

CONSUMER BANKRUPTCY

Trustee Who Fails to Timely Administer Asset Loses It

By Craig D. Robins

It sometimes gets monotonous for trustees at meetings of creditors. In case after case they must examine the debtors by essentially asking the same questions repeatedly. It is therefore not surprising that every now and then they may skip an important question or forget to inquire about something.

Sometimes the trustee's best intentions to examine the debtor don't go as planned due to hiccups that occur in the hearing room. Such a situation recently happened and came back to haunt a Chapter 7 trustee in Illinois who learned a difficult lesson about the consequences of not being careful enough and forgetting to ask important questions. *In re Lusher*, 2019 WL 4553432, Case No. 18-71772 (Bankr. C.D. Ill., Sept. 19, 2019).

In December 2018, husband and wife debtors filed a typical Chapter 7 consumer petition. The husband's brother had passed away shortly prior to the filing. The debtors disclosed the possibility of receiving an inheritance by declaring on their schedule of assets, "possible inheritance from debtor's brother passing," with a value of "unknown."

On their schedule of exemptions, the debtors claimed as exempt up to \$3,573 of the possible inheritance, an amount representing the otherwise unused portion of their Illinois wild card exemption.

About a month after filing, in January 2019, the meeting of creditors was held and a week later, the trustee filed his "Report of No Distribution" indicating that he had "made a diligent inquiry into the financial affairs of the debtor(s) and...that there is no property available for distribution from the estate." The report, which we commonly refer to as a "no-asset report," included the trustee's certification that the estate had been fully admin-

istered. The court issued an order discharging the debtors in April 2019, at which time the court clerk formally closed the case.

In May 2019, the debtors' attorney, who had learned from his clients that the inheritance was worth about \$80,000, sent an email to the trustee informing him of this. Then, in June 2019, the trustee filed a motion to reopen the case for the purpose of administering the inheritance as an asset of the estate.

The trustee acknowledged that the debtors had initially disclosed a possible inheritance of an unknown amount, but the trustee claimed the debtors provided no further information while the case was pending. Then, at the hearing on the motion, the trustee expressed concern as to the completeness of the debtors' disclosures on their schedules.

However, the trustee admitted to the judge that he had specifically made a note to ask the debtors about the inheritance, but since the debtors were late to the meeting and he took their case out of order, the matter "slipped his mind."

The trustee also acknowledged in court that he was "not particularly pleased with himself." He expressed frustration at having conducted the examination in a hurry when he had already packed up his briefcase, but candidly acknowledged that the issue of the inheritance "was in his notes." Nevertheless, he argued that he should be able to reopen the case and administer the inheritance for the benefit of the debtors' creditors.

The debtors' attorney objected to the case reopening, arguing that the inheritance had been disclosed and was abandoned when the case closed.

Judge Mary P. Gorman, of the Central District of Illinois, determined that the debtors



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had done nothing wrong and that the trustee had the opportunity to administer the asset. She noted several basic concepts. Code section 554(c) provides that "any property scheduled...[but] not otherwise administered at the time of the closing of a case is abandoned to the debtor." There is a presumption that the estate has been fully

administered in cases where "the trustee has filed a final report and final account and has certified that the estate has been fully administered. In order to reopen a case to administer assets, the assets must not be known at the time the case was closed.

Judge Gorman stated that the ultimate issue was whether the trustee should be permitted to withdraw his no-asset report and bring an abandoned asset back into the estate. In other words, can the trustee revoke his prior abandonment? The court said no.

Most jurisdictions have case law providing for a multi-factor test to determine if a case should be reopened. Here, the court determined that two factors weighed heavily against the trustee. The trustee was initially afforded the ability to make an informed decision with respect to administering the asset, and the failure to administer the asset was the trustee's fault.

The debtors disclosed the potential inheritance; the trustee could have asked questions about it; and the trustee could have kept the case open as long as necessary to get any additional information. Instead, the trustee candidly admitted that in the haste of conducting his meeting he failed to consult his own notes, which had "slipped" his mind. He filed his Report of No Distribution a few days later and never looked back.

