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CONSUMER BANKRUPTCY

How a Debtor Should Not Act

One case illustrates how much trouble a debtor can get into by not engaging in damage control

. . . and also some info on our newest bankruptcy judge

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I was hoping, planning and expecting to write this month's column as a profile on our newest Bankruptcy Court judge, Alan S. Trust, who was sworn in on April 2, 2008. I met Judge Trust two weeks ago while he was becoming acquainted with our local court practices and procedures. At the time he was sitting in on one of Chief Judge Craig's calendars. However, he subsequently declined to be interviewed for this article. Chambers advised me that he may hold a "meet and greet" event in the future.

Some Info on Judge Trust. Here's what little information we know about Judge Trust. He was born in 1960 in Monticello, New York and graduated Monticello High School in 1978. Thereafter he graduated summa cum laude from Syracuse University in 1981 with a B.A. in Political Philosophy. He attended New York University School of Law in 1984, graduating cum laude. He was a member of the Law Review.

In 1984 he became a member of the State Bar of Texas, where it appears he remained in private practice until taking the bench here. My understanding is that his practice primarily consisted of commercial Chapter 11 matters. His swearing-in actually occurred in Dallas by Fifth Circuit Court of Appeals Judge Patrick Higgenbotham.

I write this column (past deadline, mind you) at 30,000 feet on my way to a brief vacation in Tokyo, Japan, so I had no time to seek any additional information about the judge from any other sources.

Before leaving, in my quest to learn about more about Judge Trust, I inadvertently came across a highly intriguing, well-written and informative blog, entitled "A Texas Bankruptcy Lawyer's Blog, prepared by Austin attorney, Stephen Sather. One of his entries contained a summary of a fascinating Texas case which almost comically illustrates how an attorney-debtor should not act.

Accordingly, this month's column is about that case, which is be somewhat timely as my recent column in the March issue of the *Suffolk Lawyer* was about attorneys who, themselves, seek bankruptcy relief. In that article I discussed attorneys who have debt problems and then file for bankruptcy in good faith to discharge their debts.

The Start of a Bad-Faith Filing. In January 2005, Texan attorney, David Ortiz, filed a consumer Chapter 7 petition to avoid being evicted from his law office. Based on the story to follow, this filing was not in good faith.

The stay didn't last long as the landlord quickly lifted it. Then, once the eviction began to move forward again, the debtor lost interest in his case and he failed to appear for his 341 meeting. Soon thereafter the judge dismissed his case, with prejudice, for having failed to appear for the meeting. As is usual practice in such situations, the order precluded the debtor from refiling another petition for 180 days.

Nevertheless, the debtor filed another petition just one month later, apparently to stop another eviction. The

U.S. Trustee promptly moved for sanctions. The debtor appeared and pleaded ignorance, claiming that he never received a copy of the prior order as it was sent to his old address, despite his obligation to update his address with the Court clerk.

The First Sanctions Order. The judge was somewhat patient and agreed to abate the U.S. Trustee's motion long enough to allow the debtor to make an application to modify the prior order. When the parties returned to Court, the judge found that the debtor had neglected to do so. The judge also determined that the debtor had failed to file accurate schedules and did not have a good reason for failing to appear at the 341 hearing in the first case. The Judge then sanctioned the debtor by ordering him to pay attorney's fees of $1,875 to each of two landlords, and continued the matter to determine whether additional sanctions might be appropriate.

The debtor, realizing that the matter was turning serious, finally retained an attorney. At the continued hearing, the judge ordered the debtor to pay $1,000 in additional sanctions to the Court within 60 days and barred him from filing again for a year without prior permission.

Things Get Worse – the Bench Warrant(s). By the time of the first sanctions order, the debtor had angered the judge; however, his problems could have been solved by paying the $4,750 in sanctions. Unfortunately, the debtor didn't get the message.

