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Straight & Narrow

BY RYAN G. FOLEY

The Risky World of § 110 and Bankruptcy Petition Preparers



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Despite consumer bankruptcy filings recently decreasing nationwide, more people are seeking help from bankruptcy petition preparers, also called “typing services” or “paralegals.” These are nonlawyer typing services that charge a fee to generate your bankruptcy forms. As growth of the bankruptcy petition preparer industry increases, courts have taken certain bankruptcy petition preparers to task for running afoul of 11 U.S.C. § 110, which governs the actions of bankruptcy petition preparers.¹

The Applicable Sections of § 110

A “bankruptcy petition preparer” is defined under § 110(a)(1) and (2) as:

- (a)(1) ...a person, other than an attorney for the debtor or an employee under the direct supervision of such attorney, who prepares for compensation a document for filing; and
- (a)(2) “document for filing” means a petition or any other document prepared for filing by a debtor in a [U.S.] bankruptcy court or a [U.S.] district court in connection with a case under this title.²

In fact, the Bankruptcy Code provides a number of specific prohibitions for bankruptcy petition preparers. Before preparing any document for filing or accepting a fee, the bankruptcy petition preparer must provide the debtor with a notice that he/she is not an attorney and thus cannot provide legal advice.³ Pursuant to § 110(e)(2), bankruptcy petition preparers are prohibited from giving any legal advice. The advice that they cannot give includes whether (1) to file a petition under the Bankruptcy Code or (2) commencing a case under chapter 7, 11,

12 or 13, is appropriate; whether the debtor's debts will be discharged in a case under this title; whether the debtor will be able to retain the debtor's home, car or other property after commencing a case under this title; and, concerning (1) the tax consequences of a case brought under this title or (2) the dischargeability of tax claims, whether the debtor may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt; how to characterize the nature of the debtor's interests in property or the debtor's debts; or bankruptcy procedures and rights.⁴

Finally, a bankruptcy petition preparer cannot use the word “legal” or any similar term in any advertisements.⁵ The aforementioned list is not exhaustive, and § 110 lists other limits on what a bankruptcy petition preparer may not do, but the above are the most apparent — and potentially damning.⁶ In order to provide strength to § 110, Congress gave the court sanctioning power to both fine, disgorge and enjoin bankruptcy petition preparers, including the law firms with whom they are associated.

Fines and Disgorgement

Under § 110, the courts have the ability to both fine and disgorge fees from bankruptcy petition preparers. In order to do so, the language of § 110(h)(3) requires that the court review the charges that the bankruptcy petition preparer has made for all services, including nonbankruptcy services, within the 12 months before the filing. The court must then

1 11 U.S.C. § 110: Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions.

2 *Id.* at § 110(a)(1) and (2).

3 *Id.* at § 110(b)(2)(A) and (B).

4 *Id.* at § 110(e)(2)(B).

5 *Id.* at § 110(f).

6 *See also* Court Fees: A bankruptcy petition preparer cannot collect the court fees from or on behalf of the debtor. *See* § 110(g). Executing Documents: A preparer is prohibited from executing any document on behalf of a debtor. *See* § 110(e)(1). Maximum Fees: A preparer is prohibited from charging more than the maximum allowable fee chargeable by a bankruptcy petition preparer as set by the U.S. Supreme Court in its rules, or by the U.S. Judicial Conference in its guidelines.

order the turnover of those fees. If the fee charged for the bankruptcy services exceeds the court's set maximum fees, it appears that the entire fee would be ordered to be turned over.⁷ Also pursuant to § 110(h)(3), the bankruptcy petition preparer's fees are forfeited if he/she has not met the requirements described in § 110(a)(1) and (2).

