
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

M E M O R A N D U M

TO : Chapter 11 Bankruptcy Practitioners in the EDNC

FROM : A. Thomas Small

DATE : December 12, 2007

SUBJECT : Discharge Procedure in Chapter 11 Cases Involving Debtors Who are
Individuals

The purpose of this memorandum, which was prepared with the concurrence of Judge Doub and Judge Leonard, is to provide guidance to the chapter 11 practitioners in the Eastern District of North Carolina regarding discharges in chapter 11 cases involving individuals. The memorandum addresses the three ways a discharge can be entered in an individual chapter 11 case and also deals with the problem of when a chapter 11 case involving an individual should be closed. Other issues considered include the impact on discharge of domestic support obligations, the requirement that all requested tax documents be filed with the court, the finding that must be made regarding § 522(q) and the need for an individual debtor to take a financial management course.

There are three types of discharge that are possible for an individual who is a debtor in chapter 11: 1- the discharge that comes when the "court grants a discharge on completion of all payments under the plan" (§ 1141(d)(5)(A)); 2- the post confirmation "early discharge" [sometimes called the "hardship discharge," which is a misnomer because no hardship is required] pursuant to § 1141(d)(5)(B); and 3- the discharge that comes at a time different than when all payments are completed where "after notice and a hearing the court orders otherwise for cause" pursuant to § 1141(d)(5)(A).

Discharge Upon Completion of Payments

Section 1141(d)(5)(A) seems to contemplate that in most chapter 11 individual cases a discharge will not be entered until the debtor has made all plan payments. How will the court know when all payments have been made? There is no trustee in the case, so presumably it will be up to the

debtor to notify the court that all plan payments have been made. This can be accomplished by a notice to the court that is served on all creditors and the bankruptcy administrator. The notice ("Notice of Completion of Plan Payments and Request for Entry of Discharge") should be served by the debtor and be accompanied by a certificate of service.

A delayed discharge raises several questions regarding the timing of closing the case. If the debtor does not get a discharge until all payments are made, must the case remain open until the discharge is entered? If no notice of payment completion is filed, will the case remain open indefinitely? Must the clerk's office or the bankruptcy administrator monitor the case to see that the notice is filed? As long as the case remains open must the debtor pay the chapter 11 quarterly fees as required by 28 USC § 1930(a)(7)? See Robert J. Landry, *Individual Chapter 11 Cases After BAPCPA: Can You Still Close The Case Early?*, 25 Am. Bankr. Inst. J. 10 (July/August 2006).

When a case should be closed is an issue that should be considered at the confirmation hearing. In most cases, even though no discharge will be entered until all payments are completed, the case will be closed upon substantial consummation under § 1101(2) (when there has been a commencement of distribution under the plan). The order confirming the plan can provide that "upon the filing of a 'Notice of Completion of Plan Payments and Request for Entry of Discharge' accompanied by a certificate of service, the case will be automatically re-opened pursuant to § 350(b) without the payment of a fee." The notice, which the debtor shall serve on all creditors and the bankruptcy administrator, shall provide that if there is no response within 20 days, a discharge order may be entered.

Post Confirmation "Early Discharge" Under § 1141(d)(5)(B)

Section 1141(d)(5)(B) provides for entry of discharge after confirmation but before all plan payments have been made. The debtor must show that unsecured creditors received more than they would have gotten under chapter 7 and that modification of the plan under § 1127 is "not practicable." § 1141(d)(5)(B). A discharge under this section would require a motion to be filed by the debtor. If the case has been closed after confirmation, the filing of the motion will result in the automatic opening of the case without the payment of a fee. The confirmation order should provide that "after the case has been closed upon substantial consummation, the filing of a motion for discharge under § 1141(d)(5)(B) shall cause the case to be automatically re-opened without the need for payment of a fee." A motion for a discharge under § 1141(d)(5)(B) should be served by the debtor on all creditors and the bankruptcy administrator and be accompanied by a certificate of service. A hearing will be held even if there is no response to the motion.

