REVIEWED
By Chris Tighe at 9:21 am, Mar 13, 2017

§ 5.4 Burden of Proof in an Eligibility Dispute

Rev: Mar. 4, 2009 Cases Updated: Jan. 1, 2017

Cite as: Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 5.4, at ¶ ____, Sec. Rev. Mar. 4, 2009, www.Ch13online.com.

[1] Though it makes sense that the debtor bears the burden of proving eligibility for Chapter 13 relief, because most challenges to eligibility arise upon a creditor's motion to dismiss, it has often been held that the party challenging eligibility has at least the initial burden of going forward with evidence that the debtor is *not* eligible.[1] Assigning the burden of proof to the objecting creditor creates difficult problems of discovery and proof because essentially all of the evidence bearing on eligibility, except for the statements and schedules, is in the debtor's possession.

[2] The better rule would assign to the debtor the burden of proving eligibility. At least one court of appeals has so held in the context of a creditor's challenge to eligibility under § 109(g). In *Montgomery v. Ryan (In re Montgomery),*[2] a creditor moved to dismiss a Chapter 13 case filed within 180 days of the dismissal of a prior bankruptcy case on the ground that the first case was dismissed for "willful failure . . . to abide by orders of the court," and thus under § 109(g)(1) the debtor was not eligible to refile.[3] The debtor's first case was dismissed when the debtor did not appear at the § 341 meeting of creditors. At the hearing on the creditor's motion to dismiss, there was no evidence from which the court could determine whether the debtor's failure to attend the meeting of creditors in the first case was "willful." Thus, the dispositive issue became whether the debtor or the creditor had the burden of proof with respect to the circumstances of the debtor's failure to attend the meeting of creditors in the first case.

[3] Acknowledging that several lower courts had assigned the burden of proof with respect to eligibility and § 109(g)(1) to the creditor that filed the motion to dismiss, the Eighth Circuit concluded to the contrary that "the burden of establishing eligibility [falls] on the filing debtor even though the issue was raised by the creditor. . . . [W]e hold that where a § 109(g) issue is properly raised, the filing party must establish that the failure to obey a court order was not willful."[4] The court found support for this outcome in the policy behind § 109(g)(1): "Section 109(g) was enacted as part of a scheme to 'curb abuses of the bankruptcy code. . . .' It would frustrate this purpose to require a creditor to prove 'willful failure' while a debtor who failed to comply with a court order stands silent."[5] In a concurring opinion, one judge of the panel agreed that the initial burden of going forward with evidence should be on the debtor when a creditor moved to dismiss a Chapter 13 case based on § 109(g)(1); however, the concurring judge would assign the ultimate burden of persuasion to the creditor that moved to dismiss.[6]

[4] Complicating the burden of proof is the conflicting authority on the timing and procedure for measuring the debt limitations in Chapter 13 cases. Discussed in more detail elsewhere,[7] it is the rule in some jurisdictions that on a challenge to eligibility it is appropriate to consider the validity, priority and extent of security interests; it is appropriate to split claims into secured and unsecured portions; and it is appropriate to go beyond the debtor's characterization of claims in the statements and schedules. In such a jurisdiction, if the challenge to eligibility on debt limitation grounds arises as a creditor's

motion to dismiss, the creditor may find itself in the awkward position of having to prove the amount of other creditors' debts and the value of collateral securing other creditors' claims.

[5] But claim splitting can present burden of proof opportunities for the creditor objecting to eligibility. For example, if splitting a claim into its secured and unsecured portions under § 506(a)[8] would render the debtor ineligible for Chapter 13, the creditor might begin the eligibility challenge by filing a proof of claim reflecting the creditor's view of the value of the collateral. The creditor's claim would be allowed as filed (unless and until objection), and the proof of claim, if properly prepared, constitutes prima facie evidence of the validity and amount of the claim.[9] By filing a proof of claim, the creditor positions itself to argue that the burden of proof is on the debtor to object to the claim and to overcome the prima facie validity of the claim in order to demonstrate eligibility. In this way, in jurisdictions that permit § 506(a) litigation at the eligibility stage of a Chapter 13 case, the eligibility dispute becomes claims litigation, and the burdens of proof may lie accordingly.

[6] Even in jurisdictions that decline to split claims or to litigate the extent of claims at the eligibility stage, there are sometimes presumptions in favor of the debtor's statements and schedules that the objecting creditor must overcome to defeat eligibility.[10] For example, some courts look only to the debtor's statements and schedules unless lack of good-faith preparation is apparent.[11] When bad faith is alleged, the burden may be on the debtor to demonstrate good faith in the preparation and scheduling of debts.[12]

[7] If the eligibility challenge arises in the context of an objection to confirmation, it is at least arguable that the debtor bears a greater burden of proof than on a creditor's motion to dismiss. It is generally held that the debtor has the burden to prove the confirmation requirements in 11 U.S.C. § 1325(a).[13] When the challenge to eligibility is styled as an objection to confirmation on the ground that the plan fails to comply with the provisions of Title 11 (for example, 11 U.S.C. § 109(e))—the condition for confirmation contained in § 1325(a)(1)—it can be argued that the burden to prove eligibility is impounded in the debtor's burden to prove entitlement to confirmation.[14] Similar nested burdens of proof arise under 11 U.S.C. § 1325(a)(7)—the condition for confirmation that "the action of the debtor in filing the petition was in good faith"—because preparation of schedules and statements can be characterized as part of the "action . . . in filing the petition."[15]

