

NABT AMERICAN BANKRUPTCY TRUSTEE JOURNAL

THE OFFICIAL PUBLICATION OF THE NATIONAL
ASSOCIATION OF BANKRUPTCY TRUSTEES

IN THIS ISSUE

Member Q&A: William L. Fava, Trustee and H. Jason Gold, Trustee, NABT President-Elect

Disrupting Implicit Bias

Closing of the “Mom and Pop” Trustee Shop

Filing Fee Waivers in Chapter 7 Cases – Best practices for Chapter 7 Trustees

The Next Generation of Legal Professionals: What Makes Them Tick and How to Recruit and Retain Them

Video Mediation

The Word From Washington

Report From The EOUST

On The Record With The AOC

Tax Tips

Trustee Assistant Corner

Recent Case Summaries



VOLUME 35
ISSUE 02
SPRING 2019



Filing Fee Waivers in Chapter 7 Cases – Best Practices for Chapter 7 Trustees

Donald R. Lassman, Esq., Chapter 7 Trustee,
Needham, Massachusetts

Fee waiver and installment payment requests in individual chapter 7 bankruptcy cases are on the rise, putting increased pressure on the budgets of Chapter 7 Trustees¹. In my trustee practice in Massachusetts, I frequently find that as many as 10%– 15% of the cases on any given 341 meeting calendar include requests for filing fee waivers. Moreover, because fee waiver applications are made when a case is first commenced, Trustees may find that they lack sufficient time and/or information to prepare and file a timely and informed response to the fee waiver request. Also, because the financial impact of a fee waiver request could be considered modest – the loss of \$60.00 – and most likely pales in comparison to the cost that a Trustee would incur in preparing and filing an objection to the fee waiver request and then potentially having to attend both a preliminary and evidentiary hearing on the objection, investigating the propriety of every fee waiver application may not be practical. However, absent vigilance by case trustees, fee waiver requests will likely become more common place and the financial impact on the Courts and Chapter 7 Trustees will become more challenging. This article is intended to provide Chapter 7 Trustees with the framework to

effectively and efficiently analyze fee waiver requests and determine the best course of action in response thereto.

While fee waivers historically have not been permitted in bankruptcy proceedings, Congress changed its policy on fee waivers with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) in 2005 by adding a new subsection (f) to 28 U.S.C. Section 1930. The first paragraph of the subsection states that a court *may* waive the filing fee, but only for cases filed by individual debtors and only for cases commenced under Chapter 7. Moreover, entitlement to a filing fee waiver is not absolute. A two part test for filing fee waivers in bankruptcy cases is set forth in Section 1930(f) (1). Using guidelines established by the Judicial Conference, the court must find (a) that the Debtor’s income is less than 150% of the income poverty line for the family size involved, and (b) that the Debtor is unable to pay the filing fee in installments². Pointing to the permissive language in Section 1930(f) (1) (i.e. the “court may waive...”), courts have concluded that while the “income” and “ability to pay” tests are necessary conditions for a waiver, courts may consider other factors when analyzing a fee waiver application. *In re Fortman*, 456 B.R. 370, 375 (Bankr. N.D. Ind. 2011). Section 1930(f)(2) permits the court to waive all other fees for debtors that have received a filing fee waiver under Section 1930(f)(1), while Section 1930(f) (3) permits the court to waive bankruptcy fees for any other debtor (i.e. a debtor that did not obtain a filing fee waiver under Section 1930(f)(1)) or creditors in accordance with Judicial Conference policy³.

