

11 U.S.C. § 1325(a)(3)
11 U.S.C. § 1328(a)
Good Faith
Superdischarge

Charles Robert Schiffman, Case No. 05-46152

7/19/2006 RLD

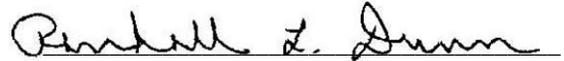
Unpub.

Chapter 13 creditor asserting claim against debtor for alleged sexual abuse moved to dismiss debtor's chapter 13 case. The Court treated the motion as an objection to confirmation of debtor's chapter 13 plan based on alleged bad faith. The Court held that seeking a discharge of the financial consequences of even egregious pre-petition conduct does not per se constitute bad faith. The court further held that the creditor did not meet his burden of proving that in the totality of the circumstances the chapter 13 petition and plan were filed in bad faith. Debtor did not inappropriately manipulate the Bankruptcy Code or inequitably file his Chapter 13 petition by filing the case immediately prior to the effective date of BAPCPA in order to preserve his access to the pre-BAPCPA § 1328(a) "superdischarge." Debtor had no history of prior bankruptcy filings, and the evidence did not establish that debtor had artificially inflated his credit card debt to "mask" his true purpose for filing bankruptcy as alleged by the creditor. The motion to dismiss was denied, the creditor's objection to plan confirmation was overruled, and debtor's chapter 13 plan was confirmed.

P06(8)-16

Below is an Order of the Court.

NOT FOR PUBLICATION



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
CHARLES ROBERT SCHIFFMAN,) No. 05-46152-rld13
Debtor.) MEMORANDUM OPINION

This case came before me for an all day evidentiary hearing (the "Hearing") on June 27, 2006, on creditor/claimant Aaron Thomas' ("Mr. Thomas") Motion to Dismiss debtor Charles R. Schiffman's ("Mr. Schiffman") chapter 13 case (the "Motion to Dismiss"). At the time that the Hearing was scheduled, I advised counsel for Mr. Schiffman that I would treat the Motion to Dismiss as an objection to confirmation of Mr. Schiffman's chapter 13 plan based on alleged bad faith. As I explained to the parties at the time of the Hearing, Mr. Thomas bore the burden of proof on his Motion to Dismiss, but Mr. Schiffman bore the burden of proof to establish that his chapter 13 plan was proposed in good faith, as provided in Section 1325(a)(3) of the Bankruptcy Code.¹

¹ Unless indicated otherwise, all statute section and chapter (continued...)

1 to object to Mr. Thomas' claim at the Hearing. When Mr. Schiffman filed
2 his bankruptcy case, he listed Mr. Thomas' claim in Schedule F² and
3 characterized the claim as contingent, unliquidated and disputed, in an
4 unknown amount. See Docket # 1, Schedule F.

5 Mr. Schiffman filed his chapter 13 petition on October 14,
6 2005, the Friday before the Monday, October 17, 2005 effective date of
7 most of the provisions of BAPCPA. Mr. Thomas received notice of
8 Mr. Schiffman's bankruptcy filing and first appeared in this case through
9 counsel, Bradley O. Baker, on December 12, 2005. See Docket # 18.

10 In his schedules, Mr. Schiffman listed unsecured credit card
11 and bank loan debt totaling \$65,493. See Docket # 1, Schedule F. During
12 the period from September 2003 through October 2005, Mr. Schiffman's
13 aggregate outstanding credit card debt increased from \$16,907.69 to
14 \$63,882.95, an increase of \$46,975.26. See Exhibit 11. However,
15 Mr. Schiffman's aggregate credit card debt already had increased to at
16 least \$33,681.71 by the time Mr. Thomas first contacted him about the
17 subject incident in June 2004. See Exhibit 11. From June 2004 through
18 October 2005, Mr. Schiffman made payments totaling \$25,025.86 on his
19 credit card obligations. See Exhibit 11. Mr. Schiffman testified that
20 at the time of his bankruptcy filing, he had unused credit card borrowing
21 availability of \$75,000 and approximately \$20,000 cash value in life
22 insurance.

