"Bad Faith" Dismissals of Non-Consumer Debtors

Jason S. Rigoli
Furr and Cohen, P.A.
One Boca Place, Suite 337 West
2255 Glades Road
Boca Raton, FL 33431
jrigoli@furrcohen.com

In 1984, Congress amended the Bankruptcy Code to add section 707(b) to curb abusive, or "bad faith," filings by consumer debtors. See, Pub.L. 99-554, Title II, § 219. In 2005, section 707(b) was amended to add a "means test" used to determine whether there was a presumption of abuse in consumer debtor chapter 7 bankruptcy cases. 11 U.S.C. § 707(b).

Notwithstanding the provisions of section 707(b), recent case law has addressed the issue of whether "bad faith" constitutes "cause" for dismissal under Section 707(a), with respect to non-consumer debtors. Section 707(a) states:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including--
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.
> 11 U.S.C. § 707(a)

Circuit Courts are split on whether "bad faith" constitutes cause for dismissal or conversion of a non-consumer Chapter 7 bankruptcy. See, In re Adolph, 441 B.R. 909 (Bankr. N.D. Ill. 2011) (holding § 707(a) does not allow dismissal for bad faith; the courts are divided on the issue, with the Third Circuit in Perlin and Tamecki and the Sixth Circuit in Zick holding bad faith can support a § 707(a) dismissal while the Eighth Circuit in Huckfeldt and Ninth Circuit in Sherman and Padilla disagree). The split arises out of the following competing statutory interpretation by the courts:

- Does excluding "bad faith" from section 707(a) but explicitly including it in section 707(b)(3)(A), mean that "bad faith" was purposefully removed as cause by Congress? See, Adolph, 411 B.R. 909. See also, In re Lobera, 454 B.R. 824, 841-42 (Bankr. D.N.M. 2012)("Congress defined "cause" by listing three examples of cause. This suggests that "cause" is a class of things or items that have some relationship to each other... The words Congress used in Section 707(a) are: 1) unreasonable delay, 2) nonpayment of required court fees, and 3) failure to file documents required by Section 521(a)(1). The most obvious common traits of these things is that they all are post-petition technical and procedural violations that prevent a prompt presentation of the

chapter 7 liquidation case to the court. They also directly impact the court or the creditors in general.")

- Or, by using the word "including" after "for cause" mean that the actions listed in subsection (1)-(3) of Section 707(a) are non-exhaustive and, therefore, "bad faith" can constitute cause under 707(a). See, In re Piazza, 451 B.R. 608 (Bankr. S.D.Fla. 2011) *rhr'g denied*, 460 B.R. 322, *aff'd* 469 B.R. 388 (S.D.Fla. 2012).

The Eleventh Circuit has yet to rule directly on the issue of whether "bad faith" constitutes "cause" under 707(a). But see, In re Bilzerian, 258 B.R. 850 (Bankr. M.D. Fla. 2001), order aff'd, 276 B.R. 285 (M.D. Fla. 2002), aff'd, 82 Fed. Appx. 213 (11th Cir. 2003) (while some conduct constituting "cause" for dismissing a Chapter 7 case can be characterized as bad faith, court's inquiry in deciding whether to dismiss should be framed in terms of whether "cause" exists for dismissal, and not in terms of debtor's good or bad faith). Many courts within Florida, and within the Eleventh Circuit have ruled on this issue and the majority have found that "bad faith" does constitute cause for dismissal or conversion of a non-consumer Chapter 7 bankruptcy case under Section 707(a). The most recent published opinion out of the Southern District of Florida held that a debtor's bad faith in filing for Chapter 7 relief constitutes "cause" for the dismissal of a case. Piazza 451 B.R. at 613.

In Piazza, the individual non-consumer debtor filed for relief one day before a deadline to produce documents relevant to a state court final judgment. Id. at 610. The state court final judgment entered against the debtor arose out of a guarantee of business debt. Id. According to the debtor's own schedules he was earning $7,740.00 per month and his wife was earning $7,709.00 per month. Id. Yet, even with the large judgment entered against the debtor, the debtor continued to contribute to his wife's 401k and make her credit card payments. Id. at 610-11. Furthermore, the debtor's Schedule F identified approximately $318,000 of unsecured debt of which approximately $161,000 was the state court judgment. Id. at 611. Additionally, the debtor omitted the $13,000 debt owed (and reaffirmed) on a vehicle lease, as well as the $48,411 of interest that had accrued on the state court judgment. Id. The court proceeded with a "totality of the circumstances" analysis, applying a 15-factor test to determine whether "bad faith" existed. Id. at 614-15. In looking at the totality of the circumstances in Piazza, the Bankruptcy Court determined more of the factors weighed in favor of a finding of "bad faith" on behalf of the debtor. Id. The Bankruptcy Court dismissed the debtor's case for "cause" as a "bad faith" filing under Section 707(a) of the Bankruptcy Code. Id. The Bankruptcy Court's decision was subsequently affirmed by the District Cout. Piazza v. Nueterra Healthcare Physical Therapy, LLC, 469 B.R. 388 (S.D.Fla. 2012).

Accordingly, it is prudent for all Chapter 7 practitioners to understand the totality of the circumstances surrounding their client's financial situation and all disclosure requirements. Further, practitioners must be aware that as the law currently stands, all debtors have an obligation of "good faith" imposed upon them when filing for relief under the Bankruptcy Code.