

Below is a summary of the cases that I feel were significant from yesterday's Lufkin docket. A copy of this e-mail will be posted as "5/11/11 Lufkin Docket" under the tab entitled "Trustee's Emails" on my website at www.ch13tyler.com.

Confirmation Docket:

10-10816 *Mickens*: Facts: This case was up against a final denial deadline. The Debtors' mortgage company had filed a motion to lift stay thereby alleging that the Debtors had failed to pay their post-petition mortgage payments. Accordingly, the Trustee objected to the sufficiency of the Debtors' disposable income as evidenced by their inability to live within their budget and make their post-petition mortgage payments. Debtors' counsel provided proof that the Debtors had brought to his office the mortgage payment that was due on 4/1/11 that he would (or had) mailed to the mortgage company and then argued that the 5/1/11 payment was not yet due since the loan documents gave the Debtors a grace period until 5/15/11 to make the May payment. Thus, the attorney for the Debtors argued that the plan should be confirmed since the Debtors were then current on their post-petition mortgage payments.

Ruling: Judge Parker held that the Debtors were not current on their post-petition mortgage payments in that the payment was due on 5/1/11.....that the grace period did not count as the actual due date. Judge Parker reiterated his past position that, if the Debtors are not current on their post-petition mortgage payments, he was not going to confirm the plan. Debtors' counsel did request an opportunity to allow the Debtors to bring their mortgage payments current (to do otherwise would mean that confirmation would be denied and the case dismissed with prejudice for 120 days which in turn would probably mean that the house would be foreclosed upon thereby leaving the Debtors and their children without a place to live). Judge Parker, in citing a reference to NASCAR, decided to give the Debtors a "free pass" and continued the hearing until 6/8/11 Beaumont docket. In so doing, Judge Parker stated that the Debtors will need to have made the 5/1/11 and the 6/1/11 mortgage payments in order for the plan to be confirmed.

Result: Judge Parker continues to put a big emphasis on the Debtors making their on-going mortgage payments.....thereby refusing to confirm the plan where the Debtors failed to make these payments. While the Judge did continue the confirmation hearing in this case, I don't think you can assume that he will do so in future cases. This case was on the radar screen because the mortgage company had filed a motion to lift stay alleging the Debtors' failure to make post-petition mortgage payments. This case also indicates that the Debtors cannot rely upon the grace period in order to claim that they are current on their mortgage payments.

As a reminder, I will be requesting proof that the Debtors have made all of their on-going direct payments (DSO payments, mortgage payments, car payments, etc.). I have posted a "**Memorandum to Debtor's Bar Concerning Certification of Payment of Post-Petition Direct Payments**" at my website under the tab "**Trustee Memos**". I have also posted a suggested "**Certification of Payment of Post-Petition Direct Payments**" under the "**Forms**" tab at my website. This Memo and Certification form will control until such time as Judge Parker issues a general order promulgating his own rules and form to be used in his Court.

Modification Docket:

10-10100 *McDonald*: Facts: The Debtors filed a motion to modify in order to comply with the TRCC. Through the Motion to Modify, the Debtors proposed to increase their monthly plan payments to more than \$1,000 per month. The Debtors' last budget on file indicated that the difference between their monthly income and their monthly expenses was approximately \$870 per month. When the case was

called, Debtors' attorney requested a continuance to allow the attorney to meet with the Debtors to finalize a budget.

Ruling: Judge Parker did grant the request for continuance to next month's Beaumont docket. However, in so doing, Judge Parker made the following inquiries: Isn't the filing of a budget part of the modification process? Why are we waiting until the last day to file the new budget? Judge Parker then complained about the size of the modification docket, thereby noting that one of the causes for such is the last minute filing of budgets.

Result: Amended budgets are part of the modification process [the last sentence of Bankruptcy Local Rule 3015(h)(1) specifically provides that "[a] debtor seeking a modification of a confirmed plan must separately file an amended Schedule I and an amended Schedule J in order to verify current income and expenditure information"]. From his comments in Court, I think Judge Parker will be less likely to grant continuances in the future because of the Debtors' failure to file an amended budget by the time the motion to modify comes up for hearing. The best of all worlds would be for the Debtors to file such an amended budget concurrently with the motion to modify.

Dismissal Docket:

10-10471 *Adams*: Facts: The Debtor filed this case thereby reflecting on his budget that his only source of income was from disability (the non-filing spouse was a wage earner). SOFA question #1 listed his wife's income from her job while question #2 listed his disability social security income for himself (as well as social security for children). There was no indication that he was ever self-employed. The Debtor's proposed plan was subsequently confirmed upon the Debtor providing to the Trustee a non-filing affidavit thereby indicating that he was not required to file tax returns due to his disability.

Thereafter, the Trustee received a "tip" from a third party that the Debtor did in fact have other income from the operation of a trucking company. As a result, the Debtor amended his SOFA to disclose that the Debtor operated a trucking business from April, 2007 through the current time. The Debtor also indicated that the business had not operated since March 2009 due to a broken transmission and that the Debtor could not afford to repair the truck. The Trustee's staff attorney actually discussed this with the third party, thereby learning that the third party had allegedly observed the Debtor driving the truck in 2010. The Trustee's staff attorney also discussed the issue with the representative of the IRS and was able to confirm that the Debtor had received income from the operation of his truck in 2010 as evidenced by form 1099s received.

With this information, the Trustee filed his motion to dismiss the case with prejudice from refiling bankruptcy under any chapter for a period of one year. The IRS filed its competing motion to dismiss.

At the hearing, the attorney for the Debtor advised the Court that the Debtor did not oppose the motion to dismiss with prejudice for one year (although the attorney did state that the Debtor mistakenly believed that he was not required to file tax returns since he lost more money than he earned in operating the truck).

Ruling: Judge Parker dismissed the case with prejudice for one year.

Result: Debtors need to be careful with their non-filing affidavits. BAPCPA (11 USC 1308) requires the Debtors to file all of their prepetition tax returns not later than the day before the first scheduled 341 meeting. BAPCPA [11 USC 307(e)] provides that the case "shall" be dismissed upon request of a party in interest based upon the Debtors' failure to file such prepetition tax returns.

If you have any comments concerning these cases (or others from this docket) that you would like to have posted and if I feel that the comments are appropriate, please forward such comments to Comments@ch13tyler.com .

John J. Talton
Chapter 13 Trustee