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Filing Fee Waivers in Chapter 7s

Best Practices for Debtors and Case Trustees

Filing fee-waiver and installment-payment requests in individual chapter 7 cases are on the rise, putting increasing pressure on the budgets of the courts and chapter 7 trustees.¹ These requests require a balancing of seemingly competing interests: (1) the importance of ensuring funding for the maintenance and operation of the bankruptcy court system,² and (2) equal access to the relief afforded debtors by the bankruptcy laws to those lacking sufficient income to pay the bankruptcy filing fee. This article focuses on the essential elements of fee waivers, providing a framework for debtors' lawyers evaluating the propriety of seeking a fee waiver, and for chapter 7 trustees who are increasingly besieged with cases including fee-waiver requests.

A proceeding under title 11 gives rise to a plethora of fees, which can present a daunting burden for low-income debtors. Section 1930(a) provides for the payment of filing fees and, in chapter 11 cases, quarterly fees to the Office of the U.S. Trustee, while 28 U.S.C. § 1930(b) provides for additional fees in all cases filed under title 11 "as prescribed by the Judicial Conference." Unlike the federal district court, where the payment of fees is not a requirement for commencement of litigation,³ fee waivers historically were not permitted in bankruptcy proceedings because of congressional policy and the absence of a right to a discharge of debt in the U.S. Constitution.⁴

However, Congress changed its policy on fee waivers with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) by adding subsection (f) to § 1930. The first paragraph of subsection (f) 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, an entitlement to a filing-fee waiver is not absolute.

First, using guidelines established by the Judicial Conference, the court must find under § 1930(f)(1) that (1) the debtor's income is less than 150 percent of the income poverty line for the family size involved, and (2) the debtor is unable to pay the filing fee in installments.⁵ Pointing to the permis-

sive language in § 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 might consider other factors when analyzing a fee-waiver application.⁶ In addition, § 1930(f)(2) permits courts to waive all other fees for debtors who have received a filing-fee waiver under § 1930(f)(1), while § 1930(f)(3) permits the court to waive bankruptcy fees for any other debtor (*i.e.*, a debtor who did not obtain a filing-fee waiver under § 1930(f)(1)) or creditor in accordance with Judicial Conference policy.⁷

General Principles

The decision to grant or deny a fee-waiver application is within the court's sound discretion.⁸ The debtor bears the burden of proof of establishing both § 1930(f)(1) elements by a preponderance of the evidence.⁹ Yet timing of the analysis is not so well settled.

Some courts have adopted a snapshot rule, ruling that the relevant facts and circumstances are determined on the date that the bankruptcy petition is filed.¹⁰ 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 six months from the date that the bankruptcy petition is filed.¹¹ Other courts have adopted an analysis of the facts and circumstances when the fee-waiver application hearing is held.¹²

The Income Test

The income test is an arithmetic formula that ought to be straightforward in its application. Simply stated, it determines how the debtor's income for a family of a particular size compares to 150 percent 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 are easy to



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1 Ed Flynn, "The Changing Profile of Chapter 7 Filers," XXXVII *ABI Journal* 9, 36, 74-76, September 2018, available at abi.org/abi-journal ("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 See *In re Gilbert*, 2016 U.S. Dist. LEXIS 18867, at *12 (E.D. Mich. Feb. 17, 2016) ("[T]he bankruptcy system is predicated (at least in part) on filing fees....")

3 28 U.S.C. § 1915(a)(1).

4 *United States v. Kas*, 409 U.S. 434, 446-48 (1973), superseded by 11 U.S.C. § 1930(a).

5 Guide to Judiciary Policy, Vol. 4, Chapter 8, § 820, Chapter 7 Fee Waiver Procedures (the "Guidelines").

6 *In re Fortman*, 456 B.R. 370, 374 (Bankr. N.D. Ind. 2011).

7 See the Bankruptcy Court Miscellaneous Fee Schedule, available at uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule (unless otherwise specified, all links in this article were last visited on Dec. 3, 2018). The list enumerates 19 types of fees applicable to cases commenced under title 11 in addition to the filing fees and U.S. Trustee quarterly fees described in § 1930(a). This schedule also indicates when fees may not be charged and when the court has the discretion to waive the fee.

8 *In re Paige*, Case No. 16-10154, 2016 Bankr. LEXIS 1876 (Bankr. N.D. Ind. March 7, 2016).

9 *In re Young*, Case No. 14-32160, 2010 Bankr. LEXIS 4932 (S.D. Ga. June 18, 2010).

10 *In re Bussey*, 2014 Bankr. LEXIS 2760 (N.D. Ohio 2014).

11 Fed. R. Bankr. P. 1006(b)(2); see also *In re Smith*, Case No. 11-11957, 2011 Bankr. LEXIS 3101 (N.D. Ind. July 27, 2011).

12 *In re Hayes*, 581 B.R. 509, 512 (Bankr. W.D. Mich. 2018).

find.¹³ However, § 1930(f) does not contain a definition of either “income” or “family” terms, and it is not clear what income measure is being used by the poverty guidelines.¹⁴

More specifically, the guidelines issued by the Judicial Conference can be helpful to 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 I,¹⁵ which is the debtor’s income after all applicable deductions.¹⁶ Similarly, Line 2 of Official Form 103B references “take-home pay.”

The guidelines also clarify the meaning of the phrase “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 [the] Schedule I.” Unfortunately, the instructions to Official Form 103B reintroduce a measure of uncertainty to the determination of family size, inserting a reference to the term “household,” then suggesting that “household” and “family” might not be the same thing, but providing no guidance as to which measure should be used.