23 Under the Plan, Mr. Schiffman proposes payments of \$919 x 5;
24 \$1,590 x 9; and \$1,882 thereafter for an approximate plan term of 39

25
26 ² Mr. Thomas was identified in Schedule F only by the initials
"T.A." No other similar claims were scheduled.

1 months, or a total of approximately \$65,955 in payments over the life of
2 the Plan. See Exhibit 8. His plan payments total the amount that
3 Mr. Schiffman estimates would be recovered by unsecured creditors in a
4 chapter 7 liquidation, the "best interest" number, plus amounts equal to
5 the amounts of recent gifts Mr. Schiffman made to his wife and daughter.

6 Mr. Schiffman testified that his decision to file for
7 bankruptcy protection under chapter 13 was influenced by a number of
8 factors. He was falling deeper and deeper into debt. Mr. Thomas' claim
9 was unresolved and potentially presented substantial risks for the
10 future. BAPCPA changed the Bankruptcy Code in profound ways that would
11 go into effect on October 17, 2005: The BAPCPA amendments could prevent
12 the discharge of claims, such as Mr. Thomas', in chapter 13, and if a
13 final determination was made that Mr. Schiffman was liable to Mr. Thomas,
14 the amount of any award of damages might make Mr. Schiffman ineligible
15 for chapter 13 relief. Mr. Schiffman also testified that he understood
16 that under chapter 13, he would be required to make payments to his
17 creditors, and he wished to make such payments to the extent he was able.

18 I generally found Mr. Schiffman's testimony credible, with one
19 exception. Mr. Schiffman testified that he first consulted with
20 bankruptcy counsel in September 2005. The first admitted page of Exhibit
21 E is a copy of a letter dated April 5, 2005 (the "April 5th Letter") from
22 counsel for Mr. Schiffman, Thomas E. Cooney, to counsel for Mr. Thomas,
23 Michael S. Morey. The first sentence of the April 5th Letter reads as
24 follows: "I have spoken to Mr. Schiffman's bankruptcy lawyer, Mr. Robert
25 Vanden Bos, and he thinks that the maximum exposure, if Mr. Schiffman
26 were to go through bankruptcy, would be \$72,000." Later during the

1 Hearing, Mr. Schiffman's counsel advised that he had reviewed his firm's
2 time records, and the first time entry reflecting a meeting with
3 Mr. Schiffman was for May 24, 2005, but time was billed commencing in
4 September 2005.

5 The parties engaged in substantial settlement negotiations in
6 advance of Mr. Schiffman's bankruptcy filing.³ Mr. Schiffman, at his own
7 expense, flew to Memphis, Tennessee, where Mr. Thomas lived, to give a
8 statement under hypnosis about the 1969 incident with Mr. Thomas in
9 Israel. Former Oregon state court judge Alan Bonebrake mediated their
10 dispute in March 2005. The mediation resulted in an impasse, with the
11 parties approximately \$40,000 apart on money issues. According to
12 Mr. Thomas, his bottom line settlement number was \$125,000, and
13 Mr. Schiffman would offer no higher than \$85,000. Mr. Morey subsequently
14 resigned as Mr. Thomas' counsel based on differences that had arisen
15 between him and Mr. Thomas in approaches to settling Mr. Thomas' claim
16 against Mr. Schiffman.

17 Thereafter, negotiations continued between Mr. Thomas directly
18 and Mr. Schiffman's counsel. Mr. Thomas testified that he advised
19 Mr. Schiffman that he planned to file a lawsuit against Mr. Schiffman
20 before the running of the statute of limitations, as Mr. Thomas
21 calculated it, by the end of October 2005. On October 11, 2005,
22 Mr. Schiffman's counsel advised Mr. Thomas that Mr. Schiffman was about
23

24 ³ Fed. R. Evid. 408 generally precludes the admissibility of
25 settlement negotiations to prove liability for or validity of a claim or
26 its amount. The rule does not require exclusion of settlement
negotiations when offered for another purpose, such as establishing
whether the debtor's plan was proposed in good faith.

