By Michael B. Joseph

Consumer *Pro Se* Bankruptcy: Finding Hope in Hopelessness

Michael B. Joseph
Office of the Chapter 13 Trustee
Wilmington, Del.

Michael Joseph is the chapter 13 trustee for the District of Delaware, a former National Association of Chapter 13 Trustees president and a Fellow in the American College of Bankruptcy.

Pro se consumer bankruptcy cases create significant and unique issues for debtors who initiate the cases and the bankruptcy system administering them. *Pro se* chapter 13 cases are particularly onerous. A vast majority of these cases are dismissed prior to confirmation and many times are dismissed prior to an appearance at a § 341 meeting.

Most debtors have difficulty navigating the complexity of chapter 13 without the assistance of a bankruptcy attorney. Furthermore, when the ABI National Ethics Task Force focused on the differences between chapter 7 and chapter 13, it concluded that chapter 13 was not conducive to attorney limited service agreements.[1]

Unwary debtors create potential roadblocks for themselves should a case be dismissed and another proceeding be filed. These include issues of eligibility[2] and the imposition of the automatic stay.[3] A missed deadline or single error can cause enormous trouble for a *pro se* debtor. An individual may file for relief unnecessarily or file under an incorrect chapter of the Bankruptcy Code. In addition, a debtor might fail to comply with the deadlines to file schedules, or be unable to adequately prepare the schedules, correctly choose exemptions or comply with filling out the means test forms. Effective Dec. 1, 2015, the official bankruptcy forms were completely revised and require careful review and extensive information. Moreover, a *pro se* debtor might be unable to defend objections to discharge, adversary proceedings and motions, or to comply with the Federal Rules of Bankruptcy Procedure.

It is difficult for an inexperienced person to prepare and submit a feasible chapter 13 plan. *Pro se* case dismissals result in the loss of the automatic stay protections. Consequently, a debtor filing multiple cases due to previous dismissals might be characterized as a serial and abusive debtor, and thus barred from making future case filing(s).[4] This might delay necessary debt management such that financial distress might become irreversible and eventual relief out of reach. As stated in the ABI National Ethics Task Force's Final Report, "Although it is difficult to measure how many consumers in financial distress do *not* file for bankruptcy protection, the Consumer Bankruptcy Fee Study did reveal that *zero* cases filed *pro se* under chapter 13 ended with a debtor receiving a discharge."[5]

The system administering bankruptcy cases is also impacted, including bankruptcy judges, court personnel (especially in the clerk's office) and trustees. Each participant must devote extra time to address deficiencies in the *pro se* cases, and monitor each to ensure that the case is proceeding properly. Creditors are potentially affected, with multiple or no notices being sent about the status of a case.

Yet the number of *pro se* consumer bankruptcy case filings is considerable. During the year ending Dec. 31, 2015, there were a total of 49,344 chapter 7 *pro se* cases, or 9.2 percent of the national total, and 25,639 *pro se* chapter 13s, or 8.5 percent of the national total.[6] Some districts attract a greater percentage of *pro se* chapter 13 cases. For example, in calendar year 2015, the Eastern District of New York reported a 52 percent rate of its total chapter 13 case filings and the Central District of California reported a 37.5 percent rate of its total chapter 13s.[7] Last year, the U.S. Bankruptcy Court for the Eastern District of New York had an unusually high *pro se* case rate, with approximately 1,000 dismissal motions being filed and noticed by the chapter 13 trustees.[8] Most of these cases take months to process and are often filed individually by one spouse, only to be followed by another *pro se* case filed by the other spouse. Eventually, almost all of these cases are dismissed.

Bankruptcy court clerks' offices nationwide provide information about filing bankruptcy without an attorney and direct *pro se* debtors to their courts' websites.[9] Special assigned staff are designated by the clerks to handle the *pro se* case intake. All bankruptcy courts and clerks' offices face this problem every day, and many have developed their own processes and procedures. For example, judges in the Eastern District of New York refer *pro se* litigants to the Pro Se Legal Assistance Project.[10]

1 *See* Lois R. Lupica and Nancy B. Rapoport, Am. Bankr. Inst., *Final Report of the ABI National Ethics Task Force* (April 21, 2013).
2 11 U.S.C. § 109(g).
3 11 U.S.C. § 362(c)(3)-(4).
4 *See, e.g., Kostyshyn v. Joseph (In re Kostyshyn)*, 2011 WL 815103 (D. Del. March 1, 2011).
5 *See* fn.1 at p. 50 (citing Lois R. Lupica, "The Consumer Bankruptcy Fee Study: Final Report," 20 *Am. Bankr. Inst. L. Rev.* 17 Spring 2012), *available at* abi.org/member-resources/law-review/the-consumer-bankruptcy-fee-study-final-report; unless otherwise indicated, all links in this article were last visited on March 23, 2016.
6 Table F-28 U.S. Bankruptcy Courts, Bankruptcy Cases Filed by Pro Se Debtors, by Chapter, During the 12-Month Period Ending Dec. 31, 2015 (unpublished).
7 *Id.*
8 As personally reported to the author by Marianne DeRosa and Michael Macco, standing chapter 13 trustees for the Eastern District of New York.
9 *See, e.g.*, "Filing Without an Attorney," Administrative Office of the U.S. Courts, *available at* uscourts.gov/services-forms/bankruptcy/filing-without-attorney.
10 *See* "Pro Se Centers Help Even the Odds for Litigants Without Lawyers," Administrative Office of the U.S. Courts, Aug. 20, 2015, *available at* uscourts.gov/news/2015/08/20/pro-se-centers-help-even-odds-litigants-without-lawyers.