---

1 *See In re Horne,* 277 B.R. 320, 322 (Bankr. E.D. Tex. 2002) (On a motion to dismiss, "[m]ovant bears the burden of proof to demonstrate to the Court, by a preponderance of the evidence, that the Debtor does not comply with the § 109 debt limit."); *In re Pike,* 258 B.R. 876, 882 (Bankr. S.D. Ohio 2001) ("A party moving for dismissal under § 109(g) has the burden of introducing evidence to support its allegation that the debtor willfully failed to abide by a court order or appear before the court in proper prosecution of the case."); *In re Baird,* 228 B.R. 324, 327–30 (Bankr. M.D. Fla. 1999) ("It is the debtor's burden to demonstrate . . . regular income. . . . IDS, as movant, bears the burden of proof to demonstrate . . . by a preponderance of the evidence, that Debtor does not comply within the $250,000 debt limit."); *In re Nix,* 217 B.R. 237 (Bankr. W.D. Tenn. 1998) (Failure to make payments as required by local rules and § 1326 can be a failure to abide by a court

order for purposes of the 180-day bar in § 109(g)(1); however, because creditor failed to present any evidence that the debtor's failures to make payments in two prior dismissed Chapter 13 cases were "willful," not appropriate to bar the debtor's third filing.); *In re Key,* 58 B.R. 59 (Bankr. E.D. Pa. 1986); *In re Ristich,* 57 B.R. 568 (Bankr. N.D. Ill. 1986); *In re Ramus,* 37 B.R. 723 (Bankr. N.D. Ga. 1984); *Pennsylvania v. Flick,* 14 B.R. 912 (Bankr. E.D. Pa. 1981); *In re Ratmansky,* 7 B.R. 829 (Bankr. E.D. Pa. 1980).

[Return to Text]

2 37 F.3d 413 (8th Cir. 1994).

[Return to Text]

3 As discussed in more detail in **§§ 21.1** and **22.1,** an individual is ineligible for bankruptcy relief if a prior bankruptcy case for the same debtor was dismissed within 180 days for "willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case." 11 U.S.C. § 109(g)(1).

[Return to Text]

4 *Montgomery v. Ryan (In re Montgomery),* 37 F.3d at 415. *Accord National Sch. Bus, Inc. v. Carignan (In re Carignan),* 190 B.R. 739, 741 (N.D.N.Y. 1996) ("It is well-settled that the *debtor* has the burden of proving entitlement to relief under Chapter 13."); *In re Smith,* 286 B.R. 104, 106 (Bankr. W.D. Ark. 2002) (Citing *Montgomery v. Ryan (In re Montgomery),* 37 F.3d 413 (8th Cir. 1994), "the debtor has the burden of proof to explain that the dismissal of the previous case was not the result of a willful violation of the court's order. . . . Here, the Debtor has failed to offer any evidence to establish his eligibility once the issue was raised. Therefore, the objection to confirmation is sustained, and this case is dismissed because the Debtor failed to establish that he is eligible for relief under the provisions of chapter 13."); *In re Basile,* 142 B.R. 931, 932 (Bankr. D. Idaho 1992) (On a creditor's motion to dismiss for willful failure of the debtor to appear at the meeting of creditors in a prior Chapter 13 case, burden of proof is on the debtor to prove that the prior failure to appear was not willful. "[T]he debtors must appear and show such lack of willfulness, subject to cross-examination by the moving parties. The excuse is not unlike a motion under F.R.C.P. 60(b)(1) as it is incumbent upon the party seeking the benefits of

such a motion to show the excusable neglect necessary to vitiate the previous court order from which relief is sought."); *In re Sassower,* 76 B.R. 957 (Bankr. S.D.N.Y. 1987) (Debtor has burden to prove that future prospects for regular and stable income are good.); *Norman v. Norman,* 32 B.R. 562 (Bankr. W.D. Mo. 1983).

[Return to Text]

5 37 F.3d at 416.

[Return to Text]

6 37 F.3d at 416.

[Return to Text]

7 *See* **§§ 11.1–14.1.**

[Return to Text]

8 *See* **§ 14.1.**

[Return to Text]

9 FED. R. BANKR. P. 3001(f). *See* **§ 287.1.**

[Return to Text]

10 *See* **§ 14.1.**

[Return to Text]

11 *See, e.g., Martindale v. Meenderinck (In re Meenderinck),* No. 06-35391, 2007 WL 4192637, at *1 (9th Cir. Nov. 19, 2007) (unpublished) (Canby, Graber, Gould) (Applying *Scovis v. Henrichsen (In re Scovis),* 249 F.3d 975 (9th Cir. 2001), although debtor failed to schedule lawsuit that would have exceeded unsecured debt limitation, there was no claim that debtor lacked good faith; bankruptcy court appropriately confirmed plan and implicitly found debtor eligible based on schedules. "'[E]ligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith.'").

[Return to Text]

12 *See* **§ 13.1.**

[Return to Text]

13 *See* **§ 217.1.**

[Return to Text]

14 *See National Sch. Bus, Inc. v. Carignan (In re Carignan),* 190 B.R. 739, 741 (N.D.N.Y. 1996) (District court found that the bankruptcy judge "erred as a matter of law" in confirming Chapter 13 plan without evidence and remanded for findings with respect to confirmation and eligibility. Debtor presented no evidence at confirmation hearing.).

[Return to Text]

15 *See* **§ 496.1.**

[Return to Text]