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# Consumer Counterpoint

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## Piggybacking onto Other Creditor's Extension-of-Time Order Is Proper

In a chapter 7 case, should a creditor who relies on another party's timely filed motion for an extension of time to file a complaint objecting to the discharge of the debtor be permitted to file such a complaint after the original bar date? Of course they should!

A creditor forwarded counsel its file more than 60 days after the debtor's meeting of creditors was initially scheduled. Thus, pursuant to Rules 4007(c) and 4004(a) of the Federal Rules of Bankruptcy Procedure, this creditor client was technically out of time to file a complaint objecting to the debtor's proposed discharge of her obligations that were due to the client.

However, within that initial 60-day period, the trustee had filed a motion to extend the time to file a complaint under § 727. Further, the trustee's proposed order did not limit the requested extension of time to file an objection to just the trustee's office.

Thus, upon the creditor's motion for joinder, the bankruptcy court had to decide whether to extend the time for all creditors to commence an adversary proceeding under §§ 523 and/or 727 based on the trustee's pending motion. While Pennsylvania case law and a number of other circuits allow such "piggybacking" onto a pending motion by a non-moving creditor, said right to "piggyback," without more, is not absolute.

### Piggybacking onto Other Creditors' Motions

There are certain circuits around the nation that have found that a motion by one creditor to extend time to file a complaint does not provide relief to all creditors.<sup>1</sup> However, these cases are distinguishable, and if the creditor had provided notice and joined in that pending motion, and provided cause for why it should be included in that pending motion, even those courts might have provided the requested extension of time to the non-moving creditor as well.

The weight of authority from around the nation, and indeed the Third Circuit, supports the creditor client's position that upon a showing that the creditor had taken some reasonable affirmative action with notice of its intention to be included in a pending extension motion, an order granting an exten-

sion of time to one creditor, or to the trustee, extends the time for all creditors to file an appropriate complaint objecting to discharge.<sup>2</sup> These courts typically require that a creditor seeking to "piggyback" onto the trustee's motion must have provided notice to the court and to the debtor that it was also seeking to be included in the requested general extension, that cause for the general extension existed and that the entered order provided for a general extension.<sup>3</sup>

Specifically, in *Watkins*, one creditor filed a motion for an extension to file complaints to object to discharge or dischargeability under §§ 727 and 523.<sup>4</sup> At a hearing to consider the motion, another creditor affirmatively joined the motion, and a third creditor made it clear that it was also seeking the requested extension of time to file a complaint.<sup>5</sup> At a further hearing to consider the extension motion where all pertinent creditors were present, the trustee indicated his intention to conduct a Rule 2004 examination about potentially undisclosed assets.<sup>6</sup> Further, the extension order did not expressly restrict the requested extension only to the movant.<sup>7</sup> In granting a general extension to all creditors, the court held that the debtor was on notice that multiple creditors sought an extension, that cause existed to grant a general extension and that the order contained nonexclusive language.<sup>8</sup>

*Watkins* can be contrasted with the listed cases in other circuits where courts did not find that general extensions existed for non-moving creditors. In *Burger King Corp. v. B-K of Kansas Inc.*, the "plaintiff did not proffer a motion for extension, nor did it apprise the court of its desire to join in the motion of the two moving creditors."<sup>9</sup> Further, the plaintiff did not demonstrate that its untimely complaint was the product of "reasonable reliance on any order of the bankruptcy court or any other act or occurrence."<sup>10</sup>

2 See, e.g., *Donegal Mut. Ins. Co. v. Watkins (In re Watkins)*, 365 B.R. 574 (Bankr. W.D. Pa. 2007); *In re Brady*, 101 F.3d 1165 (6th Cir. 1997) (trustee may secure, on behalf of all creditors, an extension of time in which to file dischargeability complaints); *In re Demos*, 57 F.3d 1037 (11th Cir. 1995) (creditor could rely on bankruptcy court order granting motion to extend deadline for filing nondischargeability complaints, even though creditor had not joined in motion).

3 See *In re Watkins*, 365 B.R. 574; *In re Brady*, 101 F.3d 1165; *Ellsworth Corp. v. Kneis (In re Kneis)*, 2009 Bankr. LEXIS 1564 (Bankr. D.N.J. June 15, 2009) (quoting *Brady*); *In re Demos*, 57 F.3d 1037 (11th Cir. 1995).

4 365 B.R. at 577.

5 *Id.* at 577.

6 *Id.* at 578.

7 *Id.*

8 *Id.*

9 73 B.R. 671, 673 (D. Kan. 1987).

10 *Id.* at 673.

1 See, e.g., *In re Floyd*, 37 BR 890 (Bankr. N.D. Tex. 1984); *In re Gallagher*, 70 BR 286 (Bankr. S.D. Tex. 1987), and *In re Burger King Corp. v. B-K of Kansas Inc.*, 73 B.R. 671 (D. Kan. 1987); *Ichinose v. Homer Nat'l Bank*, 946 F.2d 1169 (5th Cir. 1991).



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## Consumer Counterpoint: Piggybacking onto Other Creditor's Extension Order

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In addition, the *Burger King* court noted that any extension request required a showing of good cause.<sup>11</sup> Based on these particular facts, the court held that the ordered extension did not apply to all creditors.<sup>12</sup> However, based on the court's opinion and the facts cited in *Burger King*, if the non-moving creditor had demonstrated that it had taken some reasonable affirmative actions, such as joining the trustee's motion and/or providing some notice that it too sought inclusion, presumably even this court may have allowed the non-moving creditor to "piggyback" onto the moving creditors' motion for extension.

