

ATTORNEY FEES IN CONSUMER CASES

1. *Lamie vs. United States Trustee*, 540 U.S. 526 (2004). Before 1994, § 330(a) of the Bankruptcy Code authorized a court to “award to a trustee, to an examiner, to a professional person employed under section 327 ... , or to the debtor’s attorney - (1) reasonable compensation for ... services rendered by such trustee, examiner, professional person or attorney” In 1994 Congress amended the Code by deleting “or to the debtor’s attorney” from what was § 330(a) and is now § 330(a)(1). The Supreme Court held that under the Code’s plain language, § 330(a)(1) does not authorize compensation awards to debtors’ attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the court. “If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”

2. *In re Diana Busetta-Silvia*, 314 B.R. 218 (10th Cir. BAP 2004). Does counsel for a Chapter 13 debtor have the right to be paid under the terms of a Chapter 13 plan for services performed prepetition? The Bankruptcy Court ruled that such services must be paid in full prior to the filing of the case or be treated like any other prepetition unsecured claim. The Bankruptcy Appellate Panel reversed, holding that Section 330(a)(4)(B) (stating that in a Chapter 13 case the court may allow reasonable compensation to the debtor’s attorney for representing the interests of the debtor *in connection with the bankruptcy case* based on a consideration of the benefit and necessity of such services to the debtor) is unambiguous and provides the requisite basis to allow prepetition fees as an administrative claim. “The suggestion that counsel defer a significant portion of the work until after the case is filed is, as the bankruptcy court readily acknowledges, unrealistic. Even if such deferral were feasible, it would create a significant administrative strain on practitioners and the courts. A requirement that attorneys provide prepetition representation for free or the debtors find family members or friends to bankroll their case runs contrary to the priority structure outlined in §§ 330, 503, and 507 and to the notion that debtors are entitled to competent and properly compensated representation.”

3. Debtor On The Run: Issues in Converted Cases.

a. *In re Washington*, 232 B.R. 814 (Bankr. S.D. FL 1999). In a case converted from Chapter 7 to Chapter 13, former Chapter 7 trustee and counsel for former trustee filed applications for compensation and reimbursement of expenses incurred in discovering and pursuing debtors’ undisclosed assets. The Bankruptcy Court held that trustee and her attorneys were entitled to compensation for their preconversion services, even though the trustee made no disbursements in the case.

b. *In re Joyce Ann Gilchrist*, BAP No. WO-03-095 (10th Cir. BAP April 23, 2004). After withdrawing 401(k) funds from a plan and depositing them in a money market account, the debtor filed a Chapter 7 petition, but did not disclose the money market account until responding to questions by the Chapter 7 trustee at the meeting of creditors. The trustee engaged counsel and obtained an order of the Bankruptcy Court compelling turnover of the money market account funds. The debtor converted her case to a Chapter 13 case and, after five months, moved to dismiss the Chapter 13 case. Both the Chapter 7 trustee and the Chapter 13 trustee objected and moved the Court to reconvert the case to a Chapter 7 case. The debtor appealed the Bankruptcy Court's order reconverting the case, arguing that the Chapter 7 trustee lacked standing to object to the motion to dismiss. The Bankruptcy Appellate Panel held that Chapter 7 trustee's attorneys were creditors of the estate (the debtor did not object to the attorneys' fee application) and that the Chapter 7 trustee had standing to argue for conversion of the debtor's Chapter 13 case.

c. *In re Campbell*, 313 B.R. 313(10th Cir. BAP 2004). The thirty-day period to object to a debtor's claimed exemption recommences when a Chapter 13 case is converted to Chapter 7.

BANKRUPTCY RULE CHANGES

1. Rule Changes Effective December 1, 2004.

A. Rule 1011 - technical changes only.

B. Rule 2002(j) - notice to the IRS.

C. Rule 9014(c) - The rule is amended to provide that the mandatory disclosure requirements of Fed R. Civ. P. 26, as incorporated by Rule 7026, do not apply in contested matters. The typically short time between the commencement and resolution of most contested matters makes the mandatory disclosure provisions of Rule 26 ineffective. Nevertheless, the court may by local rule or by order in a particular case provide that these provisions of the rule apply in a contested matter.

2. Rule Changes Effective December 1, 2005 Pending Supreme Court Approval and Congressional Review.

A. Rule 1007 is amended to require the debtor in a voluntary case to submit with the petition a list of entities to which notices will be sent in the case. The listed parties are identified as the entities listed or to be listed on Schedules D through H of the Official Forms.

B. Rule 3004 is amended to conform the rule to § 501(c) of the Bankruptcy Code. The amendment clarifies that the debtor or trustee may not file a proof of claim until after the time for filing a proof by a particular creditor has expired.

C. Rule 3005 is amended to delete any reference to a creditor filing a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor. The amendment thus conforms the rule to § 501(b) of the Bankruptcy Code.

D. Rule 4008 is amended to establish a deadline for filing a reaffirmation agreement with the court. The amendment deletes the former version of the rule that governed the timing of the reaffirmation agreement and discharge hearing. These restrictions on the court's docket are unduly burdensome and the amendment provides the court with the discretion to set and hold these hearings at appropriate times in the circumstances presented in the case.

E. Rule 7004 is amended to authorize the clerk specifically to sign, seal, and issue a summons electronically. The amendment does not address the service requirements for a summons which are set out in other provisions of Rule 7004.

F. Rule 9006 is amended to clarify that the three-day period is added to the end of the time period for taking action when service is accomplished through certain specified means. This amendment is intended to conform as closely as possible to the amendment being proposed by the Advisory Committee on Civil Rules.

3. Proposed Rule Changes - Comments Due February 15, 2005.

A. Rule 1009 is amended to include a provision requiring the debtor to submit a corrected statement of social security number when the debtor becomes aware of an error in a statement of social security number previously submitted to the court.

B. Rule 2002(g) is amended by adding a new subdivision (g)(4) that authorizes entities and notice providers to agree on the manner and address to which service may be effected. The amendment is intended to facilitate notices to creditors that operate on a national basis, although the rule allows such agreements by an entity with any notice provider. A related amendment to Rule 9001 defines notice providers.

C. Rule 4002 is amended by adding a new subdivision (b) to implement the directives of § 521 of the Bankruptcy Code. The amendment requires that a debtor bring certain documentation to the § 341 meeting of creditors to establish current income and ownership of financial accounts, as well as the debtor's most recently filed federal income tax return.

D. Rule 7004 is amended to revise the method of service of a summons and complaint on the attorney for the debtor whenever an entity serves the debtor with a summons and complaint. The amendment makes clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor without regard to the manner in which the summons and complaint was served on the debtor. Under the current rule, the debtor's attorney must be served only if the summons and complaint was served on the debtor by mail.

E. Rule 9001 is amended to add a definition of notice provider to the rule. The definition is to be read in conjunction with the proposed amendment to Rule 2002(g).

F. Schedule I of Official Form 6 is amended to require the disclosure of current income of the non-filing spouse of a debtor.