

**Commercial Law and Bankruptcy Section**  
**May, 2009, Tip of the Month**

When you are about to file a bankruptcy petition for debtor(s) who have had a business failure pay particular attention to the characterization of the debt.

11USC 707 (b) (1) provides.

“After notice and a hearing, the court, on its own motion or on a motion by the United States trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts \*\*\* “

On the face of the petition you are to indicate whether the debts are “primarily” consumer debts or business debts. So applying 707 (b) (1) standards, if the debts are “ primarily business debts” 707 (b) (1) does not apply as it only applies to “consumer debts”

Consumer debts are defined in the code business debts are not.

“The term “consumer debt” means debt incurred by an individual primarily for a personal, family, or household purpose”

11 U S C § 101 (8)

In regard to this section note the word “purpose”.

In a recent case that grappled with what the word “primarily” mean the facts of the case were as follows,

Debtors owned a furniture business which was incorporated that began to fail in 2006 and continued until its closing. At the time of filing the debtors’ listed 46 claims of which \$ 326,178.58 were listed as disputed and contingent and in addition another 15 claims totally \$ 478,586.80 as individually or jointly owed debt. The creditor challenged the assertion by the debtors that their debts were primarily business debts pointing out that the amount of debt identified as individual or joint ( \$ 48,586.80) total more than the debt listed as disputed or contingent – presumably the corporations debt – ( \$ 326,178.58). The debtors countered by testifying that 95% of the credit card debt was incurred to pay the business bills and debt and in addition \$ 28,000 of the refinance of their home was made available and used by the business.

The court in this case reviewed *Stewart v. U. S. Trustee ( In re Stewart)*, 175 F. 3d 796,808 (20<sup>th</sup> Cir. 1997); *In re Booth* 858 f 2d 1051, 1055 (5<sup>th</sup> Cir 1998). In concluding that it should use a *totality of the circumstances* approach when determining whether the debts are primarily consumer or business debts. By the totality of circumstances the court reasoned that would not only look at the number of claims and the amount of those claims but determine which of those claims of the business while the all but \$ 28,000 of the home mortgage debt, the debtors cars and eight credit cards were consumer debt and the remainder business related debt. Here the court declined to dismiss the case under § 707 (b)

*In re Jones ( Ronald K and Gracy B Jones)*, 2009 WL 102442 ( Bkrtcy. E. D. N. C.) ; Vol. 19, Issue 6 Consumer Bankruptcy News ( February 12, 2009) J  
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