In *Ichinose v. Homer National Bank*,<sup>13</sup> that court similarly conducted a very narrow review of the facts in determining that the non-moving creditor was not entitled to "piggyback" onto filed extension requests. The *Ichinose* court considered a series of extension orders objecting to dischargeability on which later orders granted extensions solely "on behalf of the moving party."<sup>14</sup> The court held that neither the language in the later orders themselves nor the surrounding circumstances supported the non-moving plaintiff's reliance that the later orders extended to all creditors.<sup>15</sup>

Accordingly, in any case where a non-moving creditor seeks to "piggyback" onto a pending extension of time to file an objection to discharge, the non-moving creditor (1) must provide the circumstance for why the pending motion should also apply to it, (2) must provide notice to the court and to the debtor that the non-moving creditor also seeks the extension, (3) should show that cause exists for a general extension, and (4) should demonstrate that the proposed order is not limited to only the moving parties. If the non-moving creditor took the above-listed actions, even the *Ichinose* court may have found proper circumstances to allow the non-moving creditor to piggyback onto and benefit from the extension period.

### Piggybacking onto Trustee Motions Party-of-Interest

Various debtors have claimed that "piggybacking" onto a trustee's motion is not allowed as a trustee is not empowered to grant an extension pursuant to Bankruptcy Rule 4007(c).<sup>16</sup> However, many courts have found that as the Bankruptcy Rules apply to a "motion of a party-in-interest," and as the trustee is included as a "party-of-interest," the trustee has "standing under Rule 4007(c) to move for an extension of time on behalf of creditors to file nondischargeability complaints."<sup>17</sup>

The genesis of the court's reasoning comes from the Sixth Circuit in *Brady*, whereby it reasoned, in part, that depriving the trustee of standing could "undermine the efficient administration of bankruptcy proceedings."<sup>18</sup> Moreover, forcing multiple creditors to file individual extensions is

an unnecessary burden "if the trustee, a unique party with comprehensive knowledge of the case and the best ability to communicate with other interested parties, can file a single motion on behalf of all creditors."<sup>19</sup>

**Various debtors have claimed that "piggybacking" onto a trustee's motion is not allowed as a trustee is not empowered to grant an extension pursuant to Bankruptcy Rule 4007(c).**

### Trustee's Fiduciary Requirement

Moreover, a non-moving creditor should argue that by filing a motion to extend time, the trustee has been placed in a fiduciary position relative to the creditors in this matter. As a successful adversary proceeding that is filed under § 727 will provide a benefit to all creditors in a case, a party that commences an adversary proceeding under § 727 becomes (in that respect) a fiduciary on behalf of all creditors.<sup>20</sup> Accordingly, filing for an extension of time to file an adversary complaint under § 727 logically binds the filer of such a motion as a fiduciary to the creditors, as the withdrawal of such a motion necessarily affects all creditors of the debtor.<sup>21</sup>

Therefore, if the trustee were to move the court to allow its motion to extend time to be withdrawn, the court should allow another party to be substituted as the movant for that extension motion — a position that an interested creditor should be able to demonstrate to the court by having filed a joinder action to the trustee's motion to extend time. Thus, if a non-moving creditor can demonstrate that it took reasonable affirmative actions to be considered in a pending motion to extend time to object to discharge, such as (1) the filing of a joinder action, (2) participating in a hearing on the trustee's (or other creditor's) motion, (3) providing evidence that it had good cause and additional justification to pursue an action or objection to the debtor's proposed discharge, and (4) ensuring that the proposed order does not limit the extension only to the trustee (or to the moving creditor), the court should determine that the non-moving creditor was not solely relying on the trustee, and should be granted the general extension pursuant to Rule 4007(c).<sup>22</sup>

Accordingly, by pursuing such affirmative steps, the non-moving creditor can demonstrate that the surrounding circumstances support its reliance on the pending motion. The non-moving creditor should then be allowed to "piggyback" onto a timely filed motion to extend time objecting to discharge, and should be allowed to file an appropriate complaint. ❧

11 *Id.*

12 *Id.*

13 946 F.2d 1169, 1174 (5th Cir. 1991).

14 *Id.* at 1174.

15 *Id.*

16 *Ellsworth Corp. v. Kneis (In re Kneis)*, 2009 Bankr. LEXIS 1564 (Bankr. D.N.J. June 15, 2009).

17 See, e.g., *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1170 (6th Cir. 1996); accord, *Donegal Mut. Ins. Cos. v. Watkins (In re Watkins)*, 385 B.R. 574, 577 (Bankr. W.D. Pa. 2007) (recognizing that order granting extension may apply to parties other than moving party).

18 *Id.* at 1170.

19 *Id.* at 1171.

20 *Hage v. Joseph (In re Joseph)*, 121 B.R. 679, 682 (Bankr. N.D.N.Y. 1990); *State Bank v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996); *Peoples State Bank v. Drenckhahn (In re Drenckhahn)*, 77 B.R. 697, 701 (Bankr. D. Minn. 1987).

21 See *Levin v. DiLoreto (In re DiLoreto)*, 277 B.R. 607 (Bankr. E.D. Pa. 2000).

22 See, e.g., *Ellsworth Corp. v. Kneis (In re Kneis)*, 2009 Bankr. LEXIS 1564 (Bankr. D.N.J. June 15, 2009).