1 to file bankruptcy and extended an offer to settle Mr. Thomas' claim for
2 \$90,000 cash "in exchange for a full and complete release with a
3 confidentiality agreement." Exhibit E, p. 2.

4 After Mr. Schiffman filed bankruptcy, at the parties' request,
5 I set up a settlement conference ("Settlement Conference") with Judge
6 Albert E. Radcliffe of this court on January 23, 2006. The Settlement
7 Conference resulted in a tentative settlement being read into the record,
8 under which Mr. Schiffman agreed a) to pay Mr. Thomas a total of \$87,000
9 and b) further agreed to travel to Memphis, Tennessee, where
10 Mr. Schiffman would go with Mr. Thomas to a synagogue and under oath,
11 would describe the events that occurred in the summer of 1969 involving
12 sexual abuse of Mr. Thomas. Under the settlement, extended payment of
13 the settlement amount would be secured by a deed of trust on
14 Mr. Schiffman's residence. In exchange, Mr. Schiffman would receive a
15 release of all claims from Mr. Thomas, and Mr. Schiffman would move to
16 dismiss his chapter 13 case.

17 Unfortunately, the settlement negotiated during the Settlement
18 Conference fell apart for reasons that relate in part to the language of
19 the proposed settlement document(s). Thereafter, Mr. Baker resigned as
20 Mr. Thomas' bankruptcy counsel based on his disagreement with Mr. Thomas
21 "on a response to the form of settlement proposed by Mr. Vanden Bos...
22 [and based on] differences in approach to the documentation of the
23 settlement which have adversely affected our ability to work together in
24 a productive attorney/client relationship." Motion to Withdraw as
25 Creditor's Attorney, Docket # 37, pp. 1-2.

26 The parties have continued to discuss settlement options up to

1 the Hearing, and I suggested that they continue their discussions as I
2 considered this matter under advisement. At the Hearing, counsel for the
3 chapter 13 trustee recommended confirmation of the Plan.

4 Jurisdiction

5 This court has core jurisdiction to rule on the contested
6 matters raised at the Hearing under 28 U.S.C. §§ 1334, 157(a), 157(b)(1),
7 and 157(b)(2)(L), and pursuant to United States District Court for the
8 District of Oregon Local Rule 2100.

9 Legal Discussion

10 The issues before me revolve around Mr. Thomas' allegations of
11 Mr. Schiffman's "bad faith." Section 1325(a)(3) provides that I only can
12 confirm a chapter 13 plan if "the plan has been proposed in good faith
13 and not by any means forbidden by law." In addition, on request of a
14 party in interest, a chapter 13 case can be dismissed or converted to a
15 case under chapter 7, "whichever is in the best interests of creditors
16 and the estate," for "cause" pursuant to Section 1307(c). The Ninth
17 Circuit has held that the debtor's bad faith in filing a chapter 13 case
18 may constitute cause for dismissal under Section 1307(c). In re Eisen,
19 14 F.3d 469 (9th Cir. 1994).

20 In determining whether a chapter 13 petition or plan has been
21 filed in bad faith, the court must review the "totality of the
22 circumstances." In re Eisen, 14 F.3d at 470 (quoting In re Goeb, 675
23 F.2d 1386, 1391 (9th Cir. 1982)).

24 In considering evidence in the totality of the circumstances,
25 four factors particularly should be considered:

26 Factor 1. Whether the debtor misrepresented facts in his or

1 her petition or plan, unfairly manipulated the Bankruptcy Code, or
2 otherwise filed the chapter 13 petition or plan in an inequitable manner;

3 Factor 2. The debtor's history of bankruptcy filings and
4 dismissals;

5 Factor 3. Whether the debtor's only purpose in filing for
6 chapter 13 protection is to defeat state court litigation; and

