

**Section 1308 and Tax Returns-
the Standing Trustee’s Conduct of the Meeting of Creditors
Takes on New Significance**

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Trustee’s Options at Section 341 Meeting

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), a chapter 13 trustee could make one of two choices at the end of a debtor’s section 341 meeting of creditors: either conclude the meeting or adjourn the meeting. Fed. R. Bankr. P. 2003(e). Before BAPCPA’s enactment, much of the case law¹ involving conclusion or adjournment of the section 341 meeting focused on whether a trustee had “concluded” a meeting for purposes of triggering the 30-day deadline for objection to a debtor’s claim of exemptions under Fed. R. Bankr. P. 4003(b).²

With the enactment of 11 U.S.C. § 1308 under BAPCPA, Congress introduced a new phrase – to “hold open” the meeting. 11 U.S.C. § 1308(b). Whether the phrase “hold open” is the same as adjourning or continuing the meeting of creditors has become significant in the context of dismissals for failure to file tax returns that are due on the date the 341 meeting is first scheduled. This article discusses a recent decision that addresses what steps a trustee must take to hold open a meeting of creditors under section 1308, and potential consequences for the debtor if those steps are not taken. Finally, the article discusses a proposed amendment to Fed. R. Bankr. P. 2003 and the impact this proposed change will have on the “hold open” debate.

¹ See *In re Cherry*, 341 B.R. 581 (Bankr. S.D. Tex. 2006) and cases cited therein, discussing three approaches to determining whether a trustee has “concluded” a section 341 meeting: (1) “bright line rule” in which the trustee must announce the continued date and time of the section 341 meeting within 30 days of the last meeting held; (2) “case by case basis” in which the trustee must act within a reasonable and necessary time to move a particular case forward in the process in a timely manner; and (3) “debtor’s burden” in which the debtor must move for conclusion of the section 341 meeting if the trustee fails to conclude it.

² Fed. R. Bankr. P. 4003(b) requires a party in interest to object to a debtor’s claim of exemptions within 30 days after the section 341 meeting is concluded or the debtor amends the list of exemptions, whichever is later. Fed. R. Bankr. P. 4003(b).

Section 1308 is one of several sections under BAPCPA that address the debtor's obligation to file tax returns.³ Section 1308 provides in pertinent part:

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may **hold open** that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns...

11 U.S.C. § 1308(a) and (b)(emphasis added).

The Cushing Case

The phrase “hold open,” used in section 1308(b), does not appear anywhere else in the Bankruptcy Code and there have been few published decisions that interpret the meaning of the phrase. In the recent case of *United States v. Cushing (In re Cushing)*, 401 B.R. 528 (B.A.P. 1st Cir. 2009), the court addressed what it means to hold open the meeting of creditors and what steps the trustee should take to clearly convey to the debtor and creditors that the meeting has been held open.

In *Cushing*, the debtor had filed all tax returns except for her 2006 federal tax return. She had obtained from the Internal Revenue Service (“IRS”) an extension of time to October 15, 2007, for filing that return. The meeting of creditors was first scheduled for July 24, 2007. The meeting was held on July 24 and, at the end of the meeting, the chapter 13 trustee was silent regarding whether the meeting was to be concluded, or was adjourned or continued to a another

³ See also 11 U.S.C. §§ 521(e)-(g), 521(j), 1307(e), and 1325(a)(9). The legislative history of BAPCPA indicates that Congress intended to make the debtor's filing of tax returns a condition of chapter 13 plan confirmation. *In re French*, 354 B.R. 258, 260 (Bankr. E.D. Wis. 2006). The purpose behind withholding confirmation was, first, to help state revenue agencies determine whether they had claims against debtors and, second, to punish debtors who were delinquent in filing tax returns. *Id.* at 260-61 (citing H.R. Rep. No. 108-40(I), 108th Cong. (1st Sess. 2003), and at 261 (citing H.R. Rep. No. 109-31(I), 109th Cong. (1st Sess. 2005), reprinted in 2005 U.S.C.C.A.N., 88, 167). Congress accomplished this goal through the enactment of several Bankruptcy Code sections, including 11 U.S.C. §§ 521 (e)-(g), 521(j), 1307(e), 1325(a)(9), and 1308.

date. After the meeting, the chapter 13 trustee caused the following entry to be recorded on the court's docket: "Meeting of Creditors Held and Examination of Debtor as scheduled."⁴