A bankruptcy petition provider may be fined up to \$500 for each violation of the requirements described in § 110(a)(1) and (2), or for failure to turn over fees within 30 days of a court order to turn over fees.⁸ Courts are permitted to triple the fines if a bankruptcy petition preparer has done the following:

- advised the debtor to exclude assets or income that should have been included on applicable schedules;
- advised the debtor to use a false Social Security number;
- failed to inform the debtor that the debtor was filing for bankruptcy relief; or
- prepared a document for filing in a manner that failed to disclose the identity of the bankruptcy petition preparer.⁹

Damages, Attorneys' Fees and Injunctions

If a bankruptcy petition preparer violates § 110 or commits any act that the court finds to be fraudulent, unfair or deceptive, the court is required to order the bankruptcy petition preparer to pay (1) the debtor's actual damages, (2) the greater of \$2,000 or twice the amount paid for services, and (3) reasonable attorneys' fees. If the motion is brought by the trustee or creditor, the bankruptcy petition preparer shall be ordered to pay an additional \$1,000 plus attorneys' fees and costs.¹⁰ Further, the court may enjoin a bankruptcy petition preparer from engaging in prohibited conduct for the following violations: (1) engaged in conduct in violation § 110 or of any provision of the Bankruptcy Code; (2) misrepresented the preparer's experience or education as a bankruptcy petition preparer; or (3) engaged in any other fraudulent, unfair, or deceptive conduct.¹¹

It is clear from the above that Congress has identified the opportunity for courts to oversee this process and provide them with the ability to heavily sanction abusers of the practice. So how does it work in practice? *In re Johnson* is illustrative of bankruptcy petition preparers gone bad.

In re Johnson

*In re Johnson*¹² focuses on the use of a bankruptcy petition preparer service provided by Dallas X. Evans and Daniel P. Silver. These individuals created a website¹³ to lure in bankruptcy clients, featuring outlandish advertising such as "America's #1 Chapter 7 Bankruptcy Law Firm!!!" and offered "Complete Package Starting at \$399, including Free Credit Counseling."¹⁴ The court ultimately found that the bankruptcy petition preparing services provided by these individuals amounted to deceit, fraud and the unauthorized practice of law, and after reviewing the facts below, it is hard to disagree.

It is important to the case to know how this business came to be. Evans created the "Chapter 7 in 24" website after going through his own bankruptcy.¹⁵ While he is not an attorney, Evans' personal experience led him to believe that he was capable of advising and assisting others through bankruptcy. Evans and Silver met through Silver's employment in the car sales business. At that time, Silver was not a practicing attorney and had no experience in bankruptcy law beyond taking the course in law school more than a decade ago.¹⁶ Evans knew that Silver had never represented a debtor in bankruptcy, but nonetheless asked Silver to work for him because he thought having a licensed attorney would be good for marketing and credibility, as well as ease potential clients' fears.¹⁷

Silver's likeness was displayed on the website, put there to convince potential debtors that they were receiving competent legal advice, but Evans was the principal and interacted with all the clients and answered any questions.¹⁸ At the hearing, the case-preparation process was described as follows. First, Evans provided clients with a questionnaire and then completed the petitions based on their answers. Next, Silver conducted a "review" of the draft petitions (although it appears that Silver did little, if anything, to check the quality of Evans' work).¹⁹ Afterward, Evans mailed the petitions to the clients, who filed them with various courts "*pro se*."²⁰

In Evans and Silver's minds, this was most efficient and cost-effective way to build a client base and generate revenue. In theory, their business plan was a sound one, but like with most good plans, there's always a catch, and in Evans' and Silver's case, it was Dennis A. Johnson and § 110 of the Bankruptcy Code.

Johnson was financially unable to retain an attorney, so he turned to Craigslist, where he found an advertisement for the "Chapter 7 in 24" website.²¹ Through the website, Evans offered to prepare Johnson's chapter 7 documents for \$399.²² Johnson ultimately paid \$399 via PayPal on April 15, 2016.²³ While his petition was being "prepared," Johnson only communicated with Evans and never spoke to Silver.²⁴

After Evans prepared the final draft, he informed Johnson that he would have an attorney review the documents before filing.²⁵ Until that time, Johnson was unaware that Evans was not an attorney.²⁶ Once Johnson's petition was filed, the court immediately identified issues with it. The court enumerated many red flags, but specifically identified the fact that Silver is an active member of the Massachusetts Bar, not North Carolina; despite Johnson filing a *pro se* petition, Silver signed the certificate of service; and Johnson did not claim any exemptions despite having significant equity in various assets.²⁷

The court further highlighted some of the discrepancies on the website, pointing out that while in one area the website states, "We are not attorneys and cannot give you legal

15 *Id.* at 3.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 4.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 1.