7 Factor 4. Whether egregious behavior is present. In re
8 Leavitt, 171 F.3d 1219, 1224 (9th Cir. 1999).

9 Mr. Thomas particularly has recommended to my attention the
10 decision of the United States Bankruptcy Court for the Eastern District
11 of Pennsylvania in In re Norwood, 178 B.R. 683 (Bankr. E.D. PA 1995). In
12 Norwood, the bankruptcy court denied confirmation of the debtor's amended
13 chapter 13 plan, finding that it was not proposed in good faith. The
14 debtor had filed his chapter 13 petition after a default judgment for
15 \$50,000 compensatory damages, \$10,000 punitive damages and counsel fees
16 had been entered against him in the objecting creditor's suit alleging
17 sexual assault. Of the \$64,699.71 aggregate of general unsecured claims
18 listed on the debtor's Schedule F, the objecting creditor's claim, listed
19 at \$60,000, covered all but \$4,699.71 of the total. The debtor's amended
20 chapter 13 plan provided for payments over a term of 54 months to pay
21 mortgage arrears on the debtor's residence and priority unsecured claims,
22 but did not provide for any distribution on unsecured claims, including
23 the claim of the objecting creditor. In addition, the debtor's
24 disposable income was inadequate to fund the required payments under the
25 amended plan: the debtor was relying on supplemental contributions from
26 his mother, on Social Security, and his sister to make the plan work.

1 The bankruptcy court could not find that the plan was feasible.

2 The bankruptcy court denied confirmation of the amended plan in
3 the Norwood case but gave the debtor another 20 days to file a further
4 amended plan to allow for confirmation in chapter 13. While finding that
5 the debtor had failed to satisfy his burden of proof to establish that
6 the amended chapter 13 plan was proposed in good faith, the Norwood court
7 recognized that in performing the necessary legal analysis, "the court
8 must be cautious not to engage in 'moralizing' egregious conduct
9 committed by the debtor prepetition." Id. at 688.

10 Because the Chapter 13 discharge is broader than that
11 provided in Chapter 7, Chapter 13 affords Debtor the
12 opportunity to discharge this debt even though such
13 debt would likely be nondischargeable in a Chapter 7
14 proceeding under Code § 523(a)(6). [Citations
15 omitted.] That the Debtor has resorted to a section
16 of the Code that would afford him a discharge of a
17 debt that would be nondischargeable in Chapter 7 does
18 not in and of itself provide a sufficient basis from
19 which to conclude that the plan was proposed in bad
20 faith. [Citations omitted.] Id. at 689.

21 Also see Noreen v. Slattengren, 974 F.2d 75 (8th Cir. 1992), in which the
22 Eight Circuit affirmed the bankruptcy court's denial of confirmation of a
23 chapter 13 plan and dismissal of the debtor's chapter 13 case, based on
24 the bankruptcy court's finding that the debtor's chapter 13 plan was
25 proposed in bad faith.

26 The Bankruptcy Court focused on three factors in
finding that Noreen's plan was filed in bad faith:
(1) the plan was filed only eleven days before
Slattengren's civil suit (claiming damages resulting
from Noreen's sexual abuse of Slattengren) was set to
go to trial, thereby preventing her from having her
case heard; (2) Noreen's Chapter 13 case was filed
not because of debts that came due in the ordinary
course, but in anticipation of the likely damage award
resulting from Slattengren's civil suit; and (3) the
initial plan offered only a meager payment plan, which

1 was increased only in response to Slattengren's
2 objection. Id. at 77.

3 Both Norwood and Noreen underline an important point for the
4 legal analysis in this case: Proposing to discharge an obligation
5 arising from a sexual assault claim through a plan in chapter 13 does not
6 make filing a chapter 13 case an act of bad faith as a matter of law.
7 Determining whether a chapter 13 bankruptcy petition was filed in good
8 faith and whether a chapter 13 plan was proposed in good faith are fact
9 based, in the "totality of the circumstances," including consideration of
10 the nature of the claims for which discharge is sought. See, e.g., In re
11 Smith, 286 F.3d 461, 465-66 (7th Cir. 2002) ("We have held that simply
12 availing oneself of the more liberal provisions of Chapter 13 to
13 discharge a debt that is not dischargeable in Chapter 7 is not sufficient
14 to constitute bad faith."); and In re Street, 55 B.R. 763, 765 (9th Cir.
15 BAP 1985) ("Seeking to discharge an otherwise nondischargeable debt is
16 only one factor to be considered in determining whether the plan was
17 proposed in good faith.").