1. General Principles

The decision to grant or deny a fee waiver application is within the sound discretion of the court. *In re Paige*, 2016 Bankr. LEXIS 1876 (Bankr. N.D. Ind., 2016). The debtor bears the burden of proof of establishing both elements by a preponderance of the evidence *In re Young*, 2010 Bankr. LEXIS 4932 (S.D. Ga. 2010). Timing of the analysis is not so well settled. Some courts adopt a snapshot rule, ruling that the relevant facts and circumstances are determined on the date that the bankruptcy petition is filed. *In re Bussey*, 2014 Bankr. LEXIS 2760 (N.D. OH., 2014). Other courts have adopted an analysis that includes consideration of future events because debtors have the option of paying the filing fee over a period of up to 6 months from the date the bankruptcy petition is filed. F.R.B.P. 1006 (b)(2): see also *In re Smith*, 2011 Bankr. LEXIS 3101 (N.D. Ind 2011). Still other courts adopt an analysis of the facts and circumstances when the fee waiver application hearing is held. *In re Hayes*, 581 B.R. 509, 512 (Bankr. W.D.Mich., 2018).

Further complicating matters for Chapter 7 Trustees, courts typically rule on the requests before a Trustee has received and/or even had an opportunity to review the court filings in a case, and most certainly well before the 341 meeting date. Many times, a Trustee may not even become aware of a fee waiver request until after the fee waiver application has been ruled upon, thrusting the Trustee into the unenviable position of having to promptly get up to speed on the facts of the case prior to conducting the 341 meeting and then, depending on the facts, timely filing a motion seeking reconsideration or filing an appeal.

In Massachusetts, the Bankruptcy Court has greatly reduced

the chaos that fee waiver applications can create for Chapter 7 Trustees by entering what in substance is a procedural order regarding consideration of the application. The Court Orders state as follows – “Any objection to the Application to have the Chapter 7 filing fee waived shall be filed within 14 days after the conclusion of the initial convening of the meeting of creditors in which the debtor is in attendance.” In the absence of an objection, the court may allow the application without further notice or hearing. This type of order recognizes that Trustees may not have sufficient information to prepare an informed response to a fee waiver application until having an opportunity to conduct the 341 meeting and question the debtor. Trustees in other jurisdictions may similarly work together with their local U.S. Trustee offices and Judges to establish similar procedures to ensure that Trustees have sufficient time to adequately investigate fee waiver requests.

2. The Income Test

The income test is an arithmetic formula that ought to be straightforward in its application – how does the debtor’s income for a family of a particular size compare to 150% of the applicable poverty level income. The applicable poverty level income guidelines, based on family/household size, are issued by the Department of Health and Human Services and easy to find⁴. However, Section 1930(f) does not contain a definition of “income” or “family”, and it is not clear what income measure is being used to calculate the poverty guidelines. *In re Luvender*, 2008 Bankr. Lexis. 2789, Bankr. D.S. Fla. 2008) (“The court is unable to discern whether the guidelines represent net or gross income).

The Guidelines issued by the Judicial Conference help close the definitional gap for the term income, providing that the “income” to be used for comparison to the poverty income guidelines is “Total Combined Monthly Income” as reported on Schedule I⁵, which is the Debtor’s income after all applicable deductions. *In re Ross*, 2012 Bankr. LEXIS 5457 (S.D. Ill. 2012). But see *In re Lee*, 394 B.R. 402, 403 (Bankr. E.D. Va. 2008 (the court uses debtor’s gross income)). Similarly, Line 2 of Official Form 103B⁶ references “take-home pay” and Line 10 from Schedule I. Trustees can review pay stubs and tax returns that debtors must submit prior to the 341 meeting to confirm the accuracy of the income disclosure. As a practical matter, I find that most debtors seeking fee waivers sole source of income is government assistance so the income verification process is typically not time consuming.

continued on next page



About the Author

Donald R. Lassman is a sole practitioner in Needham, Massachusetts concentrating in the areas of bankruptcy, insolvency and business reorganization since 1983. Mr. Lassman is a member of the bar of the Commonwealths of Pennsylvania and Massachusetts, the Boston Bar Association, the National Association of Bankruptcy Trustees and the American Bankruptcy Institute, and has been a member of the panel of Chapter 7 Trustees for the U.S. Bankruptcy Court for the District of Massachusetts since 1995. He has earned the “Preeminent” Peer Review Rating by Martindale-Hubbell, the highest rating available. Since 2008, Mr. Lassman has been co-leading the effort of the Boston Bar Association to provide legal assistance to members of the military and their families, traveling to VFW posts throughout Massachusetts to provide informational seminars. He can be reached at Don@LassmanLaw.com or 781-455-8400.