Four months later, the U.S. Trustee filed a Certificate of Non-Compliance indicating that the Clerk had not been paid. The judge then scheduled another hearing. However, neither the debtor nor his new attorney showed up. The debtor also failed to accept service from the U.S. Trustee's process server, despite having previously agreed to do so. The judge, now quite angry, issued a bench warrant that day.

The debtor then had an attorney friend contact the U.S. Marshal who said that she was acting as an intermediary, and promised to inform the debtor about the bench warrant. Incredibly, she gave the Marshal a non-working phone number for the debtor.

When the Judge learned this, he grew even angrier, and after being unable to locate the debtor at his home or office, issued a bench warrant for the intermediary attorney.

This provided a degree of success as the "intermediary" appeared and testified that the debtor was aware that there was a bench warrant out for him, but wanted to meet with his attorney first. The judge then ordered the intermediary to check in with the U.S. Marshal twice a day until the debtor was apprehended.

The Judge Tries to Get the Debtor's Attention with a Second Sanctions Order. The judge, who no doubt progressed from furious to livid, issued a second sanctions order which required the debtor to pay $500 per day for each day that he failed to surrender, and to pay $250 per day for each day that he failed to pay the previous $1,000 sanction to the Clerk. The Judge also ordered the debtor's attorney to appear two days later to report whether he had informed the debtor of the second sanctions order.

Critical Mass – The Third Sanctions Order. Two days later the debtor appeared with a new attorney, apparently well-respected in the bar, and paid the $1,000 owing to the Clerk. The debtor claimed that while he was aware of the prior hearing, his attorney was scheduled to be out of the country and assured him that he would get the hearing re-scheduled, which was not done. The debtor also testified that when he learned of the bench warrant, he checked into a hotel to avoid being found.

The judge, who was not amused, nevertheless showed considerable restraint by ordering the debtor to: a) write a letter of apology to the U.S. Marshal; b) contact the bar association assistance program to see if he would benefit from counseling; c) take 10 hours of continuing legal education; d) find other counsel for a client he was currently representing in a Chapter 7 case; and e) and either pay an additional sanction of $750 or write "I will respect the judicial system, and such respect includes obeying all court orders" 750 times. The judge gave the debtor five days to comply.

How Stupid Can You Get? The debtor did return five days later; however, he only tendered 700 sentences instead of 750, he had failed to pay the prior sanctions of $3,750 to his landlords, and he failed to find alternate counsel for his client. He did complete his C.L.E.

The judge, again showing extreme patience, gave the debtor one last chance. The debtor, finally learning his lesson, tendered the remaining 50 sentences and paid the sanctions to his landlords. As a final sanction, the Court wrote a lengthy opinion chronicling the debtor's pattern of abuse.

Lessons to be Learned – Damage Control. Stephen Sather, in his blog about the case, suggested that attorneys make mistakes, but that the difference between a good attorney and a disgraced attorney is the ability to engage in damage control. The debtor in the above case certainly did not learn that lesson. Mr. Sather also suggested that this case be required reading in legal ethics courses.

Mr. Ortiz's motivations in filing bankruptcy to avoid eviction were not pure. The debtor, in filing a second bankruptcy in violation of a court order that he arguably did not know about, was bad but not fatal.

At this stage, the debtor had a problem, but the court offered a way out. Failing to take advantage of this offer was a major mistake.

When the debtor missed the first opportunity to extricate himself, he could have begged or borrowed the money to pay the initial sanctions and limped away, humbled but not crushed. However, when he failed to appear in court, and then evaded the U.S. Marshall, he risked serious jail time. Perhaps the ultimate consequences were so light because the debtor retained a respected and competent bankruptcy attorney, again illustrating the advantages of retaining counsel. One thing is clear, though – things could have gotten much, much worse.

Editor's Note: *(revised 2008): Craig D. Robins, Esq., a regular columnist, is a bankruptcy attorney who has represented thousands of consumer and business clients during the past twenty years. He has offices in Medford, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at* CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: CraigRobinsLaw.com.