

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

HOWARD D. WITTMUSS and
MILDRED L. WITTMUSS,

DEBTORS

CASE NO. BK85-2366



MEMORANDUM OPINION

This matter came on for hearing on August 26, 1986, on the filing of an involuntary petition in bankruptcy against the debtors, Howard D. Wittmuss and Mildred L. Wittmuss, by the Bank of Sterling, Nebraska, and upon answer of the debtors. Appearing on behalf of the Bank of Sterling was James Powers of McGrath, North, O'Malley & Kratz, P.C., Omaha, Nebraska. Appearing on behalf of the debtors was Douglas DeLair of Lincoln, Nebraska.

Findings of Fact

Petitioner, Bank of Sterling, (the "Bank"), is a creditor of the debtors with a claim of a principal sum of \$221,631.09 with accrued interest of \$19,721.85. On October 15, 1985, the Bank filed an involuntary petition in bankruptcy under Chapter 7 of Title 11 of the United States Code against the debtors. The Bank was the only petitioner. The debtors filed an answer generally denying the allegations contained in the petition and alleging affirmatively that the debtor had more than 12 creditors as of the date of the filing of the petition. A stipulation was entered into by the parties with regard to all of the facts in the case.

Issue

Are secured creditors to be counted when determining the number of creditors for the purpose of filing an involuntary petition in bankruptcy?

Decision

Secured creditors, if they are holders of claims, are to be counted when determining the number of creditors for the purpose of filing an involuntary petition in bankruptcy. Since the parties have stipulated that the debtors have more than 12 creditors when secured creditors are included, an involuntary

petition in bankruptcy against them would require that the petition be filed by three creditors. The petition against the debtors, having been filed by only one petitioner, is dismissed.

Conclusions of Law

11 U.S.C. §303 provides as follows in pertinent part:

"(b) An involuntary case against a person is commenced by the filing with the Bankruptcy Court of a petition under Chapter 7 or 11 of this title--

" (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least \$5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

"(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under §544, 545, 547, 548, 549, or 724 (a) of this title, by one or more of such holders that hold in the aggregate at least \$5,000 of such claims;"

A reading of the statute indicates no delineation between unsecured and secured creditors. In fact, the statute refers only to "entities", each of which is either a holder of a claim against such person. . . or an indenture trustee representing such a holder, . . ." "Claim" is a right to payment, whether or not such right to payment has been reduced to judgment, has been liquidated, is fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. 1 Norton Bankr. L and Prac §9.04. The statute specifically excludes claims that are contingent as to liability or are the subject of a bona fide dispute. It further specifies that in the case of one petitioner, the claim of the holder must be at least \$5,000 more than the value of any lien on the property.

Although the Bank in the instant case meets the criterion for the amount of the claim, it cannot act as sole petitioner because there are, as stipulated by the parties, more than 12 "holders of claims." This Court is not convinced by the Bank's arguments regarding legislative history and a supposed intent to keep the

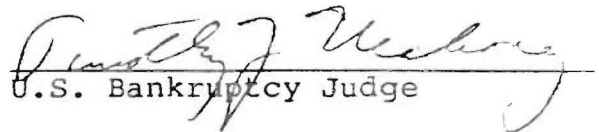
"secured creditor's exception" from the earlier Act. This Court is also unconvinced that the framers of the Code intended anything other than that which is clearly stated. There are more than 12 holders of claims in this case. If three of them meet the criteria of §303, they may file involuntary petitions against the debtors. The Bank by itself may not.

Although it is not necessary to reach the issue of misjoinder of the parties, this Court wishes to point out that a joint involuntary petition may not be filed against a debtor and spouse, as §302 of the Code permits only voluntary cases to be jointly filed. Creditors wishing to file involuntary cases against a debtor and spouse must allege and prove that grounds for relief exist against the respective debtors. See 2 Collier on Bankruptcy §303.07 (15th Ed. 1986).

Separate journal entry sustaining debtors' motion to dismiss shall be entered.

DATED: December 23, 1986.

BY THE COURT:


U.S. Bankruptcy Judge

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