

Debt collection - the issue of a bankruptcy petition

Generally

This Information Sheet provides guidance in relation to some of the issues which may be relevant when a creditor wishes to consider whether to issue a Bankruptcy Petition in an attempt to recover an outstanding debt from an individual. In addition, we set out a brief explanation of the procedure involved.

Our clients frequently ask us to collect debts by the issue of a Bankruptcy Petition. There is a misconception in relation to the bankruptcy procedure as it is thought that by pursuing an individual to bankruptcy, that will result in payment of the outstanding debt. However, whilst the 'threat of bankruptcy' can result in the debtor making proposals for the discharge of a debt (usually where the debtor wishes to avoid bankruptcy at all costs), if the debtor is simply unable to discharge the debt due to his financial status he may be content to allow one of his creditors to pursue him to bankruptcy as if made, the Bankruptcy Order will 'clear the deck' and allow him to 'start again' upon discharge of the Bankruptcy Order. In those circumstances, our advice to creditors is that once a debtor has allowed a Bankruptcy Petition to be issued against him then the debtor will probably not be in a financial position to discharge the debt. In those circumstances, the creditor will therefore be unlikely to see any (or any significant) return against the costs which will be incurred in pursuing a debtor to bankruptcy.

In order to pursue a debtor to bankruptcy, it is first necessary to demonstrate the existence of a debt owed by that individual of at least £750 (this must be a liquidated sum of money). An individual will only be made bankrupt if it is shown that he or she

is unable to pay the outstanding debt (as to which, see below).

The Statutory Demand

To commence bankruptcy proceedings, it is first necessary to serve a Statutory Demand on the debtor (alternatively, to demonstrate that the execution of a Judgment has been returned unsatisfied). The Statutory Demand must be served personally. Then, if the debtor fails to apply to set aside the Demand within 18 days from the date of service of the Demand or if he fails to discharge the sum due within 21 days, the creditor is entitled to issue a Bankruptcy Petition against him on the basis that the debtor appears unable to discharge the debt.

The Statutory Demand can only be served for an 'unsecured debt'. If the creditor has security for the debt, it will be necessary to consider whether the security is sufficient for the debt.

It is generally wise to obtain a Judgment against a debtor before serving a Statutory Demand. The reason for this is that then, the debtor can have no reason to object to the service of the Demand. Here, we must sound a warning as if following the service of the Statutory Demand, the debtor issues an application to set aside the Demand (on grounds that the debt is disputed), and the creditor has not first obtained a Judgment against him, then the court may consider that the Demand was served prematurely and can make an adverse costs order. If there are issues relating to the debt that require further investigation by the court, including the merits of a possible set-off or counterclaim, the court may well set aside the Statutory Demand.

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This firm's fees for the service of a Statutory Demand will be calculated in accordance with the time spent on the matter by reference to our applicable hourly charging out rates. However, as a 'guideline figure', we would estimate that our fees for the preparation and service of the Statutory Demand are likely to be approximately £300 to £500 plus VAT and in addition, there will be enquiry agent's fees for personal service (say, £150 to £300 plus VAT). If the debtor seeks to avoid service of the Demand or applies to set it aside, costs will increase as a result.

The Bankruptcy Petition

In the event that the debtor fails to discharge the sum due as set out in the Demand then the creditor is entitled to issue a Bankruptcy Petition against him (provided that the debtor resides or carries on business in England or Wales).

The risk of embarking upon this course of action is that if there are other creditors then the prospects of recovery of the debt are likely to be postponed or swamped by the other creditors who may be secured or whose debts may rank in priority to that of the creditor's. Further, even if the Petition results in payment being received from the debtor, that would not prevent another creditor from taking over the conduct of the Petition and ultimately, if a Bankruptcy Order is made then the Official Receiver may seek repayment of the payment received from the debtor (as it may be considered to be a preferential payment).

Before the issue of a Bankruptcy Petition, it is wise to make a search of the Land Charges Department to ensure that no other Petitions have been issued against the debtor.

Bankruptcy proceedings are commenced by the presentation at court of a Bankruptcy Petition with a supporting Affidavit verifying the sum due. It will first be necessary to consider which court has jurisdiction for the debtor's address (and in this respect, it will be necessary to consider whether the relevant court should be that for the debtor's business address). The court fee is currently £190 and there is a deposit payable in respect of the Official Receiver's fee (currently £430). On issue of the Petition, the court inserts into the Petition the time, date and place of the hearing and will register a 'pending action' against the debtor's name in the Land Charges Department.

It is then necessary to effect personal service upon the debtor and service must be effected at least 14 days before the hearing date. Following service of the Petition, our enquiry agents will complete an Affidavit of Service and the creditor is responsible for further service fees of approximately £200 to £300 plus VAT. Again, if the debtor seeks to avoid service of the Petition, costs will increase.

In response to the Petition, the debtor may:

- 1 Pay off the debt (and in those circumstances the Petition will be dismissed unless another creditor applies to be substituted as a Petitioner);
- 2 Offer to compound the debt – ie to provide security or make an offer for the payment of the debt (the court may dismiss the Petition if offers are unreasonably refused but the offer must be a 'secured' one);
- 3 Apply for an interim order - this would give the debtor a breathing space in

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which to put together a voluntary arrangement which may be acceptable to the majority of creditors;

- 4 File a notice of intention to oppose the Petition – and this can be done even though no objection to the debt has been raised previously;
- 5 Make no response at all - but this does not preclude the debtor from raising any objection at the hearing.

Before the hearing, we would be required to file a Certificate confirming that the sum set out in the Petition remains due and also, a list of those creditors who have indicated an intention to support or oppose the Petition. At the hearing, the court will decide whether to adjourn or dismiss the Petition (as to which see above), or alternatively make a Bankruptcy Order.

Again, this firm's fees for the issue and service of a Bankruptcy Petition will be calculated in accordance with the time spent on the matter by reference to our applicable hourly charging out rates. However, as a guideline, you should be aware that the costs of pursuing a Bankruptcy Petition through to final order are likely to be approximately £1,500 to £2,500 plus VAT. It is always difficult to estimate with any precision the costs involved in the issue of a Bankruptcy Petition as often, we are subject to the court's discretion - indeed, the court can make orders to adjourn a Bankruptcy Petition to give a debtor more time to pay. Any adjournments will increase costs.

The Bankruptcy Order

If a Bankruptcy Order is made, the debtor will be required to attend before the Official Receiver and the Official Receiver's Office will register the Bankruptcy Order in the Land Charges Department and arrange for its advertisement.

A Bankruptcy Order will deprive the debtor from having power to deal with any property beneficially belonging to him. Following the bankruptcy order itself, the creditor will have very little impact/involvement upon the 'calling in' of the debtor's assets and the debtor's Estate would be completely in the hands of the Official Receiver.

On 1st April 2004, the Enterprise Act 2002 reduced the duration of a Bankruptcy Order from three years so that a debtor is now discharged from his bankruptcy after one year (that period can be extended or reduced by the Official Receiver).

This information sheet has been prepared to highlight some key issues relating to the issue of a Bankruptcy Petition. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at June 2009 and may be affected by subsequent changes in the law. Should you require any specific legal advice on the issues covered, please contact Julie Gabay by email at julie.gabay@ts-p.co.uk or call on 01892 510000.