

BANKRUPTCY ^{UP}DATE

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Issues Surrounding a Chapter 7 Debtor's Discharge: Are You Requesting the Correct Relief?

Often counsel for a chapter 7 debtor will have a problem arise just as the debtor is scheduled to receive a discharge of debts. It is important to ensure the debtor is requesting the correct extension of time to address the problem.

Reaffirmation agreement still not signed and filed?

When this happens, the debtor should file a motion to defer discharge. See Fed.R.Bankr.P. 4004(c)(2) and Bankr. D.S.D. R. 4004-1(c). This will give the debtor and the creditor 30 days to get the reaffirmation agreement signed and filed. If more time is still needed, the second extension request must be to a specific date.

While Fed.R.Bankr.P. 4008(a) provides for requesting an extension of time to *file* a reaffirmation agreement, the rule does not help if the reaffirmation agreement has not yet been *signed*. It is the date a reaffirmation agreement is *signed* that controls whether it is enforceable under 11 U.S.C. § 524(c). Thus, a motion to defer discharge is the better choice since it will cover both when a reaffirmation agreement has not been filed before the discharge and also when a reaffirmation agreement has not yet been signed and filed before the discharge.

A creditor needs to be added to the schedules. In a chapter 7 case where the trustee has not found assets to liquidate and a proof of claim deadline has not been set, a creditor's claim will be discharged if the creditor received notice of the case in time to file a fraud-based nondischargeability complaint. 11 U.S.C. §§ 523(a)(3) and 727(b). If a new creditor surfaces as the discharge/dischargeability complaint deadline looms, the debtor should promptly file an amended schedule adding the creditor, Bankr. D.S.D. R. 1009-2. The debtor should also, if the discharge/dischargeability complaint deadline is fast approaching, file a motion to extend the time for the subject creditor to file a nondischargeability complaint. See Fed.R.Bankr.P. 4007(c) and Bankr. D.S.D. R. 4007-1. A good rule of thumb is to request an extension of time to file a nondischargeability complaint if the discharge/dischargeability complaint deadline is less than 20 days from the date the subject creditor is added to the case, though also factor in the sophistication of the creditor and how long it will take for the creditor to receive and react to the late notice of the commencement of the case served by the Bankruptcy Clerk. It is a case-by-case consideration. Filing a motion to defer the discharge (discussed above) will *not* be sufficient because that extension only delays the entry of the discharge order - it does not give the subject creditor more time to object to the dischargeability of its claim.

If a new creditor surfaces in a chapter 7 case before the discharge is entered and there is also a proof of claim deadline looming, the debtor needs to, as discussed above, file an amended schedule adding the subject creditor and, when appropriate, file a motion to extend the time to file a nondischargeability complaint. *In addition*, the debtor should

also utilize Fed.R.Bankr.P. 3004 and file a proof of claim for the subject creditor if the creditor does not timely file a proof of claim on its own. This is because in an asset chapter 7 case, for a creditor's claim to be discharged, the creditor needs to receive notice of the case in time to file both a nondischargeability complaint *and* a proof of claim. 11 U.S.C. §§ 523(a)(3) and 727(b). The Court's ability to extend the time to file a proof of claim is very limited, *see* Fed.R.Bankr.P. 3002(c), so both the debtor and the newly added creditor should assume the original POC deadline applies to the subject creditor. The exception at Rule 3002(c)(6)(A), though not yet formally interpreted in this district, seemingly applies only when a debtor is late in filing the entire mailing list of creditors, not when the debtor is adding a creditor to the mailing list.

If a creditor was scheduled but with a bad address, the process will be similar to when a new creditor is added to the case. In a no-asset case, the debtor will need to obtain a good address for the creditor and comply with Bankr. D.S.D. R. 2002-4(a). The debtor should also, if appropriate, seek an extension of time for this creditor to file a nondischargeability complaint. In an asset case, the chapter 7 debtor should obtain a good address, comply with Bankr. D.S.D. R. 2002-4(a), seek - if appropriate - an extension of time for the creditor to file a nondischargeability complaint, and, if necessary, also file a proof of claim for the creditor.

Questions? Comments? Please e-mail Judge Nail's law clerk, Kay Cee Hodson, at Kay_Cee_Hodson@sdb.uscourts.gov.

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