The Guidelines also clarify the meaning of the term “family size”, providing that it “may be defined as the debtor(s), the debtor’s spouse (unless separated and not filing jointly) plus any dependents listed on Schedule I”. Unfortunately, the instructions to Official Form 103B re-introduce a measure of uncertainty to the determination of family size, inserting a reference to the term “household” and then suggesting that “household” and “family” may not be the same thing but providing no guidance as to which measure should be used. Family size reported on the fee waiver application is a meaningful factor and should be cross checked with the family size reported on the Means Test and on Schedule J. Somewhat surprisingly, often times these statements do not match. Trustees should also look at the debtor’s response to question 13 on Schedule I, often left unanswered by debtors. Income changes in the year following the bankruptcy filing date will impact the income analysis since debtors have up to six months after the filing date to pay the filing fee.

3. The Totality of Circumstances Test

Most debtors are able to meet the income test. The second element of a fee waiver request, being a qualitative analysis of the debtor’s inability to pay the filing fee in installments, is more problematic. The Guidelines provide that courts should “consider the totality of the circumstances” when determining ability to pay and that a debtor may qualify for a fee waiver even if an attorney fee for the bankruptcy case has been paid. Many courts have identified a non-exclusive list of seven factors to consider when determining a debtor’s inability to pay. *In re Hayes*, supra, at 514. The factors are as follows -

(1) Discrepancies between the waiver application and bankruptcy schedules and/or testimony: Best practices for Trustees - Obtain and review source documents such as financial account statements and check images to verify funds available at filing for payment of the filing fee and to confirm no unusually large deposits or withdrawals in the year preceding the bankruptcy case that might suggest a surfeit of funds that could be used to pay the filing fee. Also request valuation reports and billing statements to ensure the accuracy of asset and expense information. I typically request documents spanning the year preceding case commencement, and in some cases two years, and for the applicable post-filing period so that I can confirm income and spending habits remain consistent with the pre-filing period. In one case I discovered from a review of bank statements that the debtor had received an income tax refund (tax refunds are typically direct deposit and thus difficult to hide) in the year preceding the bankruptcy filing and during the 341 meeting learned that the debtor expected to receive a similar refund for the current year. The debtor agreed that the filing fee could be paid from the tax refund and modified its fee waiver request to a request to pay the filing fee in installments timed to coincide with receipt of the tax refund.

(2) Collateral sources of income from family or friends: Best practices for Trustees – Fee waivers can be obtained even if the debtor’s lawyer is paid for legal services. Trustees should question the debtor about (1) efforts made to hire counsel that would not charge any fee; (2) efforts made to secure payment of the filing fee from third parties. In those cases where the attorney fee is paid by a third party, (1) what efforts were made to obtain

payment of the filing fee by the third party; (2) why were third parties willing to pay attorney fee but not the filing fee and whose idea was it not to pay the filing fee; (3) do third parties have the financial capacity to pay the filing fee; (4) what level of support have third parties provided to the debtor prior to the bankruptcy filing, and (5) has counsel charged a reduced fee or is counsel charging its usual and customary chapter 7 fee?

(3) Excessive or unreasonable expenses that could be used to pay the filing fee: Best Practices for Trustees – Question the debtor about any payments that may diminish or stop completely within the 6 month period after the bankruptcy case is filed, such as payments to secured creditors or lessors whose collateral is being surrendered or whose payment term is close to completion, or arrearage payments included in a Domestic Support Order that may be close to satisfaction in full. Check to see whether the debtor’s expenses are in line with the national standards used on the Means Test. Also, is the debtor providing support for parties who are neither household or family members that can and should be more properly devoted to payment of the debtor’s obligations, including the court filing fee. And watch for payments to friends and relatives.