On August 2, 2007, the United States,⁵ on behalf of the IRS, filed a motion to dismiss the case because the debtor had not filed her 2006 tax return. The United States argued that, notwithstanding the extension of time granted the debtor, under section 1308 the court had no discretion other than to dismiss or convert the case when the meeting of creditors was not held open and the debtor had not filed one or more tax returns.⁶ The bankruptcy court denied the motion to dismiss, holding that the debtor had not violated section 1308 because she had obtained an extension of time to file the return and, therefore, the return was not yet due under applicable non-bankruptcy law.⁷

The United States filed a motion to alter or amend that decision. In considering the United States' motion, the bankruptcy court ordered the parties to brief several issues, including:

"What the language of section 1308(b) – 'the trustee may hold open that meeting...' – means under the circumstances of this case and in view of Fed. R. Bankr. P. 2003(a) where the Debtor's Chapter 13 plan has not yet been confirmed and the docket merely states 'Meeting of Creditors Held and Examination of Debtor as scheduled,' and the United States did not submit an affidavit of the Chapter 13 Trustee or other evidence that the section 341 meeting was concluded or closed[.]"⁸

The chapter 13 trustee acknowledged in her brief that she had not stated either that the meeting was concluded or that it was continued, and that her "review of the [case law]"⁹ established that the section 341 meeting was never concluded. She argued that, "unless [a] trustee specifically states on the record that a meeting is concluded or the court orders that the

⁴ *In re Cushing*, 379 B.R. 407, 408 (Bankr. D. Mass. 2007) ("*Cushing I*").

⁵ The United States Department of Justice, Tax Division, appeared on behalf of the Internal Revenue Service.

⁶ *Id.* at 410.

⁷ *Id.* at 412.

⁸ *In re Cushing*, 383 B.R. 16, 17 n.1 (Bankr. D. Mass. 2008) ("*Cushing II*") (setting out all five issues it asked the parties to brief).

⁹ Because there was no case law under section 1308 at the time, the cases upon which the trustee based her review were not section 1308 cases. *See Id.* (the trustee cited, among others, *Premier Capital, Inc. v. DeCarolus (In re DeCarolus)*, 259 B.R. 467 (B.A.P. 1st Cir. 2001), and *In re Koss*, 319 B.R. 317 (Bankr. D. Mass. 2005)).

meeting is concluded, for the purposes of [section]1308 the meeting [is] held open and the debtor has up to 120 days from the meeting date to file all outstanding tax returns.”¹⁰

The bankruptcy court agreed, but limited its decision to the facts of this case:

Because the language employed by Congress in section 1308, “the trustee may hold open that meeting ...” was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and is arguably ambiguous in view of the provisions of Fed. R. Bankr. P. 4003, which permits parties in interest to object to a debtor’s claim of exemptions within 30 days after the “meeting of creditors held under § 341(a) has been concluded...,” the Court finds, for purposes of this decision only, that the Chapter 13 Trustee held open the meeting of creditors in accordance with 11 U.S.C. § 1308(b)(1). To hold otherwise would unduly prejudice the Debtor who relied upon her automatic extension and timely filed her outstanding tax return within the time allotted by that extension.¹¹

The bankruptcy court also ruled that, if a debtor wishes to take advantage of section 1308, she should ask the trustee to hold the meeting open for a specified time to “avoid the conundrum posed by this case.”¹² On the other hand, the court added, if the United States or any other party in interest wishes to withhold the relief afforded to a debtor by section 1308, it should ask the trustee to conclude the meeting.¹³

The Bankruptcy Appellate Panel’s Ruling

The United States appealed and the Bankruptcy Appellate Panel for the First Circuit reversed the bankruptcy court decision.¹⁴ The panel acknowledged that Fed. R. Bankr. P. 2003 permits a trustee to adjourn a meeting from time to time and that there is no rule directing how to “hold open” a meeting.¹⁵ Nonetheless, it rejected the bankruptcy court’s conclusion that the statute was ambiguous:

¹⁰ *Cushing II*, 383 B.R. at 17.

¹¹ *Id.* at 17-18.

¹² *Id.* at 19.

¹³ *Id.* at 19.

¹⁴ *United States v. Cushing (In re Cushing)* (“*Cushing III*”), 401 B.R. 528 (B.A.P. 1st Cir. 2009).