18 In the Motion to Dismiss, Mr. Thomas argues three grounds for
19 finding bad faith cause to deny confirmation of the Plan and dismiss
20 Mr. Schiffman's chapter 13 case: (1) Through chapter 13, Mr. Schiffman
21 seeks to avoid facing a judicial accounting for his sexual assault of a
22 child entrusted to his care. (2) Mr. Schiffman has artificially
23 inflated his credit card debt to provide a justification for his
24 bankruptcy filing. (3) Mr. Schiffman timed his bankruptcy filing to use
25 the pre-BAPCPA Bankruptcy Code as a shield against all accountability. I
26 will address each of these arguments in considering the Leavitt factors

1 for determining whether "bad faith" is implicated in this case.

2 Factor 1: There is no evidence in the record tending to
3 indicate that Mr. Schiffman misrepresented any facts in his chapter 13
4 petition or in the Plan. As for manipulation of the Bankruptcy Code or
5 Mr. Schiffman filing for chapter 13 relief in an inequitable manner,
6 arguably timing is the issue.

7 Mr. Schiffman filed his chapter 13 petition three days before
8 the effective date of most of the provisions of BAPCPA. Under the
9 Bankruptcy Code in effect on October 14, 2005, when Mr. Schiffman filed
10 his chapter 13 petition, a debtor may discharge personal injury
11 obligations, including personal injury damages resulting to another
12 person from the willful and malicious acts of the debtor. See §§ 1328(a)
13 and 523(a)(6). Under BAPCPA, a debtor cannot discharge damages "awarded
14 in a civil action against the debtor as a result of willful or malicious
15 injury by the debtor that caused personal injury to an individual...."
16 See new § 1328(a)(4), effective October 17, 2005, under BAPCPA.

17 Mr. Thomas argues that Mr. Schiffman is attempting to use
18 bankruptcy to avoid a judicial accounting for his sexual assault of a
19 child under his care. He further argues that such use of the remedies
20 afforded by the Bankruptcy Code is inappropriate and inequitable.
21 Assuming that Mr. Schiffman sexually assaulted Mr. Thomas in 1969 in
22 Israel, Mr. Schiffman's chapter 13 filing in 2005 availed Mr. Schiffman
23 of a means to limit his liability to Mr. Thomas and Mr. Schiffman's other
24 creditors through commitment to pay all of his disposable income over a
25 term of years to fund the Plan for the benefit of his creditors.

26 The "superdischarge" in chapter 13 has operated as an incentive

1 to debtors with regular earnings to enter into payment plans for the
2 benefit of their creditors. If Congress determined through BAPCPA that
3 the original "superdischarge" was too liberal, and if it wanted to stop
4 discharges of personal injury obligations in chapter 13 immediately, it
5 could have made the effective date for the constricted discharge in
6 chapter 13 effective immediately upon signature of the BAPCPA legislation
7 by the President, as it did with several other provisions of BAPCPA.
8 See, e.g., the provisions for reduction and/or limitation of the
9 homestead exemption in new subsections 522(o), (p), and (q). Margaret
10 Howard, Exemptions under the 2005 Bankruptcy Amendments: A Tale of
11 Opportunity Lost, 79 Am. Bankr. L.J. 397, 399 n.12 (2005).

12 The record establishes that Mr. Schiffman attempted to
13 negotiate a settlement with Mr. Thomas virtually up to the last minute
14 before he filed his chapter 13 petition in order to preserve his right to
15 the more liberal "superdischarge" pre-BAPCPA and to preserve his right to
16 chapter 13 bankruptcy relief generally. Mr. Thomas admitted at the
17 Hearing that settlement negotiations were conducted in good faith by
18 Mr. Schiffman. Mr. Schiffman joined more than 500,000 Americans who
19 filed for bankruptcy relief within the two weeks preceding the BAPCPA
20 effective date, and in the circumstances of this case, I do not find that
21 Mr. Schiffman inappropriately manipulated the Bankruptcy Code or
22 inequitably filed his chapter 13 petition.

