

Motion to Dismiss  
11 USC § 521(e)

Scott and Wendy Duffus, Case No. 605-75085-fra7

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Code § 521(e) was added to the Bankruptcy Code as part of the Bankruptcy Abuse prevention and Consumer Protection Act of 2005. It provides at (e)(2) that the debtor provide to the trustee, at least seven days prior to the meeting of creditors, a copy of debtor's federal tax return for the most recent tax year ending prior to the petition date. If debtor fails to comply with the tax return requirements, the court is instructed to dismiss the case unless the debtor can demonstrate that the failure was due to circumstances beyond the debtor's control.

While the Debtors provided the required tax return to their attorney in a timely manner, the attorney neglected to pass it on to the trustee until the day before the meeting of creditors. The Trustee, while stating that he did not advocate dismissal and had identified possible assets to administer, felt that he had no choice but to file a motion to dismiss.

The court, in denying the motion to dismiss, stated that a trustee has "prosecutorial discretion" in deciding whether to file a motion to dismiss. Where Congress intended that a case be automatically dismissed without the need for a motion, it provided for it. Because the Trustee failed to exercise his discretion in filing the motion to dismiss, the court chose to deny the motion.



1 not provided seven days prior to the § 341(a) meeting as the statute  
2 requires.

3 As it happens, the returns were in the Debtors' attorney's  
4 possession from the time of their initial meeting, and in enough time to  
5 make a timely delivery to the Trustee. The Debtors assert that they had  
6 done all they could do to ensure delivery, and should not be penalized by  
7 the attorney's oversight.

8 In his motion, the Trustee notes that he "[does] not advocate  
9 for dismissal," and that he has identified possible assets for  
10 distribution.

## 11 II. DISCUSSION

12 Code § 521(e) was added by the Bankruptcy Abuse Prevention and  
13 Consumer Protection Act of 2005. It provides at § 521(e)(2) that:

14 (A) The debtor shall provide -

15 (I) not later than seven days before the date  
16 first set for the first meeting of creditors, to the  
17 trustee a copy of the federal income tax return  
18 required under applicable law (or at the election of  
19 the debtor, a transcript of such return) for the most  
20 recent tax year ending immediately before the  
21 commencement of the case, and for which a federal  
22 income tax return was filed; and

23 (ii) at the same time the debtor complies with  
24 clause (I), a copy of such return (or if elected under  
25 clause (I) such transcript) to any creditor that  
26 timely requests such copy.

(B) If the debtor fails to comply with clause (I) or  
(ii) of subparagraph (a), the court shall dismiss the  
case unless the debtor demonstrates that the failure  
to so comply is due to circumstances beyond the  
control of the debtor.

Both parties agree that there are assets available to the  
estate for distribution to creditors. Nevertheless, the Trustee

1 maintains that he has no choice but to file the motion.<sup>1</sup> The Trustee is  
2 mistaken. Where, as here, dismissal is contrary to the interest of the  
3 estate and of creditors, the Trustee has the authority to waive an  
4 untimely delivery of documents simply by declining to file a motion.

5 There is substantial authority that trustees have such  
6 "prosecutorial discretion." See Society Bank v. Sinder (In re Sinder),  
7 102 B.R. 978 (Bankr. S.D. Ohio 1989), Larson v. Munoz (In re Munoz), 111  
8 B.R. 928 (D. Col. 1990), In re. V. Savino Oil & Heating Co., Inc., 91  
9 B.R. 655 (Bankr. E.D.N.Y. 1988). While most of the cases involve the  
10 initiation of adversary proceedings, the same principle applies here. It  
11 is the Trustee's principal duty to accumulate assets for distribution to  
12 creditors. This obligation is not necessarily trumped by a perceived  
13 duty to police every aspect of the case.<sup>2</sup>

14 This is not inconsistent with the structure of the Code, as  
15 amended by BAPCPA. The ordinary predicate for any order is a motion. F.  
16 R. Bankr. P. 9014.<sup>3</sup> This applies to nearly every proceeding which may  
17 result in dismissal. See, e.g. Code §§ 707, 1112, 1208, 1307. Where  
18 the Congress intended that a case be dismissed automatically, and without  
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21 <sup>1</sup> The Court wrote to the parties, and to the U.S. Trustee, asking them to comment  
22 on the issue of whether a trustee has the discretion to decline to file a motion to  
23 dismiss. There was no substantial response to the Court's inquiry. Particularly  
disappointing is the U.S. Trustee's failure to comment one way or the other. Neither  
the Trustee nor the U.S. Trustee appeared at the hearing.

24 <sup>2</sup> In fact, given the structure of the modern Code, it may be argued that the  
25 policing duty has been shifted by the Congress to the U.S. Trustee. See 11 U.S.C. §  
307.

26 <sup>3</sup> The Rule provides that "In a contested matter not otherwise governed by these  
rules, relief shall be sought by motion...."

1 the need for a motion, it said as much. See § 521(i)(1)<sup>4</sup>

2 Application of the wrong legal standard in the exercise of  
3 discretion constitutes an abuse of that discretion. Cf. In re Beatty,  
4 162 B.R. 853, 855 (BAP 9<sup>th</sup> Cir. 1994). The Trustee failed to consider  
5 the estate's interest in determining whether or not to file his motion,  
6 in the erroneous belief that such interest could not be taken into  
7 account. Accordingly, the motion should be denied.

8 The foregoing constitutes the Court's findings of fact and  
9 conclusions of law. An separate order denying the trustee's motion will  
10 be entered.

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13 FRANK R. ALLEY, III  
14 Bankruptcy Judge  
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25 <sup>4</sup> § 521(i)(1): "...if an individual debtor in a voluntary case under chapter 7 or  
26 13 fails to file all of the information required under subsection (a)(1) within 45 days  
after the date of the filing of the petition, the case shall be automatically dismissed  
effective on the 46<sup>th</sup> day after the date of the filing of the petition."