

### **PETITION PREPARERS**

In re Moore, 283 B.R. 852 (Bankr. E.D.N.C. Sept. 30, 2002) (Small, J.). Charlie Anderson and We the People Document Services (“WTP”) operate a document preparation business in Raleigh pursuant to a franchise agreement with We the People Forms & Service Centers USA, Inc. (“WTP USA”). Mr. Anderson and WTP provide customers with services including the typing of legal forms, the provision of pamphlets to assist with the preparation of those forms, and delivery and filing of forms with the appropriate courts, as well as making a “supervising attorney” available to answer “general” legal questions. Mr. Anderson explained that he does not advise customers whether they should file chapter 7 or chapter 13, but he does only assist those filing chapter 7. The customers sign a contract and remit \$199, and Mr. Anderson provides them with a packet of materials including a questionnaire, bankruptcy “overview” and a workbook to assist the customer with completing the questionnaire. These materials are prepared by WTP USA and are “reviewed and approved” by WTP USA’s North Carolina counsel. The customer goes home to complete the questionnaire, and then returns it to Mr. Anderson. Mr. Anderson reviews the forms only for legibility and to determine whether any blank spaces were intentionally left blank. He then faxes the forms to a typist employed by WTP USA, who then electronically sends the completed official forms to Mr. Anderson. He then compiles the documents in order and presents them to the customers for signature. He will make copies of the documents for an additional \$15, and he will file the documents with the court for no extra charge. When customers have questions as they go through the process, Mr. Anderson explains that he cannot advise them, but does suggest that they read the materials provided or contact an attorney. He also informs them that WTP has a “supervising attorney” who is available for general questions at no extra cost.

The bankruptcy administrator filed a motion to determine the propriety of the \$199 fee, for sanctions for failure to comply with certain requirements of § 110, and for entry of a show cause order to determine if Mr. Anderson and WTP violated any requirements of the Code, the Federal Rules of Bankruptcy Procedure or other requirements of the court, engaged in unfair or deceptive conduct, or engaged in the unauthorized practice of law. The North Carolina Attorney General moved to intervene to protect consumers from the unauthorized practice of law and other potentially deceptive conduct.

Mr. Anderson and WTP raised numerous challenges to the motions, contending that they were denied proper notice of the issues to be considered at the hearing, that § 110 exceeds Congress’ constitutional authority, that the bankruptcy court lacked jurisdiction over § 110 violations, and that the court lacked jurisdiction over the unauthorized practice of law. The court limited the matters for hearing to those specified in the BA’s motion to address the notice issue, though the court also noted that WTP’s counsel had faced these allegations in other proceedings and was likely not surprised by anything raised at the hearing. The court also treated the motion as one for an order to show cause, and used the order to clearly define the allegations the respondents would later be required to answer. With respect to the jurisdictional challenges, the court found that the petition and its preparation are central to the administration of a bankruptcy estate, and all parties suffer if it is improperly prepared. Thus, Congress clearly has the authority to regulate the preparation of the petition, and matters attendant to the preparation of the petition are “core” proceedings within the bankruptcy court’s jurisdiction. The court then held that it may

consider the unauthorized practice of law issues because the court has the ability to enjoin unfair or deceptive acts and acts that may subject a person to criminal penalty under § 110(j)(2)(A)(i).

The court next turned to the question of who actually prepares the petitions. While Mr. Anderson meets with the customers, he transmits the completed questionnaires to a typist employed by WTP USA, who transfers the information to the official forms and e-mails the forms back to Mr. Anderson. Mr. Anderson testified that he did not know how the information was transferred to the official forms. Mr. Anderson pays WTP USA 25% of the fees he collects, an undisclosed franchise fee, and \$200 per month for the use of the “supervising attorney.” The court found that WTP USA appeared to fall within the statutory definition of a bankruptcy petition preparer, and ordered it to appear and show cause why it should not be sanctioned for violations of § 110. The court also noted that the practice may be deceptive to Mr. Anderson’s customers, who may not understand that he does not participate in the preparation of their materials.

The court then reviewed the propriety of the fees charged, and held that a bankruptcy petition preparer is limited to merely typing the petition and schedules, and is not permitted by § 110 to provide any further services. Thus, the proper reference point is what a word processor or typist would charge. The court discredited Mr. Anderson’s limited evidence on this point, and found that \$80 is a reasonable fee for the services provided. The respondents were directed to appear and show cause why they should not refund the difference between \$199 and \$80 to the debtors.

Mr. Anderson and WTP had failed to comply with numerous provisions of § 110, each of which was corrected once the bankruptcy administrator brought the violations to Mr. Anderson’s attention. Consequently, the court intended to impose a sanction of a warning, with further sanctions in the future should additional violations occur. The court also expressed an intent to impose a monetary sanction against WTP USA, as it had not corrected its violations.