¹⁵ *Id.* at 537.

In reading the phrase, “the trustee may hold open,” the Panel agrees that this language requires the trustee to exercise discretion and take an affirmative step to hold the meeting open for a finite period of time. [Internal citations omitted]. Because the statute describes the requisite action and the requisite actor, the Panel cannot conclude that the phrase “the trustee may hold open” is ambiguous.¹⁶

The panel also rejected the reference to Fed. R. Bankr. P. 4003(b), concluding that “hold open” does not mean “adjourn” or “continue” or even “conclude”:

Fed. R. Bankr. P. 4003(b) and Fed. R. Bankr. P. 2003(e) ... refer to the meeting in context of “concluding” and “adjourning.” We presume that Congress acted intentionally when it introduced a new nomenclature to the newly enacted statutes addressing the filing of tax returns. [Internal citations omitted]. Because the phrase “hold open” must indicate something other than “adjourn” or “conclude,” it does not appear that Fed. R.[Bankr. P.] 4003 overlaps or has an effect on the operation of § 1308(b).⁷¹

The panel concluded that, in order to effectively hold open the meeting, the trustee must clearly and affirmatively state that she is doing so on the record. The trustee did not do so in this case and, therefore, the meeting was not “held open.”¹⁸ The panel also concluded that section 1307 required dismissal or conversion of the case, and remanded to the bankruptcy court for further action.¹⁹ In reaching this conclusion, the majority in *Cushing* adopted the position that section 1308(a) requires all returns—including a tax return subject to a valid IRS extension—to be filed prior to the date first set for the section 341 meeting.²⁰ The dissent found this to be a harsh

¹⁶ *Id.* at 536-37 (citations omitted).

¹⁷ *Id.* at 536 (citations omitted).

¹⁸ *Id.* at 537.

¹⁹ *Id.* at 538.

²⁰ Although beyond the scope of this article, standing trustees, and more importantly debtor’s counsel, should be aware that at least one bankruptcy court has held that section 1308(a) requires debtors who file bankruptcy between January 1 and April 15 of a given year to file the tax return for that period before the first date set for the meeting of creditors. *In re French*, 354 B.R. 258, 264 (Bankr. E.D. Wis. 2006). For a more complete discussion of the issue see William J. McLeod, *Holding Chapter 13 §341(a) Meetings Open and Dismissal or Conversion Under §1307*, 27 Am. Bankr. Inst. J. 14 (2008).

result, particularly considering that the debtor had obtained an extension and had filed the 2006 tax return before the extended deadline.²¹

Proposed Bankruptcy Rule Amendment

The Advisory Committee on Rules of Bankruptcy Procedure has proposed amending Fed. R. Bankr. P. 2003(e) to clarify the procedure for holding open the meeting of creditors. The proposed amendment, which will be published for public comment in August 2009, reads as follows:

“Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(e) ADJOURNMENT. The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time **without further written notice**. The presiding official shall file a notice specifying the date and time to which the meeting is adjourned.”

The Committee Note explains that holding open the meeting is equivalent to adjourning the meeting.²² The Committee thus disagrees with the court in *Cushing*, which found that the terms “adjourned” and “held open” are distinctly different. If the proposed amendment is approved and Fed. R. Bankr. P. 2003(e) is amended, the change should moot future discussion as to the meaning of the phrase “hold open.”

Both the proposed amendment and *Cushing* place the primary responsibility on trustees to clearly indicate on the court docket and in the recording of the meeting of creditors whether the meeting is being “held open” or adjourned to allow the debtor to file tax returns. However, the trustee shares this responsibility with debtors and debtors’ counsel, who must also take a more active role to ensure the meeting of creditors is held open when the debtor has not filed all required tax returns by the date of the first scheduled meeting of creditors.

²¹ *Id.*

²² The Committee Note to the proposed amendment states: “Subdivision (e) is amended to require the presiding official to file notice of the adjournment of a meeting of creditors or equity security holders. The presiding official is the United States trustee or the United States trustee’s designee. This requirement will provide notice to parties in interest who are not present at the initial meeting of the date of the adjourned meeting. When a meeting is adjourned or ‘held open’ as permitted by § 1308(b)(1) of the Code in order to allow a debtor additional time in which to file tax returns with taxing authorities, requiring written notice of the period of adjournment will serve to prevent premature motions to dismiss or convert the case under § 1307(e).”