Benchnotes

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First Circuit Addresses BAPCPA Stay Termination for Repeat Filers

In *In re Smith*,[1] the First Circuit Court of Appeals became the first circuit court to weigh in on an issue that has divided bankruptcy courts since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA): whether the automatic termination of the automatic stay 30 days after a repeat filing ends the stay as to all property of the estate or only as to the debtor and its property. The filing of a bankruptcy petition stays, among other things, collection actions against the debtor, the debtor's property and property of the bankruptcy estate.[2] However, § 362(c)(3)(A), a provision added by BAPCPA, provides that "if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed," then the automatic stay "shall terminate *with respect to the debtor* on the 30th day after the filing" of a petition.[3] Before the end of the 30-day period, the bankruptcy court "may extend the stay" upon a showing "that the filing of the [second] case is in good faith."[4]

In this case, Maine's Bureau of Revenue Services had a claim for a tax debt owed by the debtor, a repeat chapter 13 filer. The debtor failed to request an extension of the stay, thus the stay terminated after 30 days. The bureau and debtor disputed the scope of such termination; the bureau alleged that the stay terminated not just with "respect to the debtor" but also with respect to all property of the estate. Thus, the bureau argued, it was free to resume its collection efforts against property of the estate.

Conversely, the debtor argued that a plain-meaning interpretation of the statute limits the termination of the stay solely to the debtor and property of the debtor. However, there is very little property of the debtor in chapter 13 cases. Rather, the vast majority of the debtor's nonexempt property becomes property of the estate that, under the debtor's interpretation, would remain protected by the stay.

Lower courts are sharply divided on this issue. A minority of courts have held that § 362(c)(3)(A) terminates the stay in its entirety, allowing actions against the debtor, the debtor's property *and* property of the bankruptcy estate. A majority of lower courts have held that the provision terminates the stay only in part, allowing actions against the debtor and its property to go forward, but preserving the stay as to actions against estate property.

Stating that it was a close question, the First Circuit adopted the so-called minority view, holding that § 362(c)(3)(A) terminates the stay as to all property 30 days after the filing of the second petition. In reaching its conclusion, the court first analyzed several canons of statutory construction attempting to divine the meaning of § 362(c)(3)(A). Noting that the U.S. Supreme Court had "recently warned courts to be careful about 'rigorous application of the canon[s]' where a provision may be 'inartful[ly] drafted,'" the court concluded that § 362(c)(3)(A) is one of those examples of inartful drafting, thus strict application of the canons was not a "useful guide to a fair construction."[5] Therefore, it rejected the parties' respective arguments about plain meaning, the rule against superfluities and the maxim of *expressio unius est exclusio alterius*.

The court ultimately found that the context of the statute suggested that second-time filers should get the benefit of the stay, but only temporarily (subject to their right to seek an extension of the stay pursuant to § 362(c)(3)(B)). The court also relied heavily on the congressional intent behind BAPCPA and § 362(c)(3)(A) in particular. The court found that Congress's goals in enacting such legislation was to "deter serial and abusive bankruptcy filings" and "discourage bad-faith repeat filings" aimed at delaying foreclosure actions.[6] These goals, the court reasoned, were best achieved by adopting the bureau's broad interpretation of the automatic stay, terminating the stay as to the debtor *and* all property on day 30 in repeat-filing cases.

Debtors Who Complete Plan Payments Are Entitled to Discharge

In *In re Holman*,[7] the U.S. District Court for the District of Kansas held that bankruptcy courts are required to award a discharge under § 1328(a) to debtors who timely complete all plan payments, even though equitable considerations warranted a different result. The chapter 13 debtors proposed and confirmed a plan that required them to make 60 monthly payments. The confirmation order identified various typical duties, including (1) to notify the trustee of any change in employment, (2) timely filing all tax returns and providing copies to the trustee, (3) prohibiting the incurrence of new debt without the trustee or court's approval, and (4) prohibiting the debtors from disposing of assets without a court order. The debtors amended their plan several times post-confirmation.

During the fifth and final year of their plan, the chapter 13 trustee filed a motion to dismiss the debtors' case due to their default on plan payments, for failure to pay post-petition taxes and for a lack of good faith. Prior to the hearing on the motion to dis-

1 *In re Smith*, 2018 WL 6520887 (1st Cir. Dec. 12, 2018).
2 11 U.S.C. § 362(a).
3 11 U.S.C. § 362(c)(3)(A) (emphasis added).
4 11 U.S.C. § 362(c)(3)(B).

