of motions specified in the Interim Rule, including a motion to dismiss under section 707, are pending only so long as the motion is before the bankruptcy court. Under such a reading, a discharge could be entered immediately upon denial of a motion to dismiss even though appellate review has not yet occurred.

Proposed Amendment

The following amendment is proposed to clarify that the time a motion is pending under the Rule includes the time the denial of the motion is on appeal, which ensures discharges will not be entered in cases until the motion is final and unappealable. The proposed change protects parties’ rights to appeal denials, and ensures appellate courts will be able to exercise their jurisdiction over such appeals.

(c) Grant of Discharge.

- (1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:
 - . . .
 - (D) a motion to dismiss the case under § 707 is pending, or until appellate review is no longer available;
 - (E) a motion to extend the time for filing a complaint objecting to discharge is pending, or until appellate review is no longer available;
 - (F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending, or until appellate review is no longer available;
 - . . .
 - (I) a motion to delay or postpone discharge under § 727(a)(12) is pending, or until appellate review is no longer available;
 - . . .
 - (K) a motion to delay discharge, alleging that the debtor has not filed with the court all tax documents required to be filed under § 521(f), is pending, or until appellate review is no longer available.