The Totality-of-the-Circumstances Test

Most debtors are able to clear the hurdle presented by 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 typically 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 nonexclusive list of seven factors to consider when determining a debtor’s inability to pay as follows:¹⁷

1. *Discrepancies between the waiver application and bankruptcy schedules and/or testimony.* Practice Tips: Obtain and review source documents such as financial account statements and check images, valuation reports and billing statements to ensure the accuracy of assets, liability, income and expense information for, at a minimum, the year preceding case commencement and for the six-month period after the filing, which is the length of time that debtors may have to pay the filing fee in installments.
2. *Collateral sources of income from family or friends.* Practice Tips: Be prepared to describe the efforts made to (1) seek *pro bono* counsel; and (2) have collateral sources pay the filing fee, as well as why were third parties were willing to pay the attorneys’ fee but not the filing fee; whether third parties have the financial capacity to pay the filing fee; and the level of support third parties have provided to the debtor prior to the bankruptcy filing.
3. *Excessive or unreasonable expenses that could be used to pay the filing fee.* Practice Tips: Remember to exclude expenses that might disappear after the bankruptcy fil-

ing, such as wage garnishments, dischargeable debts, and debts secured by surrendered collateral. How do the debtor’s expenses compare to the national standards used on the means test, and is the debtor providing support for parties who are neither household nor family members?

4. *Whether any portion of attorneys’ fees will be paid after the case is filed.* Practice Tips: 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; what is the amount being paid to counsel in relation to counsel’s normal fee, and is it proportionate to the work being performed; and has counsel agreed to a reduced fee in light of the indigence of the debtor?

5. *Whether the debtor has property that could be used to pay the filing fee.* Practice Tips: Does Schedule A/B include assets readily available to the debtor for payment of filing fees, or are assets illiquid or otherwise not capable of prompt sale, and not without substantial hardship to the debtor and/or nondebtor if sold?

6. *The debtor’s historical spending of disposable income.* Practice tips: Obtain creditor billing statements, bank account statements and paychecks for the year preceding the bankruptcy filing in order to determine the nature, amount and reasonableness of expenses and to confirm the accuracy of income and expenses reported on the bankruptcy filing.

7. *Whether the debtor’s current or anticipated income or expenses are the result of temporary or extraordinary circumstances.* Practice Tips: Carefully consider the responses to questions 13 on Schedule I and 24 on Schedule J, and their impact on ability to pay future installment payments. Will the debtor be returning to work, have opportunities for overtime and/or be able to reduce certain expenses?

These seven factors are largely focused on the debtor’s financial condition. Courts still recognize that nonfinancial factors might also play a role in determining the outcome of a fee-waiver application. For example, 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.”¹⁸ In the *Ali* case, absent a discharge of a judgment, 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.

Conversely, 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.¹⁹

13 The guidelines are available at aspe.hhs.gov/poverty-guidelines.

14 *In re Van Luvender*, Case No. 08-21022, 2008 Bankr. Lexis. 2789 (Bankr. S.D. Fla. Oct. 22, 2008) (“The court is unable to discern whether the guidelines represent net or gross income.”).

15 Unlike the calculation for the means test, income for fee-waiver purposes includes Social Security and veterans’ benefits.

16 *In re Ross*, 2012 Bankr. LEXIS 5457, at *3 (S.D. Ill. 2012); *but see In re Lee*, 394 B.R. 402, 403 (Bankr. E.D. Va. 2008) (court uses debtor’s gross income).

17 *In re Hayes*, *supra* at 514.

18 2018 Bankr. LEXIS 2029, at *3.

19 535 B.R. 329 (Bankr. E.D. Cal. 2015).

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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. § 1915(a).²⁰ 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 who does not require immediate bankruptcy relief. The court notes that because there are limitations on how often a debtor may receive a discharge, a debtor might be disadvantaged by filing at a time when nonbankruptcy alternatives could provide sufficient relief and be better served by preserving the bankruptcy discharge for a later date when additional debts accumulate 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.²¹ 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.

Since there was no allegation that the debtor was seeking to protect 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 the circumstances.

²⁰ *In re Fortman*, *supra* at p. 374.

²¹ *In re Stickney*, 370 B.R. 31 (Bankr. D.N.H. 2007).

Ruling on the Fee-Waiver Application: What Can the Court Do?

In summary, a court has essentially three options when ruling on a fee-waiver request for an individual debtor in chapter 7. First, the court might allow the request, in which case no filing fee is paid and the case would proceed to discharge in the normal course. Second, the court might deny the request and enter an order dismissing the case pursuant to § 707(a)(2),²² in which case the debtor might 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. Lastly, the court might deny the fee waiver 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 six 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).²³

Conclusion

As previously mentioned, 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. Consequently, debtor’s counsel must consider the possibility of seeking fee waivers for a truly needy client for whom the filing fee might present an insurmountable barrier to bankruptcy relief. Chapter 7 trustees, on the other hand, must be prepared to promptly and thoroughly analyze the propriety of fee-waiver requests in order to eliminate improper applications and protect the financial integrity of the bankruptcy system. **abi**

²² Pursuant to 11 U.S.C. § 707(a)(2), the court might 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 enumerated in chapter 123 of the Bankruptcy Code at § 1930.

²³ 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. § 1930(a), and any other fee prescribed by 28 U.S.C. § 1930(b), unless a waiver has been granted.

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