Discharge Where Court "Orders Otherwise for Cause" Under § 1141(d)(5)(A)

The court "after notice and a hearing" for "cause" may order that the discharge may be effective before the debtor has completed all payments under the plan. In chapter 11 cases that do not involve individuals, the confirmation of the plan (unless otherwise provided in the plan or the order confirming the plan) has the effect of a discharge; there is no separate discharge order.

Presumably, in an individual's chapter 11 case, if the court found cause the court could provide in the confirmation order that the discharge would be effective upon confirmation. Such an order requires "notice and a hearing" which can be accomplished by the disclosure statement if it states **conspicuously** that the discharge will be effective upon confirmation. If the disclosure statement contains that provision, the clerk's office will **conspicuously** include in the notice of the confirmation hearing the following language: "As stated in the disclosure statement, the debtor's plan proposes that the discharge in this case shall become effective upon confirmation of the plan. Any objection to that proposal must be filed by the deadline for objections contained in this notice."

The notice and hearing requirement may also be met by a separate notice given by the debtor advising that the plan proposes that the discharge be entered upon confirmation. The notice should give a response time and be served on all creditors and the bankruptcy administrator.

If a discharge is to take effect upon confirmation, the order confirming the plan should state specifically that notice and a hearing was provided and also specify the facts that the court found supporting cause for deviating from the requirement that the debtor make all payments before receiving a discharge.

The court could also hold that the discharge would become effective at a time after confirmation, but before all payments were made. For example, if a plan provides for payment of all claims in five years and the payment of the home mortgage in 30 years, a discharge after completion of the payments to be made in five years may be warranted. However, an argument can be made that the only way a discharge can be entered after confirmation and before all payments are made is under § 1141(d)(5)(B) ("early discharge").

When will the court likely allow discharge before all payments are due? Every case is different, but presumably the judge will want assurances that payments will be made, either because a security interest is given, "exit" financing is available, or a letter of credit or something similar is provided.

Domestic Support Obligations

One of the confirmation requirements in a chapter 11 case (individual or otherwise) is that "[i]f a debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition." There is no similar requirement with respect to the entry of a discharge. The court should make a finding at the confirmation hearing regarding the domestic support obligation, but need not make a similar finding with respect to the entry of a discharge upon completion of payments under § 1141(d)(5)(A) or with respect to entry of a "early discharge" under § 1141(d)(5)(B). A debtor who is not current with domestic support obligations runs the risk of having the case dismissed or converted pursuant to § 1112(b)(4)(P).

Uncodified Confirmation Requirement that All Requested Tax Documents Be Filed

BAPCPA § 1228(b) provides that the court shall not confirm a plan of reorganization "in the case of an individual under chapter 11 or 13 of title 11, United States Code, unless requested tax documents have been filed with the court." The section is applicable to chapter 11 cases involving individuals, but is not part of the Bankruptcy Code. It is an uncodified confirmation requirement and should be addressed at the confirmation. [Official Form 15 - Order Confirming Plan provides that requirements set forth under § 1129(a) have been met, but doesn't say anything about the BAPCPA § 1228(b) requirement.]

Discharge Affected by § 522(q)(1)

Section 1141(d)(5)(C) does not make grammatical sense. Presumably, it means that in a chapter 11 case where the debtor is an individual, there will be no discharge "unless after notice and a hearing held not more than 10 days before the date of entry of the order granting discharge, the court finds that there is no reasonable cause to believe that (i) section 522(q)(1) may be applicable to the debtor; and (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B)."

