

CONSUMER BANKRUPTCY

Complying With the Payment Advice Rule

Recent case says all pay stubs may not be necessary

By Craig D. Robins

We all know that under the new bankruptcy laws debtors are required to file copies of all pay stubs for income received during the 60-day period prior to filing.

To put teeth into this requirement, the law further provides that failure to do so will result in the automatic dismissal of the bankruptcy case — a scary thought. What happens if a debtor files just one pay stub, but otherwise documents the payments they received?

The Second Circuit Court of Appeals just decided a case last month on August 9. It held that debtors do not need to file all of their pre-petition payment advices if they otherwise document all payment received from employers during the 60-day pre-petition period.

This case addressed for the first time in our circuit what obligations the Bankruptcy Code imposes upon a debtor with respect to the filing of payments advices. The bottom line is that debtors merely need to provide the necessary information on payments as opposed to the actual pay stubs themselves.

The pay stub requirement

When Congress revised the bankruptcy laws in 2005, it imposed a new requirement under Bankruptcy Code section 521(a)(1)(B)(iv) that debtors provide written verification of their current income by

filing “copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor.” Payment advices are typically pay stubs.

Bankruptcy Rule 1007(c) requires debtors to fulfill this requirement within 14 days after filing the petition. However, if the debtor fails to file the payment advices within 45 days of the filing date, then Code section 521(i)(1) provides for automatic dismissal.

Bankruptcy counsel typically file pay stubs with the bankruptcy court by ECF, and send copies to the trustee, at the same time the petition is filed or shortly thereafter.

The recent *Riffle* case

Stephen Riffle and his wife filed a routine Chapter 13 case in the Western District of New York in 2008. His attor-



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ney only filed the debtor’s last pay stub during the 60-day pre-petition period because that was the only pay stub that the debtor retained.

The pay stub contained the debtor’s earnings and deductions for the pay period and also stated the debtor’s year-to-date earning and payroll deductions in various categories.

In addition to filing this one pay-stub, the debtor also filed a chart entitled “Sales Earnings Report,” which had been issued by the debtor’s employer and showed the debtor’s gross earnings for each pay period from the beginning of the year. Debtor’s counsel believed that these two documents satisfactorily disposed of the payment advice requirement.

However, an aggressive creditor, Community Bank, disagreed, and after 45 days filed a motion asking the bankruptcy court to confirm that the case was dismissed for non-compliance with the

statute. The Chapter 13 trustee opposed the dismissal, arguing that the two documents that the debtor filed represented full compliance with the statutory requirement.

The bankruptcy court agreed with the debtor and trustee; the District Court affirmed, and so did the Second Circuit. *Community Bank v. Riffle (In re Riffle)*, no. 08-4440-bk (2d Cir. 08/09/10).

The Court of Appeals noted that it had not previously decided what obligations 521(a)(1)(B)(iv) imposes upon a debtor and further stated that “the statute, to put it mildly, is not a model of syntactical clarity. At least two grammatically valid readings of the statute are possible, each of which would place a different requirement on the debtor.”

The court determined that the statute was ambiguous and provided an analysis in which it dissected clauses and words, explored different grammatical meanings, discussed how certain words modified other words, and focused on how inter-

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preting one participle could lead to two different grammatical conclusions – both of which would be technically correct.

In the end, the court chose “the payment-focused interpretation” over a “document-focused interpretation” and held that the statute requires a debtor to file either all payment advices received within 60 days pre-petition or other evidence of payment received during this period.

“Although neither reading is perfectly satisfying, we conclude that the payment-focused interpretation is superior,” the court said.

The court commented that the documents that the debtor filed “created a very clear picture as to the amount of income the debtor received in the 60 days pre-petition” and thus met his obligation under the statute.

Cases meaning to Long Island Consumer Bankruptcy practitioners

The Second Circuit clearly indicated its desire to follow a more liberal, practical-essence approach in its interpretation of the statute. Basically, as long as a debtor provides all of the relevant information regarding payment received during the relevant period, as opposed to the actual “pieces of paper” the debtor received (pay stubs), and then the debtor has complied with his statutory requirements.

The court also commented that the Bankruptcy Code does not require a

breakdown of gross and net income on a per-pay period basis. However, a debtor must identify monthly net income.

When there are no payment advices, then there is nothing to file. However, the bankruptcy court clerk’s office does not know that there is no documentation, so it is prudent to prepare an affidavit for the debtor to sign indicating this fact, and file this “Affidavit in Lieu of Payment Advices” the same way you would ordinarily file the pay stubs.

Debtors often do a poor job of retaining papers, and frequently discard or misplace pay stubs. If a debtor has discarded or misplaced his pay stubs, then most employers will be able to print a report containing the same information that should provide all of the necessary details to comply with the statute.

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