23 In addition, Mr. Schiffman is committed to pay approximately
24 \$65,955 over 39 months under the Plan, a large proportion of which will
25 be distributed to Mr. Thomas. I do not find that payment commitment to
26 be *de minimis*. On the contrary, I find that Mr. Schiffman proposes

1 substantial payments under the Plan to his creditors over a period in
2 excess of three years. The Plan does not project a 0% payment to general
3 unsecured creditors, as in the chapter 13 plan before the Norwood court.
4 I understand that Mr. Thomas does not regard Mr. Schiffman's payment
5 commitment under the Plan as adequate to redress his grievances.
6 However, I do not find that the Plan has been proposed in an inequitable
7 manner.

8 Factor 2: Mr. Schiffman does not have any prior history of
9 bankruptcy filings and dismissals. His pending chapter 13 case is his
10 sole bankruptcy filing.

11 Factor 3: I find that at least one purpose of Mr. Schiffman's
12 chapter 13 filing was to avoid litigating Mr. Thomas' claim in another
13 forum. However, I do not find avoidance of litigation to be the sole
14 purpose for Mr. Schiffman's seeking bankruptcy protection.

15 Mr. Schiffman obviously has debt problems beyond Mr. Thomas'
16 claim. Without Mr. Thomas' claim, Mr. Schiffman might not have filed for
17 bankruptcy protection when he did, but his imprudent credit card use,
18 whether or not he had reached a settlement with Mr. Thomas, could very
19 well have precipitated a bankruptcy filing at some point. See Exhibits
20 10 and 11. Indeed, considering the settlement numbers being discussed
21 between Mr. Schiffman and Mr. Thomas, arriving at an agreeable settlement
22 might have pushed Mr. Schiffman into bankruptcy at some point in any
23 event.

24 Based on the record in this case, I do not find that
25 Mr. Schiffman artificially inflated his credit card debt in order to mask
26 his true purpose in filing for bankruptcy relief. I further do not find

1 that Mr. Schiffman engaged in a credit card "bust out." His credit card
2 use did not change all that dramatically after he was confronted by
3 Mr. Thomas in June 2004, and Mr. Schiffman made more substantial payments
4 over time on his credit card debt than I typically see with credit card
5 abusers. He also still had \$75,000 of unused credit card borrowing
6 availability on the filing date.

7 Mr. Schiffman filed his chapter 13 petition when he did in
8 order to take advantage of chapter 13 options that would not have been
9 available to him had he waited until October 17, 2005, to file.

10 Mr. Thomas' claim may have been the precipitating cause of
11 Mr. Schiffman's bankruptcy filing, but it was not the only cause. I find
12 that Mr. Schiffman's desire not to participate in litigation with Mr.
13 Thomas was not the only purpose behind Mr. Schiffman's bankruptcy filing.

14 Factor 4: I am mindful of the admonition of the Norwood court
15 that "the court must be cautious not to engage in 'moralizing' egregious
16 conduct committed by the debtor prepetition." In re Norwood, 178 B.R. at
17 688. Assuming that Mr. Schiffman committed sexual abuse of a minor in
18 1969, does that make his filing of a chapter 13 petition and proposing a
19 Plan to discharge his indebtedness, including the unliquidated claim of
20 Mr. Thomas, in 2005 an act of bad faith? I find that it does not.

21 At the Hearing's final argument, Mr. Thomas focused on his
22 arguments that Mr. Schiffman's chapter 13 filing avoided accounting for
23 his actions and avoided responsibility for his debts. When I asked
24 Mr. Thomas what conduct of Mr. Schiffman would provide the desired
25 accounting for Mr. Thomas' injury, Mr. Thomas could not give me a
26 specific answer, but ultimately fell back on an argument he made at the

