

Three People Filed an Involuntary Chapter 11 Petition Against the US Treasury Department: Analyzing the Petition

Did you hear the joke about the three guys who filed an involuntary bankruptcy against the U.S. Department of the Treasury? Sorry, no punch line – three individuals actually did recently file an involuntary chapter 11 petition against the U.S. Department of the Treasury! And it only took a week for the case to be dismissed.

On May 13, 2010, Clayton T. Utterback, Ryan Thomas Kirk, and James P. Utterback (collectively, the “Petitioners”) filed an involuntary petition (the “Involuntary Petition”) for relief under title 11 of chapter 11 of the United States Code (the “Bankruptcy Code”) against the United States Department of the Treasury (the “US Treasury”) in the United States Bankruptcy Court for the District of Columbia (Case No. 10-00463). The case had been assigned to Bankruptcy Judge S. Martin Teel, Jr.

The Involuntary Petition included as exhibits two Proofs of Claim against the US Treasury listing the creditor as Clayton T. Utterback, *et al.*¹ Based on these Proofs of Claim, it appeared the Petitioners (or, at least, Clayton T. Utterback) asserted secured claims of \$1.4 million and \$100 billion against the US Treasury. The Proofs of Claim stated that Clayton T. Utterback, *et al.* held government bonds to secure such claims. (It was unclear from the Proof of Claims whether Ryan Thomas Kirk and James P. Utterback also claimed to hold such bonds as security and, if so, the breakdown of the amount of the bonds held by each individual.) The documents attached to the Proof of Claim in connection with the \$1.4 million claim implied that Clayton Thomas Utterback held a commercial lien against the Victims Compensation and Government Claims Board. With respect to the \$100 billion claim, the documents attached to the Proof of Claim implied that Clayton Thomas Utterback had filed an amendment to a UCC Financing Statement naming the US Treasury as the debtor and had obtained a *Nihil Dicit* judgment against various defendants, including the Victims Compensation and Government Claims Board, based on that same commercial lien referenced in the \$1.4 million Proof of Claim.

Eight days after it was filed, Judge Teel dismissed the case without further pleadings being filed. If the case had not been dismissed, the US Treasury would have had 21 days from receipt of service of the summons (with a copy of the Involuntary Petition) to respond to the Involuntary Petition. See Fed. R. Bankr. P. 1010(a); 1011(b). How might the US Treasury have answered the Involuntary Petition?

First, it could have argued that it was ineligible to be a debtor under chapter 11 of the Bankruptcy Code because it is not a “person”. This was the reason given in Judge Teel’s Memorandum Decision dismissing the case. Section 303(a) of the Bankruptcy Code provides that an involuntary case may be commenced only under chapter 7 or 11 of the Bankruptcy Code and that such a case may only be commenced (with certain exceptions not relevant here) against a person that may be a debtor under the

¹ The Petitioners also requested, pursuant to Rule 201 of the Federal Rules of Evidence, that the Court take judicial notice of certain exhibits and facts. The exhibits included several articles discussing the Federal Reserve’s efforts to keep the identities of the banks that it bailed out during the financial crisis in 2008 (and details related thereto) secret. The articles discussed a lawsuit successfully brought by Bloomberg L.P. against the Federal Reserve in the United States District Court for the Southern District of New York (Case No. 08-Civ-9595) based on the Freedom of Information Act and which sought to have the Federal Reserve reveal the identities of the banks it bailed out. The Petitioners also attached a number of statutes to the request, including chapter 53 of title 31 of the United States Code (Monetary Transactions). The relevance of these exhibits was unclear.

chapter for which the involuntary case is commenced. 11 U.S.C. § 303(a). Subject to certain exceptions, the Bankruptcy Code provides that a “person” may be a debtor under chapter 7. *Id.* § 109(b).² Pursuant to section 109(d) of the Bankruptcy Code, among other entities, a “person” that may be a debtor under chapter 7 of the Bankruptcy Code may be a debtor under chapter 11 of the Bankruptcy Code. *Id.* § 109(d). A “person” is defined as an “individual, partnership, and corporation”. *Id.* § 101(41). The definition excludes governmental units³ other than a governmental unit that:

- (A) acquires an asset from a person—
 - (i) as a result of the operation of a loan guarantee agreement; or
 - (ii) as receiver or liquidating agent of a person;
- (B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or
- (C) is the legal or beneficial owner of an asset of—
 - (i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or
 - (ii) eligible deferred compensation plan, as defined in section 457(b) of the Internal revenue Code of 1986 ...

Id. Governmental units in such capacity “[s]hall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.” *Id.*

As Judge Teel held, the US Treasury does not fall within any of the categories that permit a governmental unit to be a “person” (and thus a debtor) in a chapter 7 (and therefore a chapter 11) case.

The US Treasury could have also argued that the Petitioners were ineligible petitioning creditors. If the Petitioners did in fact hold secured claims, they would have been ineligible to file the Involuntary Petition unless their claims “aggregate[d] at least \$14,425 more than the value” of their lien on the property of the US Treasury that secured their claims. 11 U.S.C. § 303(b)(1). Of course, the US Treasury may have also challenged the Petitioners’ alleged claims. The Petitioners would have been ineligible to file the Involuntary Petition if their alleged claims were contingent as to liability or subject to bona fide dispute as to liability or amount.

