

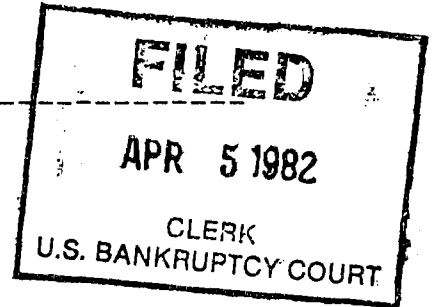
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

In the Matter of
WILLIAM A. DELAP,
d/b/a DeLap Agency

Bankruptcy No.
EF7-81-00796 Invol.

Debtor.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER



Namekagon Mutual Town Insurance Company, a secured creditor in the above proceedings, having filed a motion for dismissal of said proceedings on the grounds that the debtor had more than twelve creditors as of May 7, 1981, the date of the filing of the involuntary petition by First Agency, Inc., a Wisconsin corporation and a judgment creditor but unsecured; and the court having originally considered the motion and having directed the deputy clerk of this court to ascertain the number of creditors in existence on the date of the filing of the petition; and a hearing having been held on March 22, 1982; Eugene D. Harrington, attorney for First Agency, Inc., the petitioning creditor; Lawrence J. Kaiser, trustee; Howard P. Hilden, attorney for the debtor, and Thomas G. Kissack, attorney for Namekagon Mutual Town Insurance Company, having appeared at said hearing; and the attorneys having made oral arguments, and having filed written memorandums, and the court having considered the entire record and being fully advised in the premises, FINDS:

1. That an involuntary petition was filed against the debtor on May 7, 1981.
2. That only one creditor joined in said petition.

3. That said petition did not include an allegation that the debtor had less than twelve creditors.

4. That the debtor defaulted and did not appear.

5. That the court entered an order adjudicating said debtor on June 1, 1981.

6. That Lawrence J. Kaiser was duly appointed trustee herein.

7. That an examination of the record and file and telephone inquiries and letters by the deputy clerk of this court reveal that the debtor had the following creditors as of May 7, 1981:

Namekagon Mutual Town Insurance Co.,
Trego, WI (Secured Creditor)
First Agency, Spooner, WI
Marshfield Clinic, Marshfield, WI ----- Paid
Dr. Hussa, Hayward, WI
Anderson Funeral Home, Hayward, WI
Berry Typewriter Co., Rice Lake, WI
St. Mary's Hospital, Duluth, MN
Dr. Fuller, Duluth, MN ----- Paid
Rusk County Mutual Insurance Co.,
Ladysmith, WI
North Central Electric Co., ----- Paid
Radisson, WI
Indianhead Memorial Hospital,
Shell Lake, WI
Indianhead Telephone Co., ----- Paid
Weyerhauser, WI
Hayward Hospital, Hayward, WI
Estate of Clemon Slone,
Box 10, Raven, KY

8. That a number of the creditors were paid in full after May 7, 1981, the date of filing of the petition, as is shown by the notation following the name of the respective creditor.

9. That trustee contends that the moving party, Namekagon Mutual Town Insurance Company, received a preference by the debtor executing to the said insurance company a mortgage on his real estate.

10. That the debtor did not file schedules or a list of creditors as ordered and directed by the court for

the reason that he had been ill and in the hospital on different occasions.

11. That from the cases cited it appears there are two lines of authority as to whether or not it is necessary to allege that debtor has less than twelve creditors when only one creditor files the petition, and whether or not the failure to have at least three creditors petitioning becomes a judicial question warranting the dismissal of the proceedings.

12. The court has considered the arguments of the petitioner and the objection of the creditor insurance company, and has considered the case of In Re Earl's Tire Service, Inc., 3 CBC 2d 205, and the case of Re Israeli British Bank, Ltd., (1976, F BC SD NY) 2 BCD 1067, and after considering the other arguments of counsel and points raised by the respective parties it is my conclusion that this case should be ruled on by the decision In Re Earl's Tire Service, Inc. in which the court found that the requirements concerning the requisite number of petitioning creditors are not subject matter jurisdictional prerequisites and the debtor waives his right concerning the issue by failing to make a timely objection, and that a creditor does not have standing to raise an objection asserting that there is an incorrect number of petitioning creditors in an involuntary case.

CONCLUSIONS OF LAW

1. That an order be entered dismissing the motion and application of Namekagon Mutual Town Insurance Company.

2. That the trustee be directed to proceed forthwith with the administration of said bankrupt estate.

O R D E R

NOW, THEREFORE, IT IS ORDERED:


1. That the motion for dismissal by the Namekagon

Mutual Town Insurance Company be and the same is hereby dismissed without costs to any of the parties.

2. That the trustee, Lawrence J. Kaiser, forthwith proceed with the administration of said bankrupt estate.

Dated: April 5, 1982.

BY THE COURT:


WILLIAM H. FRAWLEY
BANKRUPTCY JUDGE