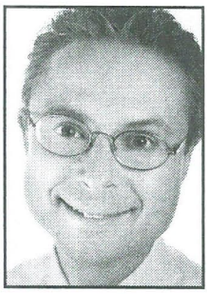
CONSUMER BANKRUPTCY

New Test for Re-Opening Case to Add P.I. Suits

Five-prong test determines good faith or cause

By Craig D. Robins



Craig D. Robins

Although debtors sometimes forget to schedule assets, trustees devote a substantial amount of attention to searching, in particular, for personal injury actions that debtors inadvertently omit. Despite being questioned at the meeting of creditors, a number of debtors still fail to advise the trustee that they have the right to sue for injuries sustained pre-petition.

As I explained previously, while such assets have high potential value, debtors often don't perceive of them as assets, since they are intangible, unliquidated and contingent. As a result, many debtors do not realize that they have to list them as potential assets.

What often happens when a debtor fails to schedule a P.I. cause of action is that the debtor eventually retains a P.I. attorney to bring suit after the bankruptcy case is closed and neglects to tell the P.I. attorney about the bankruptcy filing. Then, years later, the P.I. attorney freaks out because the defendant's counsel brings a motion to dismiss the P.I. case on the basis that the plaintiff (and former debtor) lacks standing to commence or continue the suit, as the cause of action is the sole property of the Chapter 7 trustee. This is because once a bankruptcy case is closed, non-disclosed causes of action and litigation remain the property of the bankruptcy estate, unless abandoned by the trustee. Case law provides that if the trustee never knew about the potential estate property, the trustee could not have abandoned it.

Previously I discussed the *Meneses* case in which Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, refused to permit a debtor to re-open a closed Chapter 7 case to permit the trustee to administer a P.I. cause of action. The judge cited the debtor's lack of good faith in that case. *In re: Carlos Meneses* (05-86811-ast, Bankr. E.D.N.Y., March 3, 2010).

Now let's fast forward to October 17, 2013 where we have the opposite result and a new standard for evaluating such situations. Judge Trust issued a decision permitting two separate debtors to re-open their respective Chapter 7 cases to amend their schedules to list previously undisclosed personal injury actions. In re *Craig Warmbrand* (10-76058-ast, Bankr.E.D.N.Y.). Both of these matters were consolidated into one written decision.

Each of the two debtors in *Warmbrand* commenced a personal injury lawsuit post petition seeking to recover damages for injuries allegedly sustained prepetition, and each alleged mistake or inadvertence in neglecting to schedule or disclose the claim prior to the closing of his or her case.

In permitting each of these debtors to re-open their cases, the judge adopted a test for determining whether good faith or cause has been established to re-open a case to allow a debtor to schedule a previously undisclosed lawsuit: 1) the debtor's inadvertence in failing to schedule the lawsuit; 2) potential benefit to creditors; 3) indications of forum shopping or other inequitable conduct; 4) prejudice to objecting parties; and 5) benefit to the debtor.

The Warmbrands commenced a medical malpractice case just eight days after filing their Chapter 7 petition, yet they did not disclose the case to Chapter 7 trustee Kenneth Kirschenbaum when he asked them about P.I. cases. It was three years later when they brought a motion to re-open. Warmbrand argued that his former bankruptcy attorney failed to properly advise him about his disclosure obligations.

In a separate case heard at about the same time, Craig Bowe commenced a P.I. action just two months after his Chapter 7 case was closed, for injuries he sustained two years before he filed. He, too, did not disclose the right to sue to his trustee, Neil Ackerman. Bowe brought his motion to re-open two years after the case was closed. He argued that he did not understand the questions that his former bankruptcy attorney asked him about personal injury suits and that his failure to schedule was due to mistake and inadvertent error.

In both cases, the attorneys for the defendants in the personal injury cases argued that based on *Meneses*, the court should deny the motions to re-open, based on the bad faith of the debtors and the importance of maintaining the integrity of the bankruptcy process.

Judge Trust determined the *Meneses* case was distinguishable from these cases. The judge applied a new five-prong analysis to Warmbrand and Bowe. He found that like Meneses, each of these debtors must have had a "consciousness" about their claims. However, he found that unlike Menesis, these cases would provide benefit to creditors, there was no prejudice to the objecting parties even though years had passed since the cases were closed, there was no forum shopping, and there was potential benefit to the debtors.

The judge made it a point to state that he would not draw an inference that the debtors' failures to schedule their claims was inadvertent as doing so would create too great a license for debtors to avoid or ignore their disclosure requirements and later substitute a convenient "I forgot" or "I didn't know" response.

This new standard for reviewing situations involving omitted personal injury actions is important because it gives debtors a greater chance that they will be successful in re-opening their cases.

One important issue that was not resolved in Warmbrand is whether such debtors will be successful in exempting their personal injury proceeds. I would imagine the debtor's good faith would be instrumental here. Finally, it goes without saying that all attorneys should be extremely vigilant about questioning their clients as to whether they have a potential P.I. action.

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