The US Treasury could have also contested the Involuntary Petition on the basis that it is generally paying its debts as they come due; however, this could have involved a lengthy and potentially embarrassing trial.

Had the case not been summarily dismissed by Judge Teel *sua sponte*, there may have been consequences to the Petitioners for filing the Involuntary Petition.⁴ The most likely is that in a motion to dismiss the Involuntary Petition, the US Treasury would have probably sought a judgment against the Petitioners for costs and attorney’s fees. See 11 U.S.C. § 303(i)(1). Damages caused by the filing and punitive damages could have also be awarded against the Petitioners if it was established by the US Treasury that the Petitioners filed the Involuntary Petition in bad faith. See *id.* § 303(i)(2). Also, if the

² Chapter 9 of the Bankruptcy Code covers municipalities. A “municipality” is defined in the Bankruptcy Code as a “political subdivision or public agency or instrumentality of a State.” 11 U.S.C. § 101(40).

³ The Bankruptcy Code defines a “governmental unit” as “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” 11 U.S.C. § 101(27). The US Treasury clearly falls within this definition.

⁴ It may be possible for the Bankruptcy Court to impose some penalty or sanction notwithstanding the dismissal.

Proofs of Claim were fraudulent, the Petitioners could have faced a fine of up to \$500,000 or imprisonment for up to 5 years, or both. See 18 U.S.C. §§ 152 and 3571.⁵ It is also possible that the Petitioners could have been charged with a bankruptcy crime, such as bankruptcy fraud under 18 U.S.C. § 157, which upon a finding of guilt would carry a fine, imprisonment of not more than five years, or both.⁶

⁵ 18 U.S.C. § 152 provides, in relevant part: “A person who ... (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney ... shall be fined under this title, imprisoned not more than 5 years, or both.”

⁶ 18 U.S.C. § 157 provides:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—

- (1) files a petition under title 11, including a fraudulent involuntary bankruptcy petition under section 303 of such title;
- (2) files a document in a proceeding under title 11; or
- (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

If you have questions or need further information about this Client Alert, please contact [Alan E. Gamza](mailto:agamza@mosessinger.com) at 212.554.7878 or agamza@mosessinger.com, [Christopher J. Caruso](mailto:ccarus@mosessinger.com) at 212.554.7893 or ccarus@mosessinger.com or [Christopher R. Gresh](mailto:cgrsh@mosessinger.com) at 212.554.7884 or cgrsh@mosessinger.com.

MOSES & SINGER LLP

Moses & Singer’s [Business Reorganization, Bankruptcy and Creditors’ Rights](#) practice is national in scope. Our attorneys have played significant roles in major corporate and partnership cases across the country involving financial, retail, media, technology, energy, transportation and real estate businesses. Our attorneys regularly represent creditors’ committees, creditors, indenture trustees, lessors, licensors, and debtors in bankruptcy cases and related litigation and in out-of-court exchange offers and corporate restructurings. We advise clients on enforcement of creditors’ rights and defense and prosecution of preference, fraudulent transfer, LBO, lender liability, discharge, environmental, and director fiduciary duty claims, as well as stay litigation concerning foreign and domestic arbitrations and foreclosure proceedings.

Since 1919, [Moses & Singer](#) has provided legal services to diverse businesses and to prominent individuals and their families. Among the firm’s broad array of U.S. and international clients are leaders in banking and finance, entertainment, media, real estate, healthcare, advertising, and the hotel and hospitality industries. We provide cost-effective and result-focused legal services in the following primary areas:

- Advertising
- Asset Protection
- Banking and Finance
- Business Reorganization, Bankruptcy and
- Intellectual Property
- International Trade
- Internet/Technology
- Legal Ethics & Law Firm Practice

-
- Creditors' Rights
 - Corporate, Securities and M & A
 - Employment and Labor
 - Entertainment
 - Healthcare
 - Hotel and Hospitality
 - Income Tax
 - Litigation
 - Matrimonial and Family Law
 - Privacy
 - Private Funds
 - Promotions
 - Real Estate
 - Trusts and Estates
-

The Chrysler Building
405 Lexington Avenue
New York, NY 10174-1299
Tel: 212.554.7800 Fax: 212.554.7700

2200 Fletcher Avenue
Fort Lee, NJ 07024
Tel: 201.363.1210 Fax: 201.363.9210
Abraham Y. Skoff, Esq.
Managing Attorney for New Jersey

Disclaimer

Viewing this document or contacting Moses & Singer LLP does not create an attorney-client relationship.

This document is intended as a general comment on certain developments in the law. It does not contain a complete legal analysis or constitute an opinion of Moses & Singer LLP or any member of the firm on the legal issues herein described. This document contains information that may be modified or rendered incorrect by future legislative or judicial developments. It is recommended that readers not rely on this general guide in structuring or analyzing individual transactions or matters but that professional advice be sought in connection with any such transaction or matter.

Attorney Advertising

It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

Copyright © 2010 Moses & Singer LLP
All Rights Reserved