

# BURR ALERT

## *In re Piazza* (11th Circuit):

### Bad Faith Constitutes "Cause" For Dismissal Under Section 707(a)

Until recently, the creditor of a chapter 7 debtor whose debts **were not primarily consumer in nature** was unable to rely on Eleventh Circuit precedent to support its position that its debtor's chapter 7 bankruptcy case should be dismissed for bad faith. While the plain language of Section 707(b)(3)(A) of the Bankruptcy Code provides that a debtor's chapter 7 bankruptcy case may be dismissed if "the debtor filed [its] petition in bad faith," Section 707(b) of the Bankruptcy Code is focused upon debtors with debts that **are primarily consumer in nature**.<sup>1</sup> Accordingly, Section 707(b) is of no use to the creditor whose debtor's debts are primarily commercial debts.

Bankruptcy Code Section 707(a) provides that a bankruptcy court may dismiss a bankruptcy case under this chapter only after notice and a hearing and only **for cause**, including

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days . . . , the information required by paragraph (1) of section 521, but only on a motion by the United States trustee."<sup>2</sup>

Well-settled Eleventh Circuit case law<sup>3</sup> provides that the foregoing bases for finding "cause" are "illustrative and not exhaustive." However, the Eleventh Circuit Court of Appeals had never, until recently, held that a debtor's bad faith could constitute "cause" for dismissing a debtor's bankruptcy case pursuant to Section 707(a).

On June 26, 2013, creditors of debtors with debts that are not primarily consumer in nature received good news from the Eleventh Circuit Court of Appeals when the Court issued its opinion in the case of *In re Piazza*, 719 F.3d 1253 (11th Cir. 2013). In the case of *In re Piazza*, the Eleventh Circuit, which had been called upon to determine whether bad faith could support a Section 707(a) motion to dismiss, noted that "the power of bankruptcy courts under § 707 to dismiss 'for cause' has, since its enactment, been understood by courts as the power to prevent 'manifestly inequitable result[s]'.<sup>4</sup>

---

<sup>1</sup> 11 U.S.C. § 707(b).

<sup>2</sup> 11 U.S.C. § 707(a) (emphasis added)

<sup>3</sup> *Dianne v. Simmons (In re Simmons)*, 200 F.3d 738, 743 (11th Cir. 2000) (noting the examples of "cause" are "nonexclusive").

<sup>4</sup> *In re Piazza*, 719 F.3d at 1264-65 (citing *In re Pagnotta*, 22 B.R. 521, 522-23 (Bankr. D. Md. 1982) (applying § 707 in a voluntary dismissal case); and *In re Khan*, 35 B.R. 718, 719-20 (Bankr. W.D. Ky. 1984) (interpreting "for cause" to include bad faith)).

The Court further noted that "...every federal bankruptcy statute since the nineteenth century has 'incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.'"<sup>5</sup> The *Piazza* Court also noted that "bankruptcy courts may sanction litigants for filing documents with 'any improper purpose' [pursuant to Fed. R. Bankr. P. 9011(b)(1)];" therefore, "we see no reason why prepetition bad faith should not constitute an adequate or sufficient reason for dismissal [under Section 707(a) of the Bankruptcy Code]."<sup>6</sup> "To hold otherwise would 'create[] the appearance that such an abusive practice is implicitly condoned by the [Bankruptcy] Code.'"<sup>7</sup> Accordingly, the Court held that "bad faith" constitutes an additional basis for "cause" for involuntary dismissal under Section 707(a) of the Bankruptcy Code.

Having concluded that bad faith may constitute "cause" to dismiss a chapter 7 bankruptcy case under Section 707(a) of the Bankruptcy Code, the *Piazza* Court next addressed the factors to be considered when determining the existence of bad faith. Although the *Piazza* Court did not expressly adopt the following factors used by the bankruptcy court<sup>8</sup> to determine the existence of bad faith, the Court held that the bankruptcy court did not commit reversible error in using these factors in its totality-of-the-circumstances analysis:

- (i) the debtor reduced his creditors to a single creditor shortly before the petition date;
- (ii) the debtor made no life-style adjustments or continued living a lavish life-style;
- (iii) the debtor filed the case in response to a judgment, pending litigation, or collection action;
- (iv) there is an intent to avoid a large, single debt;
- (v) the debtor made no effort to repay his debts;
- (vi) the unfairness of the use of Chapter 7;
- (vii) the debtor has sufficient resources to pay his debts;
- (viii) the debtor is paying debts of insiders;
- (ix) the schedules inflate expenses to disguise financial well-being;
- (x) the debtor transferred assets;

---

<sup>5</sup> *Id.* at 1265 (citing *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 (5th Cir. 1986); *cf. Neal v. Clark*, 95 U.S. 704, 709, 24 L.Ed. 586 (1877); *see also In re Piazza*, 451 B.R. 608, 613 (Bankr. S.D. Fla. 2011) (citing *In re O'Brien*, 328 B.R. 669, 674 (Bankr. W.D.N.Y. 2005)) ("one of the primary policy aims of bankruptcy [is] to give the honest yet unfortunate debtor a fresh start—not the dishonest business person a head start").

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (quoting *Dinova v. Harris (In re Dinova)*), 212 B.R. 437, 441 (2d Cir. BAP 1997)).

<sup>8</sup> *In re Piazza*, 451 B.R. 608 (Bankr. S.D. Fla. 2011), *aff'd*, 469 B.R. 388 (S.D. Fla. 2012); *aff'd* 719 F.3d 1253.

- (xi) the debtor is over-utilizing the protections of the Bankruptcy Code to the unconscionable detriment of creditors;
- (xii) the debtor employed a deliberate and persistent pattern of evading a single major creditor;
- (xiii) the debtor failed to make candid and full disclosure;
- (xiv) the debtor's debts are modest in relation to his assets and income; and
- (xv) there are multiple bankruptcy filings or other procedural "gymnastics."

After reviewing the facts of the case, the *Piazza* Court concluded that the debtor's chapter 7 bankruptcy case was due to be dismissed for bad faith pursuant to Section 707(a) based upon the existence of **six (6)** of the foregoing factors—(ii), (iii), (iv), (vii) (viii) and (xii)—outlined above.

The Eleventh Circuit's decision in *Piazza* is an excellent development for creditors who seek to have the chapter 7 bankruptcy cases of their debtors, who are not subject to the provisions of Section 707(b), dismissed for bad faith pursuant to Section 707(a) of the Bankruptcy Code. Accordingly, creditors and their attorneys should become well-acquainted with the Eleventh Circuit's decision in *Piazza* and be prepared to file a motion to dismiss for bad faith under Section 707(a) of the Bankruptcy Code in the event factors evidencing bad faith as set forth in *Piazza* are present.

**If you have any questions concerning the Eleventh Circuit's decision in *Piazza*, please contact:**

**[Ryan D. Thompson](#)** in Birmingham at (205) 458-5397 or **[rthompson@burr.com](mailto:rthompson@burr.com)**

or your Burr & Forman attorney with whom you regularly work.

*No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.*