Several years ago, recognizing the significant impact of *pro se* consumer bankruptcy debtors in the District of Delaware, Bankruptcy Judge **Brendan Linehan Shannon** convened a special committee consisting of consumer bankruptcy attorneys, as well as representatives from the clerk's office, the U.S. Trustee's Office and the Chapter 13 Trustee, to consider the problem. After a significant amount of review, the committee determined that the best approach was to contact every *pro se* chapter 13 debtor and provide a referral contact and information about the need for representation. The initial contact would be Legal Services Corporation of Delaware (LSCD), which could provide bankruptcy representation to debtors who qualify for their services. Debtors who otherwise did not qualify for LSCD's services would be provided a referral to a panel of experienced bankruptcy attorneys. LSCD would make contact in all *pro se* chapter 13 cases and provide information and assistance to debtors in need.

With a grant from the American College of Bankruptcy and matching funds from the Bankruptcy Section of the Delaware State Bar Association, LSCD was able to establish the Delaware Pro Se Initiative. LSCD provided a *pro se* consumer bankruptcy coordinator to receive referrals from the bankruptcy court clerk's office, the New Castle County Sheriff's Office and the Delaware Legal Help Link, as well as direct calls from debtors. The bankruptcy coordinator is also available on site at the bankruptcy court clerk's office around the time of scheduled sheriff foreclosure sales in Delaware (when many *pro se* filings are made). The bankruptcy coordinator provides information and screening services to the prospective debtors to allow for quick and efficient access to appropriate bankruptcy representation. As part of this initiative, LSCD expanded its referral panel of bankruptcy attorneys. The referral panel agreed to initial free consultations with *pro se* debtors that are designed to help the filers learn about their obligations to the bankruptcy court and chapter 13 trustee, as well as encourage them to retain counsel to assist them in the complexities of chapter 13. If retained, the referral panel members would be permitted to charge the standard fees allowed in Delaware.

Since the launch of the Delaware Pro Se Initiative in 2013, the program has seen a steady increase in the number of referrals. In 2015, recognizing the ongoing need to continue the program and with generous contributions from local law firms, the Delaware Consumer Bankruptcy Pro Se Foundation Fund was established under the Delaware Community Foundation. The aim is to maintain the future funding of the program.

While it may appear as though a number of *pro se* chapter 13 cases are filed without the intent to propose a plan or seek a discharge, there are certainly exceptions. Where the court or a trustee is faced with an honest-but-misguided debtor, it is an invaluable resource to have LSCD and the Pro Se Initiative available for a referral and consultation. Here are some recent examples.[11]

The Delaware Pro Se Initiative helped "JD," a 48-year-old single mother who filed her own chapter 13 to stop a sheriff's sale. JD's income had been limited to her daughter's Social Security and some financial assistance from a friend. She fell behind on making payments for her mortgage and could not catch up. Desperate to avoid foreclosure, she turned to filing a chapter 13 petition without any concept of how it might work. Fortunately, she made initial contact with a *pro se* coordinator and was screened and referred to an attorney whom she retained. At the time she filed her case, JD had gotten a new job and gained sufficient monthly income to support a chapter 13 plan. She successfully proposed a plan that is curing her mortgage arrears and pre-petition property taxes, and is on her way to saving her home.

Another debtor who benefited from the Pro Se Initiative is "LS," also a single mother supporting her household on Social Security, food stamps and minimal child-support payments. She previously filed a chapter 7 case in 2008 that was not closed until 2011. Her previous filing history would have caused concern if this new case did not proceed well. LS filed the chapter 13 *pro se* to stop a sheriff's sale. She was contacted by the *pro se* coordinator and accepted a referral to an attorney on the consumer bankruptcy panel. With that attorney's assistance, her plan has been confirmed, she has been able to retain her home, and she also avoided a second lien as unsecured.

"KN" has three children and two grandchildren living with her. She also filed a *pro se* chapter 13 case to stop a sheriff's sale that had been scheduled after the Delaware Mandatory Foreclosure Mediation was unsuccessful. KN also wanted to pursue a mortgage modification; however, her ex-husband refused to cooperate and sign a quitclaim deed to clear the title. Although KN has limited income from employment, child support and food stamps, she was able to pay a chapter 13 plan and cure her mortgage arrears. At the same time, with the assistance of counsel, she will pursue clearing the title so she may qualify for an affordable mortgage modification. She qualified for LSCD representation and retained LSCD after consulting with the *pro se* coordinator.

Finally, "WA" is a single man with limited income and a prior dismissed bankruptcy case filed in 2011. He has questioned his alleged mortgage arrears and has had issues with delinquent city property taxes. WA commenced a *pro se* chapter 13 case and was referred to LSCD, whom he retained. With the assistance of an LSCD attorney and several months of sorting out the claims, resolving both income and property tax issues, an amended plan was approved and confirmed by the court.

Conclusion

The proliferation of *pro se* consumer bankruptcy cases is problematic. Although *pro se* chapter 7 debtors have a greater chance of completing their case, albeit without knowing potential pitfalls that competent legal advice could avoid, *pro se* chapter 13 debtors are the least likely to have successful outcomes and the most likely to detrimentally impact their financial futures. *Pro se* cases also require more support from court staff and trustees' offices. Developing a program that targets consumer bankruptcy *pro se* debtors helps alleviate this burden. Having a referral program as a resource for *pro se* debtors who are acting in good faith and who desire such assistance benefits everyone. abi

11 Personal identifiable information has been changed to protect privacy.