From a procedural standpoint this discharge requirement [if that is what it is] is taken care of by Bankruptcy Rule 1007(b)(8), which requires a chapter 11 individual debtor to file a statement if the debtor has claimed an exemption under § 522(b)(3)(A) in property of the kind described in § 522(p)(1) with a value in excess of the amount set out in § 522(q)(1); the statement must indicate whether there is a proceeding pending in which the debtor may be found guilty of a § 522(q)(1)(A)-type felony or be liable for a § 522(q)(1)(B)-type debt. The statement must be filed no later than the date when the last payment under the plan is made or before the filing of a motion for discharge under § 1141(d)(5)(B). If a statement is filed under Interim Bankruptcy Rule 1007(b)(8) it must be dealt with by "notice and hearing," but if no statement is filed, which will be the situation in most cases, § 522(q) will not be an issue.

Completion of a Course Concerning Personal Financial Management As A Condition of Discharge

In most chapter 11 individual cases the debtor will not have to take the personal financial management course. The course, however, is required by § 1141(d)(3)(C) when the plan provides for the liquidation of all or substantially all of the property of the estate and the debtor does not engage in business after consummation of the plan. In those circumstances (liquidation of all or substantially all assets and not engaging in business) the discharge would be denied if the discharge would be denied under § 727(a). Section 727(a) now includes denial of a discharge for failing to attend the personal financial management course. § 727(a)(11). Interim Bankruptcy Rule 1007(b)(7) requires an individual debtor in chapter 11 to file a statement of a completion of the financial management course where § 1141(d)(3) applies (i.e., where there is a liquidation of all or substantially all assets and the debtor is not engaging in business).

Summary

- In most individual chapter 11 cases the discharge will come after the completion of all plan payments.
- When a case should be closed is an issue to be addressed at the confirmation hearing.
- The case most likely will be closed upon substantial consummation.
- When the debtor has completed all payments, the debtor shall file a notice with the court [Notice of Completion of Plan Payments and Request for Entry of Discharge] stating that payments have been made and that discharge is requested.
- The filing of the notice that payments have been completed automatically re-opens the case with no filing fee being required.
- The notice that payments have been completed will be served on all creditors and the bankruptcy administrator by the debtor and the notice shall be accompanied by a certificate of service.
- If there is no response within 20 days, a discharge order will be entered.
- A request for an early discharge under § 1141(d)(5)(B) ("early discharge") shall be made by motion served by the debtor on all creditors and the bankruptcy administrator.
- Upon the filing of a motion under § 1141(d)(5)(B) a closed case will be automatically re-opened without the need of a filing fee.
- Confirmation of a plan may, in some cases, have the effect of a discharge under § 1141(d)(5)(A), but there must have been a conspicuous notice given to all creditors either in the disclosure statement (in which case the notice of confirmation hearing will state that the plan provides for discharge before all payments are completed) or by a separate notice served on all creditors and the bankruptcy administrator that contains a specific response time.
- The order of confirmation that provides for a discharge before the completion of all payments must make specific findings as to the "cause" why discharge is effective before the completion of all payments, and refer to there having been notice and a hearing.
- The order of confirmation (in those cases where discharge will be entered after the payments have been completed) shall state that "upon the filing of a 'Notice of Completion of Plan Payments and Request for Entry of Discharge' accompanied by a certificate of service, the case will be automatically re-opened pursuant to § 350(b) without the payment of a fee."

- The order of confirmation (in those cases where discharge will be entered after the payments have been completed) shall state that "after the case has been closed upon substantial consummation, the filing of a motion for discharge under § 1141(d)(5)(B) shall cause the case to be automatically re-opened without the need for payment of a fee."
- Being current with domestic support obligations is a confirmation requirement, but not a condition of the discharge.
- A plan should not be confirmed in a chapter 11 case involving an individual debtor unless requested tax documents have been filed with the court. § 1228(b) of BAPCPA.
- Section 522(q) will not be a confirmation issue unless the debtor has filed a statement under Interim Bankruptcy Rule 1007(b)(8).
- An individual who is a chapter 11 debtor need not complete a financial management course unless the plan calls for a liquidation of all or substantially all assets and the debtor is not engaging in business.