Finally, the judge observed that even though the trustee complained that the debt-

ors could have volunteered more at the meeting, his own transcript of the meeting suggested that the debtors answered all questions truthfully.

Perhaps harshly, the judge stated that "the trustee is solely at fault for the inheritance not being administered and the case being closed, resulting in the inheritance being abandoned. He admits he was on notice to inquire and he failed to inquire. Nothing the debtors did or said precluded him from doing his job."

Judge Gorman also noted that the debtor's scheduling of the potential asset was a "clear disclosure" that "was not a hint or a vague reference."

In concluding, the judge stated, "Mistakes happen, and the trustee surely should have done things differently here. The trustee has admitted as much. Under the circumstances, reopening the case is not appropriate."

Thus, the trustee was admonished for bringing the proceeding and the debtors received an unexpected windfall, although at the expense of the creditors.

This case illustrates the importance of disclosing assets in the petition, especially those that are not exempt. Although a debtor is obligated to do so and can be denied a discharge for failure to disclose, every now and then a trustee's failure to adequately investigate, despite full disclosure, can provide an unexpected bonus.

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EMPLOYMENT

FLSA Settlements Reached Via Rule 68(a) Offer of Judgment Do Not Require Court Approval

By Mordy Yankovich



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Since the Second Circuit's decision in *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), parties have been unable to stipulate to the dismissal of Fair Labor Standards Act ("FLSA") claims. Rather, settlements of FLSA claims (i.e. unpaid wages, overtime compensation, etc.) require the approval of the Department of Labor or a federal district court. The Second Circuit in *Cheeks* held that the FLSA represented an exception to the Federal Rule of Civil Procedure 41(a)(1)(A), which generally permits the parties to a lawsuit to stipulate to the dismissal of an action without judicial intervention. The court reasoned that settlements without court approval frustrate the purpose of the FLSA by permitting employers to coerce employees into unjust settlements and waiver of their claims.

Court approval of settlements of FLSA claims are often labor intensive, requiring

plaintiff(s) and defendant(s) to submit a joint letter articulating the reasonableness/fairness of the settlement agreement (including the reasonableness of attorneys' fees) based on the claims and defenses of the parties, and/or appear for a fairness hearing. This often delays the settlement process for months.

However, the Second Circuit has recently authorized an avenue for settlement without court approval – a Rule 68(a) Offer of Judgment.

In *Yu v. Hasaki Restaurant*, 17-3388-cv (Decided on Dec. 6, 2019), a sushi chef ("Plaintiff") at Hasaki Restaurant ("Hasaki"), filed a lawsuit against Hasaki claiming that Hasaki failed to pay Plaintiff overtime compensation in violation of the FLSA. Hasaki sent Plaintiff an Offer of Judgment, pursuant to 68(a) of the Federal Rules of Civil Procedure in the amount of \$20,000, plus reasonable attorneys' fees. Plaintiff accepted the offer, which was then filed with the Southern District of New York. However, the court declined to enter the judgment pending submis-

sion of the settlement agreement along with a joint letter explaining why the settlement agreement was fair and reasonable, pursuant to *Cheeks*, for judicial approval. Both parties disputed the court's decision to conduct a fairness review and filed an interlocutory appeal with the Second Circuit that judicial approval of a settlement agreement reached pursuant to Rule 68(a) was not required.

In overturning the District Court's decision, the Second Circuit relied on the plain meaning of Rule 68(a), which states, in relevant part:

At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment (emphasis added).

This mandatory language along with the lack of any express requirement of court approval in the FLSA guided the court's deci-

sion. In addition, the court found that entering a Rule 68(a) judgment without court approval does not overly frustrate the purpose of the FLSA because an Offer of Judgment (which contains the amount of the settlement) is publicly filed minimizing the chances of "secret," unjust or coercive settlements.

Utilizing an offer of judgment to resolve wage and hour disputes is often a useful tool because it compels the plaintiff to consider the value of their case. If the plaintiff declines the offer, the plaintiff is responsible for the costs (inclusive of attorneys' fees) incurred following the declination of the offer if the verdict obtained is less than the offer. Now, in light of *Yu*, an expedited settlement without court approval provides extra incentive for defendant to make a Rule 68(a) Offer of Judgment.

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