

United States Bankruptcy Court
for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

March 8, 2006

By Electronic Transmission

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Bankruptcy Rule 2002(f): Need for Requiring Notice
of Deadline for Filing a Motion Under § 727(a)(12).

Dear Mr. McCabe:

I write to recommend that Rule 2002(f) of the Interim Rules, when adopted as a Federal Rule of Bankruptcy Procedure, be amended to include a requirement for giving notice of the deadline for filing a motion under § 727(a)(12).

As amended with respect to bankruptcy cases commenced on or after April 20, 2005, 11 U.S.C. § 727 provides in relevant part that:

(a) the court **shall grant** the debtor a discharge, unless--

* * * * *

(12) the court **after notice and a hearing** held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that--

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

[Emphasis added.] Similar provisions exist in chapters 11, 12, and 13, although cast in terms of when the court may **not** grant a discharge, as opposed to when it **shall** grant a discharge. See 11

U.S.C. §§ 1141(d)(5)(C), 1228(f), and 1328(h).¹ All four provisions require that the court make findings pursuant to those provisions be made only “after notice and a hearing.”

From a procedural standpoint the language “after notice and a hearing” clearly contemplates some notice to at least someone of the opportunity to address the § 727(a)(12) issue. The critical issue is who is to receive the notice.

The Interim Rules make no provision for giving notice to creditors of the opportunity to request a hearing to determine whether § 727(a)(12) applies to bar the entry of a discharge but do make provision for giving notice to creditors of the opportunity to request a hearing to address whether § 1141(d)(5)(C), § 1228(f), or § 1328(h), as the case may be, is satisfied such as to permit entry of a discharge.² Can it be that in chapter 7 no notice to the creditor body is required, but that in chapters 11, 12, and 13, notice to the creditor body is required?

The statutory term “after notice and a hearing”:

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the

¹ For example, § 1328(h) provides:

(h) The court **may not grant a discharge** under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that--

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

² The vehicle for requesting such a hearing to determine the applicability of § 727(a)(12) is a motion. Interim Rule 4004(c)(1) provides in relevant part that:

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

* * * * *

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending[.]

This is the only mention of such a motion in the Interim Rules. There is no provision in the Interim Rules stating a deadline for the filing of such a motion, and, as already noted, no provision requiring notice to creditors of the opportunity to file such a motion.

particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if--

- (i) such a hearing is not requested timely by a party in interest; or
- (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act[.]

11 U.S.C. § 102(1).

An argument can be made that § 727(a)(12) does not require notice to the creditor body of the opportunity to file a § 727(a)(12) motion to delay entry of the discharge. The argument would be that § 727(a)(12) may envision that a creditor can file a motion to delay the discharge and that if the creditor does so, the court can act on such a motion only after notice and a hearing (that is, notice to the debtor of the motion and of the opportunity to oppose the motion). If such a motion is filed, then the court must not grant a discharge if § 727(a)(12)(A) and (B) are both shown to be applicable.

But that argument does not make sense. The term “unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge” is found in both § 727(a)(12) and its sister provisions in chapters 11, 12, and 13. It would be strange to interpret “notice and a hearing” in § 727(a)(12) not to require notice to the creditor body but to interpret “notice and a hearing” in §§ 1141(d)(5)(C), 1228(f), and 1328(h) as requiring notice to the creditor body.

Moreover, the provisions contemplate “notice and a hearing **held not more than 10 days before the date of the entry of the order granting the discharge**” (emphasis added). Bearing in mind the definition of “notice and a hearing,” this strongly suggests that creditors are to be given notice of the opportunity to file a motion to delay discharge as late as 10 days before the court grants a discharge. The focus is on the opportunity to file a motion requesting a delay, not on the opportunity to oppose the motion.

Accordingly, I recommend that when Interim Rule 2002(f) is made F.R. Bankr. P. 2002(f) it include the following change indicated by underlining:

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of: . . . (11) the time to request a delay in the entry of the discharge under §§ 727(a)(12), 1141(d)(5)(C), 1228(f), and 1328(h). . . .

Alternatively, when Interim Rule 2002(f) is made F.R. Bankr. P. 2002(f), it could be changed to read:

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of: . . . (4) the time allowed for filing a complaint objecting to, or a motion to delay the entry of, the debtor's discharge pursuant to § 727 of the Code as provided in Rule 4004;

Rule 4004 already contemplates that a motion can be filed under § 727(a)(12) to delay entry of the discharge, and the change (whichever is selected) would simply require notice to creditors of the deadline for filing such a motion. (I suggest in a separate letter that amendments be made to F.R. Bankr. P. 4004 to address the deadline for such a motion.)

If my recommendation is not adopted, it might be useful guidance to bench and bar for the Committee Note to F.R. Bankr. P. 2002(f)(11) (when Interim Rule 2002(f)(11) is adopted as such) to explain why Rule 2002(f)(11) was made applicable to a delay in the entry of the discharge under §§ 1141(d)(5)(C), 1228(f), and 1328(h), but not to a delay of the entry of the discharge under § 727(a)(12).

Sincerely yours,

/s/

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia

Copies to:

Gregory Hughes
Acting Clerk
United States Bankruptcy Court
for the District of Columbia

Patti Meador
Chief Deputy Clerk
United States Bankruptcy Court
for the District of Columbia