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Three People Filed an Involuntary Chapter 11 Petition Against the U.S. Treasury Department: Analyzing the Petition

ALAN E. GAMZA, CHRISTOPHER J. CARUSO, AND CHRISTOPHER R. GRESH

Individuals fail in their involuntary petition, and may still face sanctions.

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 “U.S. 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.

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The Involuntary Petition included as exhibits two Proofs of Claim against the U.S. 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 U.S. 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 U.S. 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 U.S. 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.² How might the U.S. Treasury have answered the Involuntary Petition?

THE “PERSON” REQUIREMENT

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 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 7.³ 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.⁴ A “person” is defined as an “individual, partnership, and corporation.”⁵ The definition excludes governmental units⁶ 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....⁷

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.”⁸

As Judge Teel held, the U.S. 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 PETITIONING CREDITORS

The U.S. 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 U.S. Treasury that secured their claims.⁹

Of course, the U.S. 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.

GENERALLY PAYING DEBTS AS THEY COME DUE

The U.S. 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.

POTENTIAL CONSEQUENCES

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.¹⁰ The most likely is that in a motion to dismiss the Involuntary Petition, the U.S. Treasury would have probably sought a judgment against the Petitioners for costs and attorney's fees.¹¹ Damages caused by the filing and punitive damages could have also be awarded against the Petitioners if it was established by the U.S. Treasury that the Petitioners filed the Involuntary Petition in bad faith.¹² Also, if the Proofs of Claim were fraudulent, the Petitioners could have faced a fine of up to \$500,000 or imprisonment for up to five years, or both.¹³ 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.¹⁴

NOTES

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.

² *See* Fed. R. Bankr. P. 1010(a); 1011(b).

³ *Id.* § 109(b). 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).

⁴ *Id.* § 109(d).

⁵ *Id.* § 101(41).

⁶ 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 U.S. Treasury clearly falls within this definition.

⁷ *Id.* § 101(41).

⁸ *Id.*

⁹ 11 U.S.C. § 303(b)(1).

¹⁰ It may be possible for the bankruptcy court to impose some penalty or sanction notwithstanding the dismissal.

¹¹ *See* 11 U.S.C. § 303(i)(1).

¹² *See id.* § 303(i)(2).

¹³ *See* 18 U.S.C. §§ 152 and 3571. 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.”

1418 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.

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