5 *In re Smith* at *6 (discussing *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015)).
6 *Id.* at *11 (citations omitted).
7 *In re Holman*, 2018 WL 5633989 (D. Kan. Oct. 31, 2018).

miss, the debtors made a lump-sum payment that completed all plan payments.

At the hearing on the motion to dismiss, the bankruptcy court found "ample cause to dismiss the case" under § 1307 of the Bankruptcy Code, noting that the debtors "had flouted their duties throughout the case."[8] Specifically, the court found that the debtors had misrepresented their employment status, concealed a dramatic increase in income and 10 different bank accounts, incurred post-petition debt without requisite disclosure and approval, failed to pay post-petition taxes and purchased two cars, which they had titled in their parents' names. Notwithstanding the foregoing, the bankruptcy court held that it was compelled to grant discharges to the debtors because § 1328(a) provides that "the court *shall* grant the debtor a discharge" after "completion of all payments under the plan."[9] The chapter 13 trustee appealed.

The district court affirmed on appeal. Noting a split in the case law, the court found that § 1328(a)'s use of the word "shall" when discussing the court's obligation to grant a discharge upon completion of all plan payments trumped § 1307(c), which uses the word "may" when discussing circumstances where a chapter 13 case can be dismissed for "cause."

The court found that there was no ambiguity in the statute, stating that § 1328(a) mandates that the bankruptcy court "grant the debtor a discharge after completion of all plan payments under the plan."[10] Acknowledging that the statute created an "unsatisfying resulting" because "it appear[ed] that the Debtors [had] gamed the system to their advantage," the court joined the district court in concluding that § 1328(a) left it no alternative but to grant the debtors' discharges.[11]

Miscellaneous

• *Pergament as Tr. of Est. of Barkany v. Marina Dist. Dev. Co. LLC*, --- B.R. ---, 2018 WL 5018654 (E.D.N.Y. 2018) (U.S. District Court for Eastern District of New York dismissed trustee's claims that gambling losses incurred by perpetrator of Ponzi scheme should be recovered as constructively fraudulent transfers or on theory of unjust enrichment; court rejected defendant's motion to dismiss with respect to trustee's claims to recover gambling losses as actual fraud; court indicated that trustee's claims may proceed as it is well-settled law that "[w]hen a debtor operating a Ponzi scheme makes a payment with the knowledge that future creditors will not be paid, that payment is presumed to have been made with actual intent to hinder, delay or defraud other creditors — regardless of whether the payments were made to early investors, or whether the debtor was engaged in a strictly classic Ponzi scheme" (*Id.* at * 9 (quoting *In re Manhattan Inv. Fund Ltd.*, 310 B.R. 500, 509 (Bankr. S.D.N.Y. 2002)));

• *Denby-Peterson v. NU2U Auto World*, 2018 WL 5729907 (D.N.J. Nov. 1, 2018) (chapter 13 debtor sought sanctions against a secured creditor for willfully violating the automatic stay by failing to return vehicle that was lawfully repossessed prior to petition date; noting split in circuit court case law, district court affirmed bankruptcy court's adoption of so-called minority view, holding that secured creditor's passive retention of property of estate is not an "act … to exercise control over property of the estate" in absence of commencement of turnover action by debtor/trustee);

• *In re Colton*, --- B.R. ---, 2018 WL 5733505 (Bankr. C.D. Ill. 2018) (bankruptcy court rejected chapter 7 trustee's objection to debtor's homestead exemption on theory that debtor had moved out of residence as of her petition date as result of marital separation; bankruptcy court found that moving out of residence during separation or divorce proceeding does not in itself evidence debtor's intent to permanently abandon her homestead interest in property);

• *Firstrust Bank v. Indus. Bank (In re Essex Constr.)*, 591 B.R. 630 (Bankr. D. Md. 2018) (if perfection of security interest lapses after a bankruptcy filing because first-priority secured creditor fails to file continuation statement, does junior secured creditor jump ahead in priority? Invoking so-called "freeze rule," and notwithstanding § 362(b)(3), which permits filing of continuation statement post-petition, bankruptcy court held that liens are fixed on petition date, therefore post-petition lapse did not alter senior secured creditor's position);

• *Hayduk v. Burke (In re Burke)*, 2018 WL 5472002 (Bankr. E.D. Tenn. Oct. 26, 2018) (chapter 7 debtor's prepetition disclaimer of any interest in her late mother's probate estate was not "transfer" of "interest of the debtor in property" of kind potentially avoidable as fraudulent transfer; joining five different circuit courts of appeals, bankruptcy court held that under Tennessee state law, disclaimer related back to moment of mother's death such that debtor never acquired any interest in her probate estate);