The court then turned to two issues related to the unauthorized practice of law. First, WTP USA maintained a “supervising attorney” in North Carolina whose role was to supervise Mr. Anderson and to field calls from WTP clients. The attorney testified that he does not keep a record of the calls received and he does not account for the calls. He is not a bankruptcy expert and has little bankruptcy experience. He provides only “general legal information” to callers; for example, “what is an exemption.” However, the testimony showed that the attorney does give more tailored advice depending upon the customer’s question. The court expressed concern about the relationship between the attorney and WTP customers. The documents referring customers to the attorney do not suggest that his services are limited. The association of an attorney with the services provided by WTP may lead customers to believe that WTP’s approach to processing their bankruptcy forms is more reliable than the services provided by others. The parties were directed to appear and show cause why they should not be enjoined from offering the services

of a “supervising attorney” to their customers, as the practice appeared to be deceptive and unfair and in violation of § 110.

Mr. Anderson and WTP provide written information to their customers that was prepared by WTP USA and reviewed by the “supervising attorney.” These documents attempt to clarify the information required on the official petition and schedules, but the BA expressed concerns that the “clarifications” are both incorrect and constitute legal advice. For example, the

documents ask a customer whether he or she wishes to “Reaffirm (Keep) or Surrender (Give Up)” property. Not only are the parentheticals oversimplifications of the concepts of reaffirmation and surrender, but the “clarifications” may lead a debtor to choose how to treat his or her property incorrectly. Similarly, some of the instructions are interpretations that are not found in the official forms, such as asking for the “quick sale” value of property instead of “value” and limiting “animals” to “farm, not pets.” The documents also include information about the bankruptcy process that does not relate to the completion of the official forms, such as how to time a chapter 7 filing if a debtor is expecting a tax refund (wait until it is both received and spent). While several courts have expressed concerns that these documents contain legal advice, the court noted that it is not in the business of regulating publishers. The court did find that the petition preparers could not provide these documents as part of the services provided in connection with preparing petitions. The court further found that providing the documents was unfair or deceptive because it gives the false impression that these documents were all that would be required to determine whether to file and how to complete the forms. The parties were directed to appear and show cause why they should not be enjoined from providing the documents in connection with their petition preparation services.

In re Moore, 290 B.R.287, 2003 WL 1456499 (Bankr. E.D.N.C. March 20, 2003) (Small, J.). The court held a hearing on the order to show cause and the parties submitted post-hearing briefs. WTP, Mr. Anderson, and WTP USA contended that the court did not have the authority sua sponte to command WTP USA to appear, that WTP USA is not a petition preparer, and that the matter of the “supervising attorney” had not been addressed in the BA’s original motion and should not be considered by the court. They further contended that the court did not have the authority to issue an injunction absent an adversary proceeding.

The court first noted that the BA filed her motion based on the information available from the debtors’ petitions. The court could itself have initiated the same inquiry sua sponte. At the hearing, the court and the BA became aware of WTP USA and its role in the preparation of the petitions, the documents, and the provision of the “supervising attorney.” To the extent the hearing revealed additional violations of § 110, the court could expand the show cause order. Similarly, the information about the “supervising attorney” was not generally known prior to the hearing. Once the potential issues were identified, the court outlined the problems in detail in the show cause order to provide the parties with an opportunity to present further evidence on these issues.

The court rejected the contention that it does not have the authority to issue an injunction absent an adversary proceeding. The court relied on a Ninth Circuit BAP case in which the court found that the court could issue an injunction so long as constitutional due process requirements are met. The respondents were afforded substantial due process in this case: the BA’s motion set forth the general allegations, the parties presented several hours of evidence at the preliminary hearing, and the court issued a detailed show cause order identifying the evidence it found persuasive regarding potential violations of § 110 and the potential consequences for the violations, including a possible injunction. A hearing date was set nearly two months later, and the respondents were afforded the opportunity to present further evidence and to submit post-hearing briefs. The court concluded that it did have the authority to issue injunctive relief.

WTP USA put on evidence only on the issue of whether it is a bankruptcy petition preparer. The court found that the evidence supported its conclusion that WTP USA falls within the statutory definition, as WTP USA was the entity actually transferring the information from the questionnaire to the official forms.

The court then concluded that its prior assessment of \$80 as the reasonable value for the services provided by Mr. Anderson, WTP, and WTP USA was consistent with other court's rulings around the country, noting that courts have approved flat fees ranging from \$50 to \$150, with hourly rates ranging from \$16.82 to \$20. The court also concluded that the use of the supervising attorney and the inclusion of documents prepared by WTP USA are unfair or deceptive, and enjoined the respondents from providing those services. The court also issued a warning for the technical violations of § 110 and noted that future violations by any of the parties would result in a monetary sanction.

Having concluded that Mr. Anderson, WTP, and WTP USA had violated § 110 and committed unfair or deceptive practices, the court certified its findings to the district court pursuant to § 110(i)(1), which provides that if a court finds a violation of § 110 or an unfair or deceptive act, the court shall certify that fact to the district court. The debtor, trustee, or a creditor may then make a motion in the district court for the imposition of damages.

Mr. Anderson, WTP and WTP USA filed a notice of appeal of these orders.