7 11 U.S.C. § 110(h)(3).

8 11 U.S.C. §§ 110(h)(5) and 110(i)(1).

9 11 U.S.C. § 110(i).

10 11 U.S.C. § 110(i).

11 *Id.* at § 110(j).

12 *In re Johnson*, 2016 WL 5417367 (W.D.N.C. 2016).

13 The website was www.chapter7in24.com, but it has since been removed from the internet.

14 *Id.* at 2.

advice,”²⁸ elsewhere the site boasts that “Your Chapter 7 Bankruptcy will be completed by a licensed attorney,”²⁹ then it lists 49 states in which “Chapter 7 in 24” operated. The court was certainly concerned about how the company could offer quality bankruptcy services even the word “bankruptcy” was misspelled as “bancruptcy” on almost every page.³⁰

Based on this, the court ordered Silver and Evans to show cause on two separate occasions, June 19 and July 16, 2016.³¹ Evans did not appear at either show-cause hearing and thus was held in contempt by the court.³² The sanction was only the beginning of how the court sought redress against Evans and Silver.

The court (applying both § 110 and North Carolina’s state law equivalent³³) found that Silver acted deceptively by knowingly signing documents that contained misrepresentations and filed them under penalty of perjury with the court, as well as engaged in the unauthorized practice of law in North Carolina.³⁴ For that offense, the court ordered Silver to pay \$7,500 to Johnson.³⁵ Further, the court forever enjoined Silver from preparing a petition to be filed the Western District of North Carolina and directed him to disgorge to Johnson any fees that he collected in association with this case.³⁶

The court concluded that Evans illegally (1) offered Johnson legal advice, (2) used advertisements that stated “Chapter 7 in 24” was a law firm and provided legal services, (3) failed to sign documents that he had prepared, and (4) failed to disclose his identity.³⁷ For these infractions, the court imposed penalties, including the aforementioned contempt sanction, against Evans totaling \$12,000.³⁸

If that wasn’t enough, the court then directed the clerk of court to forward a copy of the order to the Massachusetts Board of Bar Overseers of the Supreme Judicial Court and the North Carolina State Bar, as well as the Consumer Protection Division (through the North Carolina Attorney General’s Office) and the state division of the Consumer Protection Consumer Assistance Unit (through the New York State Department).³⁹ Believing that the matter might have implicate criminal acts, including violations of 18 U.S.C. §§ 151-158, the clerk was also directed to forward a copy of the order to the U.S. Attorney’s Office for the Western District of North Carolina.⁴⁰

It is hard to argue that Silver and Evans did not get what they deserved. Ultimately, Johnson was able to hire an attorney who corrected the issues caused by Silver and Evans; otherwise, his case would have likely been dismissed, or worse, he would have lost his home and individual retirement account for failing to claim either as exempt.

Conclusion

Bankruptcy petition preparation in compliance with § 110 serves a valuable role to potential debtors who might not

be able to afford their own attorney. In researching for this article, it was discovered that while there were several cases with similar fact patterns to *In re Johnson*, there were also many other situations in which bankruptcy petition preparers had appropriately performed their job function pursuant to § 110. The cautionary tale enumerated herein highlights the pitfalls of playing fast and loose with the bankruptcy process and the ramifications for doing so. **abi**

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²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 2.

³² *Id.* at 8.

³³ N.C.G.S. § 84-4.

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.* at 5.

³⁷ *Id.* at 6.

³⁸ *Id.* at 6-7.

³⁹ *Id.* at 8.

⁴⁰ *Id.*