• *In re Brookstone Holdings Corp.*, 592 B.R. 27 (Bankr. D. Del. Oct. 1, 2018) (U.S. Trustee objected to retail debtors' motion to assume store closing agreement on grounds that debtors' proposed liquidator was "professional" whose retention needed to be approved under § 327(a); bankruptcy court held that liquidators who provide services related to going-out-of-business sales are not professionals; "'professional' is limited to those occupations [that] control, purchase or sell assets that are important to reorganization, is negotiating the terms of a plan of reorganization, [and] has discretion to exercise his or her own personal judgment");

• *In re City of Stockton, Calif.*, 2018 WL 6442104 (9th Cir. Dec. 10, 2018) (agreeing with Sixth Circuit, Ninth Circuit held that equitable mootness does apply in chapter 9 cases; court reasoned that reversal of confirmation would undermine long-implemented settlements with unions, bondholders and capital markets creditors, as well as citizens of the municipality; "The reorganization train left the station ... [the appellant] offers too little, too late…. Thus, his appeal must be dismissed.");

• *Opt-Out Lenders v. Millennium Lab Holdings II LLC (In re Millennium Lab Holdings II LLC)*, 591 B.R. 559 (D. Del. 2018) (in a departure from its prior ruling, district court held that bankruptcy courts have constitutional authority to approve nonconsensual, third-party releases in chapter 11 plans; court reasoned that confirming chapter 11 plan is not tantamount to adjudicating state law claims released pursuant to releases contained in confirmation order);

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8 *Id.* at *2.
9 *Id.* at *3 (emphasis added).
10 *Id.* at *6.
11 *Id.* at *7.

• *Roth v. Butler Univ. (In re Roth)*, 2018 WL 6039099 (Bankr. S.D. Ind. Nov. 16, 2018) (bankruptcy court held that arbitration clause in student loan contract was not enforceable in context of § 523(a)(8) dischargeability action; court reasoned that requiring arbitration would remove essential function of bankruptcy law from bankruptcy courts; "Allowing arbitration of dischargeability … would effectively allow parties to contractually overrule the application of federal bankruptcy law. Bankruptcy without the discharge is like a car without an engine; a useful tool rendered ineffective.");

• *In re Happy Jack's Petroleum Inc.*, 2018 WL 6192207 (Bankr. D. Neb. Nov. 7, 2018) (bankruptcy court held on issue of first impression that conversion of case from chapter 11 to chapter 7 does not impact priority of a chapter 11 super-priority claim granted under § 364(c)(1); § 364 super-priority administrative expenses continue to enjoy priority over all administrative expenses, including chapter 7 administrative expenses, notwithstanding § 726(b)'s elevation of chapter 7 administrative expenses upon conversion);

• *They Might Be Inc. v. Carter (In re Carter)*, 2018 WL 4945128 (Bankr. M.D. Fla. Oct. 11, 2018) (chapter 7 debtor hired alternative rock band "They Might Be Giants" to appear as headliner at music festival called "Nerdapalooza," but failed to pay band half of fee for its performance; band sought determination that debt was nondischargeable under § 523(a)(2)(A); bankruptcy court held that band failed to show that debtor acted with intent to deceive, or that it had justifiably relied on alleged misrepresentations made by debtor and debt was therefore deemed dischargeable);

• *U.S. v. Seiller Waterman LLC (In re St. Catherine Hosp. of Ind. LLC)*, 2018 WL 4620273 (S.D. Ind. Sept. 26, 2018) (district court held that *Jevic* did not mandate disgorgement of debtor's attorneys' fees in administratively insolvent bankruptcy case to ensure a *pro rata* distribution amongst all holders of administrative expenses; *Jevic* "addressed Bankruptcy Code's basic-priority system, but did not address *pro rata* distributions within classes of creditors"); and

• *Wilmington Trust Co. v. Tribune Media Co. (In re Tribune Media Co.)*, 2018 WL 6167504 (D. Del. Nov. 26, 2018) (noting split in case law, bankruptcy court held that post-petition attorneys' fees are not recoverable as part of unsecured claim, reasoning that § 506(b) contemplates post-petition legal fee claim for oversecured creditors only; district court reversed, holding that unsecured creditors are entitled to unsecured claim for post-petition attorneys' fees if payment of legal fees is contemplated in pre-petition contract; "The courts of appeals that have considered this issue post-*Travelers* have unanimously ... allowed unsecured claims for contractual attorneys' fees that accrued post-filing of the bankruptcy petition."). abi

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