

Lou Jones Breakfast Club ~~September 12, 2006~~

Rebecca Garcia
Rebecca Holzhauser
Todd Koenig

DSO's

Definition found at 11 USC § 101(14A)

Under § 523(a)(5) all DSO's are non-dischargeable

Automatic Stay Issues

-continued payment of arrearages from wages outside the plan allowed
see § 362(b)(2)

-If payment made directly through continued wage withholding AND through the plan – does it get overpaid?

Confirmation and Dismissal

Standards to confirm a plan now include a requirement that the debtor has paid all amounts required to be paid under a DSO that first became payable after the filing of the petition. If the plan is not confirmable it may be subject to dismissal. See § 1325(a)(8) and § 1307(c)(11).

Notice sent by Trustee see § 704 and § 1302

-debtor's burden to provide the name, address and telephone number of DSO holder (the telephone number of the holder gets sent to the agency)

- If Debtor doesn't know try 1. CCAP, 2. internet search, or 3. as a last resort affidavit or letter to trustee stating address and phone number unknown.

-2 notices – first one at the beginning of the case the second at discharge

Priority of DSO's -Different in 7 than 13

look to § 1322 and 1326 if you're in a Chapter 13, not 507
see In re Sanders 341 B.R. 47 (Bankr. ND Ala. 2006)
and In re Vinnie 345 B.R. 386, (Bankr. MD Ala. 2006)

When can DSO's be treated differently in a Chapter 13? (i.e. less than PIF)

-by agreement under §1322(a)(2)

-or see §1322(a)(4) – government is holder (owed directly to the government or assigned to government) per §507(a)(1)(B) AND 5 year plan

Interest and DSO's (may be required)

see In re Reid 2006 Bankr. LEXIS 1642 (Bankr. MDNC July 19, 2006)

Discharge (Chapter 12 & 13)

The Debtor who owes a DSO must certify that all payments due on the obligation have been paid, except those pre-petition obligations not required to be paid by the confirmed plan. see §§ 1228(a) & 1328(a)

How do you make this certification?

Do you have an asset Chapter 7 case?

All property claimed exempt by the debtor is liable for DSO's even if the property would not have been liable for such obligations under applicable non-bankruptcy law. 11 U.S.C. §522(c)(1)

Taxes

- I. §1308 requires past 4 years of taxes be filed. Be sure this is done.
 - A. §1308(b)(1) states if not case SHALL be dismissed 120 days after 1st 341's per 1307(e). No chance to make this up.
 - B.
 - i. If Tom is the trustee, the trustee gets previous 4 years tax returns and 60 days of pay stubs 7 days before 1st 341.
 - ii. If Mary is the trustee, the trustee gets previous 1-2 years tax returns and 60 days of pay stubs 7 days before the 1st 341.
(In addition to §1308 requirement of past 4 years, §521(e)(2)(A) requires previous years returns be turned over to trustee; LR 1007.4(a)(5) requires previous 2 years be turned over to trustee; §1308 requires the past 4 years be filed.)
 - C. In re French, 06-20066-PP – code allows for delay of confirmation in situations where debtor files in first 3 ½ months of the year and has not yet filed tax returns for the previous year.
 - D. §1308 does not just apply to income taxes, could also be sales tax, personal property tax, 941's for futa, fica, etc.
- II. Tax refunds
 - A. Some courts say must be turned over to trustee in over median cases too
In re Risher – 344 B.R 833; 2006 Bankr. LEXIS 1364 W.D. KY
 - B. Under median still ½ refunds here so far – also case pending - Walls 06-21228-PP
- III. Means Test – Line 30 of Form B22C
 - A. Case law stating that withholding is not the correct number to use – In re Johnson 2006 Bankr. Lexis 1516
 - B. There are several cases pending before our judges regarding what the correct number should be. Examples:
 - 06-21695 Balcerowski
 - 06-20774 Kowalewski
 - 06-20798 Lloyd
- IV. Dischargeability
 - A. In re Malin, 2006 Bankr. Lexis 1629 - Plaintiffs, debtors, filed an adversary proceeding requesting that the taxes owed for the year 2000 be discharged in their Chapter 13 bankruptcy pursuant to 11 U.S.C.S. § 507(a)(8)(A)(I). Defendant Internal Revenue Service (IRS) filed a motion to dismiss. The IRS contended that the court lacked subject matter jurisdiction because the debtors' Chapter 13 plan had not been confirmed, and alternatively, that the debtors failed to state a claim.
 - B. Todd's question – taxes non-dischargeable in 1st CH 13 case, non-dischargeable in 2nd?
- V. Odds and ends
 - A. No statement for taxes like for DSO stating current – watch out for 1305 claims
 - i. Todd brought up the issue of Milw. Co not wanting to file a 1305 claim. Does not appear that debtor's attorney can do it for them in 1305 situation.
 - B. Priorities are not paid in order as they are in Chapter 7.

A sampling of "Exigent Circumstances" cases

1. In re Dixon, 338 B.R. 383 (8th Cir. B.A.P. 2006)(No error where bankruptcy court held impending foreclosure did not constitute exigent circumstances.)
2. In re Cobb, 343 B.R. 204 (Bankr. E.D. Ark. 2006)(Court denied request for waiver where the request was not signed under penalty of perjury.)
3. In re Talib, 335 B.R. 417 (Bankr. W.D.Mo. 2005)(Certification of exigent circumstances did not have to be under penalty of perjury but Debtor failed to satisfy the request prong because counseling was available within two days of request.)
4. Raymond, 2006 WL 1047033 (Bankr. D.N.H. 2006)(Debtor failed to satisfy the request prong of §109(h)(3).)
5. Hedquist v. Fokkena, 342 B.R. 295 (8th Cir. B.A.P. 2006)(Upheld dismissal of case where Debtors failed to indicate they ever sought credit counseling.)
6. In re Romero, 2006 WL 2642109 (Bankr. N.D.Ca. 2006)(Wage garnishment constitutes exigent circumstances.)
7. In re Petit-Louis, 338 B.R. 132 (Bankr. S.D.Fla. 2006)(Court waived credit counseling requirement under §109(h)(3) where Debtor spoke Creole and an interpreter was not available.)
8. In re Navarro, Case No. 2006-51007 (Bankr. W.D. Tex. June 27, 2006) (Unpublished) (Where Debtor was *pro se*, the exigent circumstances requirement was satisfied.)
9. In re Bass, 2006 WL 1593978 (Bankr. W.D.Tenn. 2006)(Motion to dismiss denied although credit counseling not obtained within 45 days by pro se debtor.)

Miscellaneous Decisions

1. In re Racette, 343 B.R. 200 (Bankr. E.D.Wis. 2006)(Court denied Debtor's motion to strike prior case because of lack of credit counseling.)
2. In re Barbara J. Spears, Case No. 2006-21015 (Bankr. E.D.Wis. June 19, 2006) (Unpublished) (Credit counseling can be obtained the same day the petition is filed..)
3. In re Reed, Case No. 2005-45739 (Bankr. E.D.Wis. November 14, 2005) (Unpublished) (Court granted motion for an extension of time to obtain credit counseling although Debtor's request did not describe exigent circumstances.)