(4) Whether any portion of attorney fees will be paid after the case is filed: Best Practices for Trustees– Is the debtor committing to using so called “fresh start funds” (i.e. post –petition earnings or exempt property) to pay counsel that could be used to pay the filing fee and if so, how much and is it proportionate to the amount of work that will be performed. Also, explore why some portion of the fresh start funds cannot be used to pay the filing fee.

(5) Whether the debtor has property that could be used to pay the filing fee: Best Practices for Trustees– Does schedule A/B include assets readily available to the debtor for payment of filing fees, such as funds in a bank account, or are the assets illiquid or otherwise not capable of prompt sale without substantial hardship to the debtor and/or non-debtor if sold, such as equity in a principal residence. Question the debtor about pre-petition efforts made to liquidate assets with substantial equity. Can the debtor draw on a home equity line of credit to pay the filing fee?

(6) The debtor’s historical spending of disposable income: Best Practices for Trustees– What are the debtor’s pre-filing spending habits and might the habits be viewed as unreasonable.

(7) Whether the debtor’s current or anticipated income or expenses are the result of temporary or extraordinary circumstances: Best Practices for Trustees– Carefully consider the responses to questions 13 on Schedule I and 24 on Schedule J for insight on the debtor’s ability to make future installment payments. Question the debtor about future earning capacity, ability to return to work, opportunities for overtime and/or to reduce monthly household expenses.

These seven factors are largely focused on the debtor’s financial condition. Courts recognize that non-financial factors may also play a role in determining the outcome of a fee waiver application. In *In re Ali*, the Court noted that, in recognition of the impact on both case trustees and the bankruptcy court system as a whole, waivers should not be granted absent a showing of special circumstances establishing that a bankruptcy discharge will afford a debtor “out-of-the ordinary benefits”. *In re Ali*, 2018 Bankr. LEXIS 2029 (Bankr. E.D. WI. 2018).

In the *Ali* case, absent a discharge, the debtor was in danger of losing his license. Finding that denial of bankruptcy relief posed a substantial risk to the debtor's welfare, the Court approved the debtor's fee waiver request.

In *In re Gjerde*, the Court focused on the debtor's conduct both in the case before it and in prior bankruptcy cases filed by the Debtor. Finding that the debtor had not complied with the basic duties that the bankruptcy code imposes on debtors in his prior bankruptcy cases, and finding that the debtor provided false information in his current bankruptcy case, the court denied the debtor's fee waiver application. *In re Gjerde*, 535 B.R. 329 (Bankr. E.D. Calif., 2015).

In *In re Fortman*, the Court looked to the merits of the bankruptcy filing, noting that District Courts "have long considered the merits of the plaintiff's action" when evaluating fee waiver applications under 28 U.S.C. Section 1915(a). *In re Fortman*, supra. at p.374. Specifically, a court should look at whether bankruptcy "offers an effective remedy and whether the debtor needs bankruptcy at all," citing the example of a judgment proof debtor as someone that does not require immediate bankruptcy relief. The Court noted that because there are limitations on how often a debtor may receive a discharge, a debtor may be disadvantaged by filing bankruptcy at a time when non-bankruptcy alternatives may provide sufficient relief, and may be better served by preserving the bankruptcy discharge for a later date when additional debts may have accumulated and the need for bankruptcy relief becomes more acute.

The Court in *In re Stickney* took a very different approach to the fee waiver question, focusing on the purpose of the filing. *In re Stickney*, 370 B.R. 31 (Bankr. D. N.H., 2007). The court ruled that a debtor's temporary inability to pay the filing fee would not justify a fee waiver where the purpose of the bankruptcy filing was to preserve "significant equity" in the debtor's residence through any combination of:

"(1) temporary protection from foreclosure through the automatic stay, (2) discharging unsecured debt to enable the debtor to preserve the equity through a cure of mortgage defaults or refinancing a defaulted mortgage, (3) obtaining time to sell the residence after abandonment by a trustee, or (4) any other use of a bankruptcy filing to preserve material equity in an exempt asset."

Because there was no allegation that the debtor was seeking to protect the equity in her residence *solely for her account*, the court found that the Debtor's equity was not a factor to be considered when evaluating the totality of circumstances.

4. Ruling on the Fee Waiver Application – What can the Court do?

A court has essentially three options when ruling on a fee waiver request for an individual debtor in Chapter 7. The court may allow the request, in which case no filing fee is paid and the case would proceed to discharge in the normal course. The court may deny the request and enter an order dismissing the case pursuant to Section 707(a)(2)⁷, in which case the Debtor may either seek to re-file and pay the filing fee, delay the re-filing until such time as the filing fee sum has been obtained, or seek non-bankruptcy forms of relief. The court may deny the request but allow the case to continue and enter an order directing the debtor to pay the filing fee in installments over a period

of up to 6 months from the filing date of the petition. Absent payment of the filing fee installments, the court could then close the bankruptcy case without entering a discharge in accordance with Bankruptcy Rule 4004(c)(1)(G)⁸.

5. Conclusion

Fee waiver requests are on the rise in consumer chapter 7 cases, a trend that will likely accelerate together with the increase in pro se filings. Fee waivers should be limited to the truly needy debtor for whom the filing fee may present an insurmountable barrier to bankruptcy relief. Chapter 7 Trustees must be prepared to promptly and thoroughly analyze fee waiver requests to eliminate improper applications and protect the financial integrity of the bankruptcy system. I have found that many debtors' lawyers are not aware of the financial impact of filing fee waivers and, when apprised, are considerate of, and receptive to, the inquiries that I make to confirm the validity of the request. I have also found that, as more Trustees in my District have implemented a policy of careful review of fee waiver applications, Debtors' counsel have become more attuned to the facts and circumstances that do not support fee waivers and more carefully scrutinize their cases before filing fee waiver applications. 🏠

ENDNOTES:

- ¹ Flynn, Edward. *The Changing Profile of Chapter 7 Debtors*. American Bankruptcy Journal, September 2018, p. 34 ("Over the last decade, the percentage of chapter 7 debtors who do not pay their filing fees in full at the time of filing has tripled, now accounting for nearly one in five chapter 7 cases").
- ² Guide to Judiciary Policy, Volume 4, Chapter 8, Section 820 – Chapter 7 Fee Waiver Procedures (the "**Guidelines**").
- ³ See the *Bankruptcy Court Miscellaneous Fee Schedule*, which may be found at <http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule>. The list contains 19 fees applicable to cases commenced under Title 11 in addition to the filing fees and U.S. Trustee quarterly fees described in Section 1930(a). This Schedule also indicates when fees may not be charged and when the court has the discretion to waive the fee.
- ⁴ The guidelines may be found at <https://aspe.hhs.gov/pover-ty-guidelines>
- ⁵ Unlike the calculation for the Means Test, income for fee waiver purposes includes social security and veterans benefits.
- ⁶ Official Form 103B is the "Application to Have the Chapter 7 Filing Fee Waived".
- ⁷ Pursuant to 11 U.S.C. Section 707(a)(2), the court *may* dismiss a case after notice and hearing for cause, including nonpayment of any fees or charges required under Chapter 123 of title 28. Bankruptcy fees are included in Chapter 123 at Section 1930.
- ⁸ Pursuant to Rule 4004(c)(1)(G), upon the expiry of applicable time periods for objecting to discharge, the court shall grant a discharge unless the debtor has not paid in full the filing fee prescribed by 28 U.S.C. Section 1930(a), and any other fee prescribed by 28 U.S.C. Section 1930(b), unless a waiver has been granted.